IN THE MATTER OF SPADEA FOR GOVERNOR, A SINGLE CANDIDATE COMMITTEE FOR THE 2025 PRIMARY ELECTION.	NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION

TOWNSQUARE MEDIA, INC.'S RESPONSE TO THE NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION'S ORDER TO SHOW CAUSE

GENOVA BURNS LLC
494 Broad Street
Newark, New Jersey 07102
(973) 533-0777
Attorneys for Townsquare Media, Inc.

Of Counsel and on the Brief:
Angelo J. Genova, Esq.
Harrison C. Clewell, Esq.

On the Brief:
Daniel A. Lebersfeld, Esq.
Katherine Szabo, Esq.

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Townsquare Media, Inc. ("Townsquare") respectfully submits this brief in response to the Order To Show Cause, dated June 20, 2024 ("OTSC") of the New Jersey Election Law Enforcement Commission ("ELEC" or the "Commission") and in anticipation of the hearing of the Commission to consider whether a declared gubernatorial candidate's media airtime is an "in-kind" contribution to that candidate's campaign, and, therefore, subject to the applicable requirements for same, including contribution limits under the New Jersey Campaign and Expenditures and Reporting Act, N.J.S.A. 19:44-1, et seq. (the "Act").

INTRODUCTION

The Commission has asked for this submission to determine whether William G. "Bill" Spadea's ("Spadea") airtime on New Jersey 101.5 constitutes an in-kind contribution to his recently announced gubernatorial campaign. The answer to the Commission's inquiry is an emphatic "no." Townsquare does not provide Spadea with airtime as a means for him to promote his candidacy, advocate for the defeat of political opponents, or otherwise conduct campaign related activities. On the contrary, Spadea has been employed by Townsquare in his role as a radio host for nearly ten years, and his continued presence on air is part of his longstanding employment.

Since Spadea notified Townsquare of his intention to seek public office, Townsquare has implemented detailed and proactive guidelines, acknowledged and signed by Spadea, to ensure strict compliance with New Jersey election laws and Federal Communication Commission ("FCC") regulations. As described in further detail below, these guardrails have been meticulously designed to prevent any potential misuse of the broadcast platform for campaign purposes and to maintain the neutrality and integrity of Spadea's role as a radio host.

The plain text of ELEC's regulations, which are wholly consistent with precedents set by the Federal Election Commission ("FEC") and advisory opinions from other states, makes clear

that regular media employment does not equate to campaign contributions when appropriate safeguards are in place. These precedents underscore the necessity of maintaining a clear separation between a candidate's professional media role and their campaign activities. They also emphasize the importance of protecting the fundamental principles of free speech and the media's vital role in a democratic society.

Therefore, the Commission has little choice but to conclude that Spadea's employment and associated airtime are not in-kind contributions given the construct of its own regulations, and the prophylactic effect of the guidelines and guardrails implemented by Townsquare. This conclusion aligns with established legal standards and prevents setting a dangerous precedent that could have far-reaching negative implications for media and political discourse. Classifying Spadea's airtime as an in-kind contribution, in contrast, would open the door to excessive regulation of media activities involving any candidate, chilling free speech and hindering political participation. Upholding the established guidelines and legal precedent is crucial to ensuring the continued integrity and independence of the media while supporting fair and transparent electoral processes.

FACTUAL BACKGROUND

Since late 2015, Spadea has been the host of the morning drive show on New Jersey 101.5, a commercial FM radio station (WKXW, 101.5 FM) owned by Townsquare.[1] See Certification of Samuel Gagliardi ("Gagliardi Cert."), ¶¶ 1, 4. The show airs live on weekdays between 6:00 A.M. and 10:00 A.M. and is renowned for its wide-ranging content, touching upon various issues affecting New Jersey. See Gagliardi Cert., ¶ 4. While the program occasionally addresses political

[1] Townsquare Media, Inc., is the parent company to wholly owned subsidiary Townsquare Media Trenton, LLC., which employs Spadea and owns New Jersey 101.5.

topics, it also covers a broad spectrum of non-political subjects, such as local sports, favorite restaurants, community events, and entertainment news. See id.

Once Townsquare became aware of Spadea's intention to seek the Republican nomination for New Jersey Governor, Townsquare conferred with counsel and subject matter experts to prepare guidelines (the "Guidelines") that would ensure compliance with relevant State and Federal laws and regulations. See id. at ¶ 5. Spadea signed and acknowledged the Guidelines on June 14, 2024. See id. at ¶ 6, Exhibit A. The Guidelines include, but are not limited to, the following key points:

1. **Transition to Legally Qualified Candidate**: Once Spadea becomes a "legally qualified candidate," he will no longer be permitted to appear on the Station as the host of his program or any affiliated program. The definition and timing of becoming a "legally qualified candidate" are based on FCC regulation 47 CFR §73.1940.[2]

2. **Objective of Guidelines**: The primary objective is to prevent the use of Spadea's broadcast platform to advance his candidacy. These guidelines ensure that his activities do not constitute illegal campaign contributions or expenditures and comply with FCC regulations, including "plugola" and "equal time" obligations.

[2] Townsquare does not dispute that Spadea is a candidate in the 2025 gubernatorial primary election as defined by N.J.S.A. 19:44A-3c, N.J.A.C. 19:25-1.7 and N.J.A.C. 19:25-16.3. However, Spadea has not yet met FCC requirements to become a "legally qualified candidate." An individual is a "legally qualified candidate" if he/she/they meets all the following criteria:

(1) has publicly announced their intention to run for office;
(2) is qualified under applicable state and/or federal law to hold the office being sought; **and**
(3) qualifies for a place on the ballot, or is running as a write-in and has made a substantial showing of his/her candidacy. See 47 CFR §73.1940

Neither Spadea (nor any other candidate) has qualified for a place on the 2025 Republican primary election ballot, which requires a properly filed nominating petition (N.J.S.A. 19:23-14), the survival of any challenges to that petition (N.J.S.A. 19:13-11), and certification of the names of the candidates by the Secretary of State to the County Clerks (N.J.S.A. 19:23-21). Accordingly, no candidate has triggered the FCC's equal time rules which provide that broadcast stations provide equivalent access to competing political candidates. As a result, any inquiry here into, or discussion about, whether a candidate for the Republican primary race for Governor of New Jersey is entitled to equal time is inapplicable and under the sole jurisdiction of the FCC.

3. **Content Restrictions**:
    - Spadea may not solicit campaign contributions, endorsements, or other support during his show.
    - He may not discuss the candidacies or qualifications of any other gubernatorial candidates.
    - He may not use his platform to endorse or advocate for his own candidacy or attack his opponents.
    - Discussions about his candidacy are prohibited, and callers or guests are instructed not to mention his candidacy.
4. **Political Content Management**:
    - Spadea can discuss political issues but must avoid linking his opinions to his candidacy.
    - He should refrain from discussing hypothetical actions as Governor or as a candidate.
    - Callers mentioning his candidacy should be redirected without substantive comment.
5. **Event Promotion**:
    - Campaign-related events cannot be discussed on air, but non-campaign-related events can be mentioned if they comply with the guidelines.
    - Spadea's campaign may purchase advertising on the Station, adhering to political reporting rules.
6. **Compliance and Review**:
    - Content and segments will be regularly reviewed with Townsquare's legal department to ensure ongoing compliance.
    - Townsquare reserves the right to revisit these guidelines in response to legal or other challenges.

See id., Exhibit A.

On June 17, 2024, following the conclusion of his program, Spadea publicly declared his candidacy for Governor.[3] See id. at ¶ 10. That same day, Townsquare issued a press release containing the following language:

> [W]e are sensitive to the legal parameters attendant keeping a broadcast personality on air while they are seeking public office. Accordingly, we have taken steps and imposed guidelines to ensure that Bill's on-air presence over the coming months and until he becomes a legally qualified candidate, are in accordance with New Jersey election law, applicable FCC guidance, and industry standards and best practices for such circumstances.
>
> **As a company, and to be clear, Townsquare is and will remain neutral with respect to a Spadea candidacy and does not endorse any political candidates or parties.** At the same time, Townsquare will continue to uphold the values of integrity and community involvement personified by our team members.

"Townsquare Commends Bill Spadea's Civic Engagement and Commitment to Public Service" *Townsquare Media*, June 17, 2024, https://www.townsquaremedia.com/equity-investors/press-releases. Press release. See Certification of Katherine Szabo, Esq. ("Szabo Cert."), Exhibit A.

In addition to the Guidelines, Townsquare also prepared the below disclaimer, a recording of which has been broadcasted directly before Spadea's program since June 18, 2024:

> Townsquare Media, and New Jersey 101.5 do not support, endorse, advocate, encourage, fund, or appeal for the election or defeat of any candidates for public office, including Bill Spadea specifically, who has announced his intention to run for the Office of Governor of New Jersey. Townsquare Media, its affiliates, executives, officers, agents and employees, including New Jersey 101.5 did not request, suggest, invite or encourage Bill Spadea to decide to seek to become a legally qualified candidate for the Office of Governor of New Jersey. As a result of Mr. Spadea's decision to run for Governor, Townsquare Media and New Jersey 101.5 have implemented parameters, restrictions and guidelines on the content of this broadcast to eliminate any communication and broadcast of any content endorsing, supporting, encouraging, advocating, promoting,

[3] Upon information and belief, Spadea has not yet declared his intent or filed to participate in New Jersey's gubernatorial public financing program.

> or appealing for the nomination, election or defeat of any candidates for public office, and in particular Bill Spadea.

See Gagliardi Cert., ¶ 11.

This disclaimer will be played at the beginning of each of Spadea's shows for the remainder of his time on air as a declared candidate. See id.

LEGAL ARGUMENT

POINT I

PROVIDING SPADEA WITH AIRTIME DOES NOT AMOUNT TO AN IN-KIND CONTRIBUTION TO SPADEA FOR GOVERNOR UNDER NEW JERSEY LAW

As described above, Spadea's airtime is part and parcel of his longstanding employment relationship with Townsquare. And, since he declared his candidacy, he has been, and will continue to be, subject to the Guidelines. Under these circumstances, the airtime Spadea receives is not an in-kind contribution for two independent reasons: (i) the airtime provides his campaign with no direct or tangible benefit; and (ii) the airtime he receives is not an "other thing of value" because the Guidelines ensure that the airtime he receives will not contain what ELEC defines as a "political communication."

A. Spadea's Airtime Does Not Constitute an In-Kind Contribution to Spadea for Governor Under New Jersey Law Because It Is Part of His Regular Employment and Subject to the Guidelines.

Providing Spadea with airtime does not amount to a contribution under New Jersey law because the airtime is part of his regular, compensated employment and is strictly governed by Guidelines that prevent any campaign-related use. According to N.J.S.A. 19:44A-3d, "contributions" and "expenditures" include "all loans and transfers of money or other things of value" to or by any candidate, candidate committee, or political committee, and all pledges or other commitments to make such transfers. An "in-kind contribution" is a particular type of campaign

contribution in which goods or services are provided to a candidate or committee but are paid for by an entity other than the recipient. N.J.A.C. 19:25-1.7. These provisions are designed to target transactions that provide direct and tangible benefits to a candidate or their campaign which would otherwise require expenditure by same. Since the airtime is strictly non-campaign related, there is no promotional or strategic advantage conferred to his campaign. Therefore, it is not something that Spadea for Governor would purchase, as there is no direct benefit to his candidacy. Spadea's on-air time as a morning drive host does not fit the definition of an in-kind contribution, as the Guidelines ensure that it is not, and cannot be, a candidate or campaign-related good or service.

In contrast to being a direct and tangible benefit to his campaign, Spadea's airtime on New Jersey 101.5 is a regular component of his employment with Townsquare Media. Unlike an in-kind contribution, which involves the provision of goods or services at no cost or at a reduced cost specifically for the benefit of a candidate or their campaign, Spadea's airtime is part of his professional duties as a radio host, which predate his declaration of his candidacy by almost ten years. See Gagliardi Cert., ¶ 4. The show, which covers a variety of non-campaign related topics, falls squarely within the scope of his regular employment duties. It is not tailored to promote his candidacy but rather serves as a general talk program for New Jersey 101.5's audience. The airtime Spadea receives is not an additional service or benefit provided for campaign purposes but the core aspect of his job.

The Guidelines established by Townsquare ensure that Spadea's on-air content remains completely unrelated to his candidacy, thereby maintaining a clear separation between his employment activities and any campaign activities. Indeed, the Guidelines explicitly state that Spadea "may not solicit campaign contributions, endorsements, resources, or other support for [his] candidacy during [his] show" and that he "may not use [his] radio platform to directly or

indirectly endorse or advocate for [his] own candidacy or attack [his] opponents." See id. at ¶ 8, Exhibit A. Additionally, the Guidelines require that Spadea "refrain from explicitly stating or discussing what [he] would or would not do if [he] were the Governor or the Republican candidate for Governor." See id. at ¶ 9. This structured separation prevents the airtime from being a campaign-related benefit, thus distinguishing it from a good or service provided to his campaign. Consequently, Spadea's airtime is merely an aspect of his job and not an in-kind contribution aimed at supporting his gubernatorial bid.

Since announcing his candidacy on June 17, 2024, Spadea has adhered to these Guidelines, and his airtime has been limited to subjects unrelated to his candidacy or the candidacy of other gubernatorial candidates. In addition to creating the Guidelines, Townsquare is committed to maintaining a neutral and unbiased stance regarding Spadea's candidacy. To ensure that no actions by Townsquare are construed as in-kind contributions to Spadea's campaign, the company has established, and will adhere to, several key commitments.

First, Townsquare will not provide any free or discounted advertising airtime to Spadea for Governor. Campaign ads purchased by Spadea's campaign (if any) will be subject to the same standard rates and terms as those applied to all other political candidates, ensuring no preferential treatment or in-kind contributions, and will not be aired during Spadea's show. Additionally, Townsquare will not promote any events related to Spadea's candidacy on air, on its website, or through any of its social media channels. This includes but is not limited to campaign rallies, fundraisers, or any public appearances made in the capacity of a gubernatorial candidate. The station will also refrain from endorsing Spadea's candidacy or any political agenda related to his campaign, ensuring all programming and promotional activities remain strictly neutral.

Second, to further maintain editorial independence, Townsquare will ensure that its editorial content remains unbiased and will not provide Spadea with any special opportunities to discuss his candidacy or political platform outside the established Guidelines. All pre-prepared content related to Spadea's show will be vetted in advance to ensure compliance with the Guidelines, avoiding any discussions that could potentially be construed as campaign related. Moreover, callers and guests on Spadea's show will be pre-screened to prevent discussions about his candidacy, with station staff instructing them not to mention Spadea's campaign or any related political activities.

Third, Spadea will not use any of Townsquare's resources, including equipment, studio space, or personnel for campaign-related activities. All campaign activities must be conducted independently of his role and responsibilities at the station. Spadea will also not be permitted to solicit campaign contributions, endorsements, or other support during his show or through any Townsquare platform. Fundraising activities must be entirely separate from his broadcasting responsibilities. Townsquare has taken all necessary steps to comply with election laws and ensure that Spadea's radio show remains a neutral, non-campaign-related platform. Therefore, under the legal definitions provided by N.J.S.A. 19:44A-3d and N.J.A.C. 19:25-1.7, Spadea's airtime on New Jersey 101.5 is a regular component of his compensated employment, not a provision of goods or services aimed at benefiting his campaign. As such, it cannot be considered an in-kind contribution at the threshold.

B. Spadea's Airtime Is Also Not An In-Kind Contribution Because It Is Not An "Other Thing of Value" Since It Does Not Constitute a "Political Communication"

ELEC's definition of a "political communication," which, as applicable here, encompasses only express advocacy, provides an independent basis to conclude that Spadea's airtime is not an

in-kind contribution. This is so, as without the ability to be a vehicle for express advocacy, which the Guidelines are designed to prevent, the Spadea's airtime has no "value" for purposes of determining whether it is a campaign contribution, in-kind or otherwise.

Under N.J.A.C. 19:44A-1.7, a "contribution" includes, in addition to cash payments, the provision of any "other thing of value to or by any candidate, including any in-kind contribution, made to or on behalf of any candidate committee...." Spadea's airtime is not something of "value," the expense of which would otherwise need to be reported as a campaign "contribution," which expressly includes "any in-kind contribution," because it does not entail the dissemination of a "political communication."

Specifically, N.J.A.C. 19:25-10.1 provides that "[e]ach contribution received by a candidate [or] candidate committee... must be reported at the time and in the manner provided in the Act and this subchapter." Among the "contribution[s]" described in that "subchapter" that must be reported are the costs of "[a]ny political communication as defined by N.J.A.C. 19:25-10.10 incurred or paid for by any person or entity other than the candidate's candidate committee...." That is, only if the airtime Townsquare provides to Spadea entails a "political communication" that must be reported as a "contribution" is it something of "value" under N.J.A.C. 19:25-1.7. The Guidelines, which expressly prevent Spadea from engaging in political advocacy while on the air, ensure that there can be no such "political communication" present here, and thus, the airtime Spadea receives from Townsquare has no "value" as that term is used in ELEC's regulations.

In particular, N.J.A.C. 19:25-10.10(a), defines a "political communication" as "any written or electronic statement, pamphlet, advertisement, or other printed or broadcast matter or statement, communication, or advertisement delivered or accessed by electronic means, including the

Internet, that contains an explicit appeal for the election or defeat of a candidate. Examples of explicit appeals include phrases such as 'Vote for (name of candidate),' 'Vote against (name of opposing candidate),' 'Elect (name of candidate),' 'Support (name of candidate),' 'Defeat (name of opposing candidate),' and 'Reject (name of opposing candidate).' Id. Under N.J.S.A. 19:25-10.10(b) a communication that does not contain such explicit appeals can still be considered a "political communication" if it meets several conditions: it is circulated or broadcast within specific time frames relative to an election, it targets an audience substantially comprised of eligible voters, it references the candidate's governmental or political objectives or achievements, and it is produced, circulated, or broadcast with the cooperation or consent of the candidate. Id. Importantly, however, this broader definition of a "political communication" only applies "after January 1st in a year in which a primary election for Governor is being conducted, in the case of a candidate for election to the office of Governor in a general election[.]" Therefore, up until January 1, 2025, Spadea can only be considered to be making "political communication[s]" under N.J.S.A. 19:25-10.10 to the extent he makes express appeals to his own candidacy or the rejection of another candidate.

As explained above, the Guidelines are designed to remove the use of language that can be reasonably interpreted to mean "Vote for Spadea" or "Elect Spadea" within the content of his broadcasts. The Guidelines likewise specifically prohibit Spadea from using his platform to directly or indirectly endorse or advocate for his own candidacy or to attack his opponents. This ensures that the show's content does not contain the explicit appeals outlined in the regulation. Accordingly, for this additional reason, the airtime Spadea receives from Townsquare is not a "contribution," including an "in-kind contribution" under N.J.A.C. 19:25-1.7.

POINT II

TOWNSQUARE'S GUIDELINES INCORPORATE INSTRUCTIVE LEGAL PRECEDENT

Townsquare worked diligently to alleviate any concern that Spadea's airtime would be treated as an in-kind contribution to Spadea for Governor when creating the Guidelines. In doing so, Townsquare sought guidance from the FEC and other state precedents with analogous factual circumstances. In reviewing this precedent, all of which had similar definitions for in-kind contributions as New Jersey, all allowed candidates to remain on air under comparable circumstances. In fact, we were unable to locate any precedent that reached an alternative conclusion.

Federal Election Commission

Similar to N.J.A.C. 19:25-1.7, a "contribution" under 2 U.S.C. 431(8)(A)(i) includes a gift of "anything of value made by any person for the purpose of influencing any election for Federal office." See also 11 CFR 100.52(a). FEC regulations define "anything of value" in this context as an in-kind contribution. This type of contribution, like that under New Jersey law, includes "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services." 11 CFR 100.52(d)(1). The FEC has issued two instructive advisory opinions, AO 1977-42 and AO 1992-37[4] that directly address the potential for radio airtime to be an in-kind contribution.

AO 1977-42 was issued in response to a requestor's letter regarding the application of the Federal Election Campaign Act to radio programs he hosted. The requestor hosted two radio interview programs in West Virginia: a weekly one-hour call-in program focused on housing

[4] AO 1977-42 and AO 1992-37 are attached to the Szabo Cert. as Exhibits B and C respectively.

issues, sponsored by a non-corporate business, and a daily one-hour interview and talk show covering various topics, for which he was employed and paid by the radio station. Id. The FEC concluded that neither the radio stations nor the private sponsor made a "contribution" or "expenditure" on behalf of the candidate. Id. at 2. This conclusion was based on the assumption that the programs were not conducted to influence the candidate's nomination and that the appearances did not involve expressly advocating for the nomination or election of the candidate or soliciting campaign contributions. Id.

In AO 1992-37, the FEC addressed whether a candidate for the House of Representatives in New York could continue hosting his radio show while running for office. The requestor's show dealt with contemporary issues and included a call-in format. Id. The requestor stated that he did not intend to use the show to promote his candidacy or raise funds, and no ads promoting his candidacy would be aired during the show. Id. The FEC examined whether the expenses incurred by the show, or by the radio stations carrying the show, would constitute in-kind corporate contributions to the requestor's campaign and concluded that, based in part on the requestor's representations that he would not use the show to promote his candidacy or raise funds, and that no ads promoting his candidacy would be aired, the requestor could continue to host his show without a prohibited contribution occurring. Id.

Other states have followed the FEC's directive, recognizing that a candidate's media employment does not constitute a contribution or expenditure as long as the media platform is not used for campaign promotion or fundraising.

Hawaii

In 2000, the Hawaii Campaign Spending Commission (the "HCSC") issued Advisory Opinion 00-07[5], in which the HCSC responded to an individual's inquiry regarding whether their employment in radio and television would preclude them from running for elective office or require them to take leave if they chose to run. The HCSC concluded that an individual need not leave their employment in radio, television, or other media as a candidate for public office, provided that their position is not used to promote their candidacy. Id. Similar to New Jersey, Section 11-191 of the Hawaii Revised Statutes defined a contribution to include any "gift, subscription, deposit of money or anything of value" made for the purpose of "influencing the nomination for election, or election, of any person to office."

The HCSC further noted that it has consistently ruled that the mere appearance of a candidate on a radio or television program, absent any communication advocating their nomination or election, or the solicitation of campaign contributions, does not result in a contribution or expenditure. Advisory Opinion 00-07. Thus, it concluded that if a candidate's media employment activities do not involve advocating their nomination or election, there is no contribution or expenditure. Id. Consequently, the employer of such a candidate is not required to report any activity as a contribution or expenditure, provided there is no activity promoting the candidate or soliciting contributions. Finally, the Commission noted that this opinion is consistent with FEC AOs 1992-37 and 1977-42.

Maryland

In Maryland, the State Board of Elections ("SBE") asked the Maryland Office of the Attorney General to provide legal advice regarding an allegation by the Maryland Democratic

[5] Attached as Exhibit D to the Szabo Cert.

Party that former Governor Robert Ehrlich and WBAL Radio violated Maryland's campaign finance law. 95 Md. Op. Att'y Gen. 110, 2010 WL 3547900 (Ops.Md.Atty.Gen. 2010).[6] The allegation claimed that WBAL Radio made an illegal in-kind contribution to Ehrlich's gubernatorial campaign because Ehrlich acted as a host or co-host on the station.

The Attorney General advised that state efforts to regulate media appearances by candidates through campaign finance laws raise significant First Amendment concerns, noting that its research "revealed no recent instances, under either federal law or the laws of other states, where in-kind contribution limits have been successfully applied in the way urged by the complaint." Id. at 111. The Attorney General further found that courts have routinely disapproved efforts to closely regulate the content of print or broadcast media featuring political discussion and that "[t]he role of the candidate or potential candidate in that discussion does not fundamentally change that analysis." Id. The Attorney General then listed content-neutral factors in its analysis: (1) if the radio show significantly pre-dated the campaign season, it is unlikely that the program was created to promote a candidacy; (2) a live call-in show featuring political discussion, similar in format to other regular broadcasts, would negate an inference that it was created for campaign purposes; and (3) if the program is part of the station's ordinary broadcasting business, sponsored by paid commercial advertisements, it is unlikely to be deemed a contribution to a particular campaign. Id.

Applying in-kind contribution limits to media commentary by a candidate would likely infringe on First Amendment rights. Id. at 112-113. The Attorney General noted that in past cases, neither federal nor state agencies successfully upheld findings that media commentary by a candidate amounted to an impermissible in-kind contribution. Id.

[6] Attached as Exhibit E to the Szabo Cert.

Given these considerations, the Attorney General advised that SBE should treat a broadcast hosted by a candidate or potential candidate no differently than other appearances or commentary by political figures in print or broadcast media. Id. at 121-122. Therefore, according to the Attorney General, the program's continuation until Ehrlich filed a certificate of candidacy did not constitute an illegal contribution. Id. Finally, the Attorney General noted the program would not air after Ehrlich files his certificate of candidacy, and therefore the FCC's "equal time" rule would not apply. Id.

Washington State

In an August 29, 1995 advisory opinion, the Washington State Public Disclosure Commission ("PDC") addressed the question of "whether a radio-television talk show host who becomes a candidate for state office under the [Washington State] Public Disclosure Law must report the time he is regularly on the air after becoming a candidate as an in-kind contribution from his employer."[7] The PDC concluded that the talk show host, as a candidate, would be receiving a contribution from the radio station if, while on the air, the host "[s]olicits votes, expressly advocates or expressly discusses his candidacy, or expressly discusses the candidacy of any of his opponents"; "solicits or accepts contributions or campaign volunteers"; or "[e]xpressly advocates the defeat of opposing candidates." Id. Also relevant to the analysis was whether the radio host was a long-time employee of the station and not hired in anticipation of his candidacy; the radio station was not controlled directly or indirectly by the radio host; the radio host would be on the air as part of his regularly scheduled program; and there were no changes in the radio host's employment conditions or compensation in anticipation of his candidacy. Id.

[7] The advisory opinion is attached as Exhibit F to the Szabo Cert. See also Joshua M. Duffy, King Makers?: Talk Radio, The Media Exemption, and Its Impact on the Washington Political Landscape, 33 Seattle U. L. Rev. 191, 212-14 (Fall 2009). Szabo Cert., Exhibit H.

* * *

In sum, the FEC and various state advisory opinions consistently demonstrate that media appearances by candidates, when conducted in accordance with established guidelines and without explicit campaign promotion, do not constitute in-kind contributions. The guidance from the FEC and multiple states highlight that regular employment activities in media, without express advocacy or solicitation of contributions, fall outside the realm of regulated campaign contributions. These opinions reinforce that Townsquare's actions are in line with the legal standards across the country, and thus, providing airtime to Spadea as part of his regular employment does not constitute an in-kind contribution. Applying an opposite interpretation would contradict established legal precedent and advisory opinions nationwide, which protect the media's role in public discourse while upholding the integrity of campaign finance laws.

POINT III

RULING THAT SPADEA'S AIRTIME IS AN IN-KIND CONTRIBUTION SETS A DANGEROUS PRECEDENT THAT COULD SIGNIFICANTLY IMPACT THE MEDIA LANDSCAPE AND POLITICAL DISCOURSE

If the Commission were to classify Spadea's regular employment as an in-kind contribution, it would open the door to excessive regulation of media activities involving any candidate. This could lead to a chilling effect on free speech, where media outlets might refrain from hiring or retaining any individual with political aspirations for fear of regulatory repercussions. Moreover, this approach would undermine the fundamental role of the media in fostering public debate and informing the electorate. Candidates who are media professionals would be unfairly disadvantaged, forced to choose between their careers and their political aspirations. Such a policy would also burden media companies with the constant threat of campaign finance violations, stifling their ability to operate freely and independently. Or, as

Thurgood Marshall explained, an overly expansive interpretation of campaign finance laws and regulations "might discourage incorporated news broadcasters and publishers from serving their crucial societal role," which highlights "[a] valid distinction….between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668 (1990), overruled on other grounds by Citizens United v. Fed. Elec. Comm'n, 558 U.S. 310 (2010).

This slippery slope could extend beyond radio hosts to journalists, commentators, guest speakers, and even comedians performing at the Stress Factory, creating a landscape where political participation is hindered by overzealous regulation. As described above, the FEC and other states, for these reasons, have recognized the importance of maintaining a clear separation between regular media employment and campaign activities. Adopting a contrary position would not only contradict these established precedents but also erode the protections afforded to free speech under the First Amendment. It is imperative that ELEC uphold the established standards and avoid embarking on a regulatory path that could have far-reaching negative consequences.

POINT IV

ELEC BEARS THE BURDEN OF PROOF IN SHOWING THAT TOWNSQUARE HAS PROVIDED SPADEA FOR GOVERNOR WITH AN IN-KIND CONTRIBUTION

While ELEC's powers to enforce the Act are broad, they are not without limit. Rather, as relevant here, N.J.S.A. 19:44A-41(b) provides that: "Upon receiving evidence of any violation of [N.J.S.A. 19:44A-29], [ELEC] shall have power to hold… hearings upon such violation and, upon finding any person to have committed such a violation, to assess such penalty… as it deems proper under the circumstances…." In this case, the OTSC, on its face, does not demonstrate the ELEC has "receiv[ed] evidence of any violation of" of the Act. Rather, the only evidence cited in the

OTSC is that a radio personality has declared his gubernatorial candidacy, and that Townsquare released a statement, stating that it "has taken steps and imposed guidelines to ensure that Bill's on-air presence over the coming months and until he becomes a legally qualified candidate are in accordance with New Jersey election law…."

This type of hearing is also unusual in that it places the burden on Townsquare and the other respondents to prove a negative, *i.e.* that Spadea's radio airtime is *not* an in-kind contribution from New Jersey 101.5 or Townsquare. While proceedings to determine whether a violation of the Act has occurred can be commenced by way of an Order to Show Cause, the burden of proving a violation rests with the complainant. See, e.g., People for Whitman Committee v. Florio '93, Inc., 93 N.J.A.R.2d (ELE) N.J., 1993 WL 548393, at *1, 3 (1993); see also New Jersey Elec. Law Enforcement Comm'n v. Brown, OAL Dkt. No. ELE 07169-12, Agency Dkt. No. C-9 0324 01 01-P2010, 2013 WL 12371242, at *3 (N.J. Admin. Aug. 8, 2013) ("in an action by the Commission for a violation of the Act, the Commission carries the burden of proof, by a preponderance of the evidence.") (citation omitted).[8] Indeed, where, as here, relief is sought on "an emergent basis" in an administrative setting, the party seeking relief must demonstrate irreparable harm, N.J.A.C. 1:1-12.6, and otherwise demonstrate that emergent relief is appropriate under the standards set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). See In re Comcast of Central New Jersey, LLC, No. CE0411161, 2005 WL 389135 (N.J.B.P.U. Jan. 13, 2005) ("With a request for emergent relief… the moving party must make a showing of the criteria set forth in a series of cases flowing from the Court's determination in Crowe v. DeGioia").[9] One such factor the Commission should therefore consider at the hearing is "the relative hardship to the parties in granting or denying

[8] Attached to the Szabo Cert. as Exhibits H and I respectively.
[9] Attached to the Szabo Cert. as Exhibit J.

relief." Crowe, 90 N.J. at 134 (citation omitted). In doing so, ELEC should carefully weigh the objectives of the Act with the unmistakable First Amendment rights of Townsquare to produce and disseminate content of its choice relating to public affairs.

While Townsquare has given, and will continue to give, its full cooperation to the Commission to ensure that Spadea's broadcasts do not constitute an in-kind campaign contribution, the undersigned feels compelled to point out the unusual nature of these proceedings and reserves all rights in connection therewith.

CONCLUSION

For all of the foregoing reasons, the Commission must find that Townsquare's provision of airtime to Bill Spadea does not constitute an in-kind contribution.

Respectfully Submitted,

GENOVA BURNS LLC
494 Broad Street
Newark, New Jersey 07102
(973) 533-0777
Attorneys for Townsquare Media, Inc.

s/*Angelo J. Genova*
ANGELO J. GENOVA

Dated: June 24, 2024

GENOVA BURNS LLC
Angelo J. Genova, Esq. (005501979)
Daniel A. Lebersfeld, Esq. (022552004)
Harrison C. Clewell, Esq. (338302021)
Katherine Szabo, Esq. (411662022)
494 Broad St.
Newark, New Jersey 07102
(973) 533-0777
Attorneys for Respondent
Townsquare Media, Inc.

IN THE MATTER OF SPADEA FOR GOVERNOR, A SINGLE CANDIDATE COMMITTEE FOR THE 2025 PRIMARY ELECTION	**CERTIFICATION OF KATHERINE SZABO, ESQ.**

I, Katherine Szabo, of full age, hereby certify as follows:

1. I am an attorney at law of the State of New Jersey and an associate with the law firm of Genova Burns, LLC, located at 494 Broad Street, Newark, New Jersey, attorneys for respondent Townsquare Media, Inc. ("Townsquare") in this matter. As such, I have personal knowledge of the matters set forth herein.

2. Attached hereto as **Exhibit A** is a true and correct copy of Townsquare's June 17, 2024 press release, which is also publicly available at https://www.townsquaremedia.com/equity-investors/press-releases.

3. Attached hereto as **Exhibit B** is a true and correct copy of the Federal Election Commission's advisory opinion, AO 1977-42.

4. Attached hereto as **Exhibit C** is a true and correct copy of the Federal Election Commission's advisory opinion, AO 1992-37.

5. Attached hereto as **Exhibit D** is a true and correct copy of the Hawaii Campaign Spending Commission's advisory opinion 00-07.

6. Attached hereto as **Exhibit E** is a true and correct copy of the Maryland Office of the Attorney General's Opinion, 95 Md. Op. Att'y Gen. 110 (Ops.Md.Atty.Gen. 2010).

7. Attached hereto as **Exhibit F** is a true and correct copy of the Washington State Public Disclosure Commission's August 29, 1995 advisory opinion.

8. Attached hereto as **Exhibit G** is a true and correct copy of Joshua M. Duffy, King Makers?: Talk Radio, The Media Exemption, and Its Impact on the Washington Political Landscape, 33 Seattle U. L. Rev. 191, 212-14 (Fall 2009).

9. Attached hereto as **Exhibit H** is a true and correct copy of the unpublished decision People for Whitman Committee v. Florio '93, Inc., 93 N.J.A.R.2d (ELE) N.J., 1993 WL 548393, (1993).

10. Attached hereto as **Exhibit I** is a true and correct copy of the unpublished decision New Jersey Elec. Law Enforcement Comm'n v. Brown, OAL Dkt. No. ELE 07169-12, Agency Dkt. No. C-9 0324 01 01-P2010, 2013 WL 12371242 (N.J. Admin. Aug. 8, 2013).

11. Attached hereto as **Exhibit J** is a true and correct copy of the unpublished decision In re Comcast of Central New Jersey, LLC, No. CE0411161, 2005 WL 389135 (N.J.B.P.U. Jan. 13, 2005).

I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Katherine Szabo
KATHERINE SZABO

Dated: June 24, 2024

EXHIBIT A

ABOUT US

JUN 17, 2024 TOWNSQUARE COMMENDS BILL SPADEA'S CIVIC ENGAGEMENT AND COMMITMENT TO PUBLIC SERVICE

Purchase, NY – June 17, 2024 – One of our valued employees, Bill Spadea, announced today that he has decided to pursue a candidacy for Governor of New Jersey.

At Townsquare, we respect the rights of our employees to engage in civic activities that contribute to the well-being of our society and serve the local communities that are so important to us.

Until he becomes a legally qualified candidate, Bill will continue to fulfill his employment responsibilities entertaining and informing the local audience on NJ 101.5 airwaves and digital platforms, as he has done for the last 9 years. However, we are sensitive to the legal parameters attendant keeping a broadcast personality on air while they are seeking public office. Accordingly, we have taken steps and imposed guidelines to ensure that Bill's on-air presence over the coming months and until he becomes a legally qualified candidate, are in accordance with New Jersey election law, applicable FCC guidance, and industry standards and best practices for such circumstances.

As a company, and to be clear, Townsquare is and will remain neutral with respect to a Spadea candidacy and does not endorse any political candidates or parties. At the same time, Townsquare will continue to uphold the values of integrity and community involvement personified by our team members.

ABOUT TOWNSQUARE MEDIA, INC.

Townsquare is a community-focused digital media and digital marketing solutions company with market leading local radio stations, principally focused outside the top 50 markets in the U.S. Our

providing website design, creation and hosting, search engine optimization, social media and online reputation management as well as other digital monthly services for approximately 23,300 SMBs; a robust digital advertising division, **Townsquare Ignite**, a powerful combination of a) an owned and operated portfolio of more than 400 local news and entertainment websites and mobile apps along with a network of leading national music and entertainment brands, collecting valuable first party data and b) a proprietary digital programmatic advertising technology stack with an in-house demand and data management platform; and a portfolio of 349 local terrestrial radio stations in 74 U.S. markets strategically situated outside the Top 50 markets in the United States. Our portfolio includes local media brands such as WYRK.com, WJON.com, and NJ101.5.com, and premier national music brands such as XXLmag.com, TasteofCountry.com, UltimateClassicRock.com, and Loudwire.com. For more information, please visit

LOCAL MEDIA

EXHIBIT B

FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 12, 1978

AO 1977-42

Mr. Ken Hechler
Box 818
Huntington, West Virginia 25712

Dear Mr. Hechler:

This responds to your letter of September 12, 1977, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended, ("the Act") to radio programs in which participated as host and interviewer.

You state that you hosted two interview programs aired on two different radio stations in West Virginia in one of which live phone calls from the listening audience were accepted. A newspaper clipping, enclosed with your letter, describes one of the call-in programs (one hour long and broadcast weekly) in which representatives of Federal, State, and local government agencies and of private industry discussed housing issues. You explain that the other program, on the air for an hour five days a week, was "an interview and talk show program dealing with a different issue every day." The weekly program was paid for and sponsored by a noncorporate business enterprise while, in the case of the Monday through Friday programs, you were employed and paid by the radio station which broadcast them.

You also state that you are a 1978 candidate for nomination to the House of Representatives from the 4th Congressional District of West Virginia. You filed with the Commission as a Congressional candidate on July 5, 1977, and designated a principal campaign committee. You filed as a candidate with the West Virginia Secretary of State on January 11, 1978. The Commission understands that the programs began in mid-August of 1977 and ended in October, well before the 1978 election year.

You ask whether the funding of your appearances on these interview programs involves the making of a "contribution" to you by the private sponsor of the weekly program and by the radio station which carried the Monday through Friday program. Since the programs have now ended the issue is whether reports filed to date should disclose the costs incurred for the programs as contributions in kind to your campaign and corresponding expenditures.

The definitions of "contribution" and "expenditure" in 2 U.S.C. 431 include gifts of anything of value and any purchase or payment made for the purpose of influencing the

nomination or election of any person to Federal office. Any gift or payment constituting a contribution or expenditure is required to be disclosed under the Act. 2 U.S.C. 432, 434. Contributions are also subject to limitation and, in some cases, are prohibited. See 2 U.S.C. 441a, 441b, 441c, et seq. Recent advisory opinions of the Commission have concluded that a "contribution" or "expenditure" would not necessarily occur in certain specific circumstances where the major purpose of activities involving appearances of candidates for Federal office was not to influence their nomination or election. These opinions were, however, conditioned on (i) the absence of any communication expressly advocating the nomination or election of the candidate, and (ii) the avoidance of any solicitation, making or acceptance of campaign contributions for candidate in connection with the activity. See Advisory Opinions 1977-54 and 1978-15; see also Advisory Opinion 1978-4, (copies enclosed).

In the circumstances presented by your request it is the Commission's opinion that neither the stations broadcasting your programs, nor the private sponsor of the weekly program, have made a "contribution" or "expenditure" on your behalf, as defined in the Act and Commission regulations. This conclusion is based on an assumption that the programs were not conducted for the purpose of influencing your nomination and that your appearances on the programs did not involve the activity described above. See 2 U.S.C. 431(f)(4)(F).

The Commission expresses no opinion as to any application of the Communications Act of 1934. as amended, or Federal Communications Commission rulings and regulations to your participation in these programs.

This response constitutes an advisory opinion concerning the application of a general rule of law stated in the Act, or prescribed as a Commission regulation, to the specific factual situation set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)
Thomas E. Harris
Chairman for the
Federal Election Commission

EXHIBIT C

FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 30, 1992

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1992-37

Randall A. Terry
Box 196 RD2
Harpursville, NY 13787

Dear Mr. Terry:

This responds to your letters dated September 29 and August 5, and August 4, 1992, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the airing of your radio show while you are a candidate for Federal office.

You are the Right-to-Life candidate for the House of Representatives from the 23rd District of New York. Among your opponents is Congressman Sherwood Boehlert, the Republican nominee. You have not filed a Statement of Candidacy indicating that your campaign has raised or spent $5,000 but you are on the 1992 general election ballot as the Right-to-Life candidate and intend to raise funds. You state that, in late July 1992, you accepted the Right-to-Life Party's request to run on their ballot line.

You have also been the host of a daily radio talk show entitled "Randall Terry Live," since the beginning of May, 1992. The show "deals with all major contemporary issues, both domestic and foreign," and has a "call-in" format "in which the news of the day is discussed." You state that you do not intend to use the show to promote your candidacy or raise funds for your candidacy, and that no ads raising funds for or promoting your candidacy would be run during the show.

Randall Terry Live, Inc. produces the show which is distributed via satellite around the nation on a Christian Broadcasting Network satellite. The show airs on approximately 95 stations nationwide, but on only one station in New York State, WLNL in Horseheads, near Elmira. You state that the show does not air in the 23rd District. You note that WLNL beams into areas west

of the district, but that "the signal is almost extinct" at Binghamton which is just outside the district on the southwest side.

You state that you are a contractual employee of Randall Terry Live, Inc., and neither an owner or stockholder of the company. A family member is the sole incorporator of the company. You state that neither the family member nor the corporation has made any donations or in-kind contributions to the campaign.

You spend about 35 hours a week working for Randall Terry Live and average another 15 hours a week as a lecturer and pro-life activist. You are employed by the company at a salary of between $23,000 and $25,000 per year and earn roughly the same amount of money through speaking honoraria.[1/] You have sent three tape cassettes of your show, one each for August 3, 4, and 5, 1992. Your usual format appears to be to begin with three or four news headlines, to comment on these stories, and to talk with phone-in listeners either about a specific topic for the program or general topics. There were also satirical features (i.e., on the Clinton-Gore campaign bus and on Ross Perot). The shows repeatedly attack "humanists" and "liberals." During these shows, you derogate the Clinton-Gore ticket and express support for George Bush's candidacy.[2/]

You begin the August 3 show with a tape of a male voice saying the following:

> One, I find him to be one of the most offensive people I've ever been exposed to in my life, trampling all over the constitutional rights of other people. That's not the type of people that we want representing us in any elective office.

You identify the speaker as Congressman Sherwood Boehlert and explain that he is talking about you. You then remark that, if you are one of the most offensive people he knows, then he must not know many people, because you are "a nice guy."

You ask whether you may continue to host your radio show while you are running for Federal office. This question may also be expressed as whether the expenses incurred by Randall Terry Live, Inc., or by the radio stations or network carrying the show, would be in-kind corporate contributions to your campaign.

The Act and regulations prohibit corporations from making contributions or expenditures in connection with any Federal election campaign, and prohibit any Federal candidate or campaign from knowingly accepting such a prohibited contribution or expenditure. 2 U.S.C. 441b(a); 11 CFR 114.2(b) and (c). The term "contribution or expenditure" is defined to include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value ... to any candidate, campaign committee, or political party or organization, in connection with any [Federal] election." 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1). See 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1).

The Commission notes your statements that your show does not air in the 23rd District. The Commission also notes your representations that you do not intend to use the show to promote your candidacy or raise funds for your candidacy, and that no ads raising funds for or promoting your candidacy would be run during the show. The Commission interprets your representations

to include a commitment to refrain from attacks on your opponents, or from soliciting funds or airing ads for those purposes. Based upon these conditions, the Commission concludes that you may continue to host your show during your candidacy without a prohibited contribution occurring.[3/] The Commission's conclusion is based on the specific facts and representations presented and is not meant to reverse or modify any previous opinions pertaining to the participation of, or communications referring to, a Federal candidate in other activities and contexts. See Advisory Opinion 1992-5 and opinions cited therein.

The Commission expresses no opinion as to any ramifications of communications law, which is outside its jurisdiction.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Joan D. Aikens
Chairman for the Federal Election Commission

Enclosure (AO 1992-5)

ENDNOTES
1/ Previous radio experience included a five-minute daily show entitled "Operation Rescue News Update" which aired from the fall of 1988 to this past summer. Between July 1991 and February 1992, you had three one-week stints and one two-week stint at hosting daily one-hour radio shows.

2/ The Commission also notes that you criticize the President on his handling of the situation in Sarajevo. After making this criticism, you state that this is proof to your listeners that you are not a "lapdog" of the Bush administration.

3/ In the absence of further facts or other contextual information, the Commission makes no determination as to the playing of the tape of Congressman Boehlert and your statements immediately subsequent to that.

EXHIBIT D

ADVISORY OPINION 00-07

An individual has been employed locally in radio and television for many years, and this employment is the individual's principal business. The individual does not have any ownership nor management interest in any media organization and is contemplating candidacy for an elective office. The individual requests an opinion as to whether this employment would preclude his running for an elective office, or in the alternative, would it be necessary to take leave of his employment in radio or television, should he choose to run for elective office. The Commission, by this Advisory Opinion, responds that an individual need not leave employment in radio, television or other media as a candidate for public office, as long as any such position is not used to promote the candidate for elective office.

The campaign spending statute contains no express or implied language regarding the propriety of employment by a candidate in a media related field. Instead, questions on the employment in the media are usually related to the potential for contributions and expenditures relating to the employment. In other words, does the employment in a radio or television program, for example, constitute a contribution or expenditure by one person or another to the candidate? Is there a reportable activity by the sponsor or the owner of the station or program?

Section 11-191, Hawaii Revised Statutes defines a contribution to include any "gift, subscription, deposit of money or anything of value," for the purpose of "influencing the nomination for election, or election, of any person to office." Similarly, an expenditure means any "purchase or transfer of money or anything of value, or promise or agreement to purchase or transfer of money or anything of value, or payment incurred or made, or the use or consumption of a nonmonetary contribution," for the purpose of "influencing the nomination for election, or election of any person seeking nomination for election, or election, to office".

The Commission has ruled consistently, that the mere appearance of a candidate on a radio or television program, absent any communication advocating the nomination or election of the candidate, or the solicitation of campaign contributions, does not give rise to a contribution or expenditure. Thus, where a candidate has been regularly employed in the media and the purpose of the candidates activities or discourse are not related to advocating the nomination or election of any candidate, there would not be a contribution or expenditure. The employer of the candidate would not be required to report any activity as a contribution or expenditure, where there is no activity to advocate or promote a candidate or make a solicitation for a contribution. The Commission, advi-

sory opinion is consistent with Federal Election Commission Advisory Opinions 1992-37 and 1977-42.

This Advisory Opinion does not express an opinion on any rulings or regulations by the Federal Communications Commission with regards to a candidate's participation as an employee in radio or television. The Federal Communications Commission has jurisdiction over radio and television broadcasts and certain equal time provisions which radio and television stations must adhere to when campaign activity is involved.

This Advisory Opinion is provided by the Commission as a means of stating its current interpretation of the Hawaii election Campaign Contributions and Expenditures laws provided under HRS section 11-191, et seq. and the administrative rules of the Commission provided in chapter 2-14, Hawaii Administrative Rules. The Commission may adopt, revise, or revoke, this Advisory Opinion upon its own initiative or upon the enactment of amendments to the Hawaii Revised Statutes or the adoption of amendments to the administrative rules by the Commission.

Dated: Honolulu, Hawaii, July 5, 2000.

CAMPAIGN SPENDING COMMISSION

_____

A. Duane Black
Chairperson

_____

Della Au
Commissioner

_____

Clifford Muraoka
Commissioner

_____

Andrea Low
Commissioner

EXHIBIT E

ELECTION LAW

CAMPAIGN FINANCE – IN-KIND CONTRIBUTION – CONSTITUTIONAL LAW – FREEDOM OF SPEECH

May 24, 2010

Ms. Linda H. Lamone, Administrator
Maryland State Board of Elections

You have requested legal advice regarding a letter submitted to the State Board of Elections ("SBE") by the Maryland Democratic Party alleging that former Governor Robert Ehrlich and WBAL Radio have violated Maryland's campaign finance law. In essence, the letter asserts that, because the former Governor acts as host or co-host of a show on WBAL Radio, the station has made an illegal in-kind contribution to his gubernatorial campaign. The legal issue concerns the circumstances under which the broadcast of political discussion or commentary by a candidate or prospective candidate would amount to an in-kind contribution by the broadcaster.

In general, state efforts to regulate media appearances by a candidate, potential candidate, or others through a state's campaign finance laws raise significant First Amendment concerns. This is true even where the person appearing has some practical control over the content of the broadcast, including as host. Significantly, research by our Office has revealed no recent instances, under either federal law or the laws of other states, where in-kind contribution limits have been successfully applied in the way urged by the complaint. To the contrary, courts have routinely disapproved efforts to closely regulate the content of print or broadcast media featuring political discussion. The role of the candidate or potential candidate in that discussion does not fundamentally change that analysis. Our Office therefore advises that, consistent with its past practice with respect to media coverage of a candidate or potential candidate, SBE should decline to treat the radio broadcasts complained of as an illegal contribution to the Ehrlich campaign.

Several objective, content-neutral factors may be of special relevance. First, if the radio show at issue significantly pre-dates the current campaign season, it is unlikely that a court would find the station created the program as a vehicle to promote an actual or prospective candidacy. Second, a live call-in show featuring

political discussion that is similar in format to other broadcasts regularly aired by the station would tend to negate an inference that the show was created especially for a campaign purpose. Third, if the program appears to be part of the station's ordinary broadcasting business, sponsored by paid commercial advertisements, that, too, makes it unlikely the program would be deemed a contribution to a particular campaign. In such circumstances, it would not appear that a station has donated to a campaign free air-time for which it would ordinarily charge a fee. *Cf.* Letter from Assistant Attorney General Kathryn M. Rowe to Delegate George W. Owings, III (August 25, 1994) (concluding that political use of a public access channel is not an in-kind contribution, in part because the cable franchisee does not charge for time). Therefore, regardless of any reason a candidate or potential candidate might have for hosting this type of show, from the station's perspective, the show would not amount to an unpaid "infomercial."

Unquestionably, Maryland has a strong interest in preventing the evasion of its campaign finance limits through indirect means. This includes, of course, misconduct by media companies. But the First Amendment demands a lighter touch in this area, due to the media's role in providing a forum for public debate. This calls for a regulatory approach narrowly tailored to prevent the threatened harm, while avoiding unnecessary burdens on political speech. In our view, applying in-kind contribution limits to the type of activity at issue here would not be sufficiently tailored to the problem to justify its likely impact on political speech. Accordingly, SBE should treat a broadcast hosted by a candidate or potential candidate no differently than it does other appearances or commentary by political figures in the print or broadcast media.

Greater scrutiny may be appropriate during the period immediately preceding the election, when both the temptation to abuse and the potential for harm are at their greatest. *See e.g.*, *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 895 (2010) ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held."). Other regulations, such as the Federal Communication Commission's ("FCC") "equal time" rule, are specifically targeted at such pre-election campaign activity. In any event, because we

understand that this latter issue is not immediately of concern, it is not addressed in this advice letter.[1]

I

Background

A. First Amendment Standards

A major purpose of the First Amendment is "to protect the free discussion of governmental affairs ... includ[ing] discussions of candidates." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The First Amendment guarantee "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). More recently, the Supreme Court has warned against laws that, either through imprecision or complexity, impose impermissible burdens or uncertainties on speakers "discussing the most salient political issues of our day." *Citizens United*, 130 S.Ct. at 888. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

This need for specificity means that not all campaign-related speech may be regulated. Only campaign speech that can be identified as "express advocacy or its functional equivalent" meets a sufficiently definite standard that it may be subject to some government imposed limits. *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) ("WRTL").[2] Therefore, in the case of a radio broadcast involving a candidate or potential candidate, the question whether the appearance is subject to regulation, including as an in-kind contribution, arises *only* to the

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[1] According to public statements by the Ehrlich campaign and WBAL station management, the program will not be aired after the former Governor files a certificate of candidacy on or before the July 6, 2010 deadline. From that date, the FCC's "equal time" rule would apply to any "use" of the station by a filed candidate. *See* 47 U.S.C. §315(a); 47 CFR §73.1940 *et seq.*

[2] The "functional equivalent" of express advocacy is a political message that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70.

extent the broadcast involves express advocacy or its equivalent. If it does not, no further analysis is needed; the First Amendment precludes regulation of the appearance through campaign finance laws. If the broadcast *does* involve express advocacy or its equivalent, the issue becomes whether the purported restriction may be constitutionally applied. *See, e.g.*, *Citizens United*, 130 S. Ct. at 898 ("Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.")(citation and internal quotations omitted).

States have a strong interest in enacting laws to preserve the integrity and fairness of the electoral process. *Federal Election Comm'n v. National Right to Work Comm.,* 459 U.S. 197, 208 (1982). This includes measures relating to campaign finance. *Buckley*, 424 U.S. at 26-29; *see also Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 389 (2000). Limits on campaign contributions – which generally have their most direct impact on the First Amendment right of free association, *see Buckley,* 415 U.S. at 25 – are subject to a somewhat less rigorous standard of review than are more direct restrictions on speech. In analyzing laws that limit campaign contributions, courts will uphold the restriction if it promotes a "sufficiently important" government interest and is "closely drawn" to avoid unnecessary abridgment of the right to free association. *Id*. Under either standard, however, the test to be applied is a demanding one.

With regard to dollar limits on the value of contributions, the Supreme Court has recognized two "sufficiently important" state interests: an "anti-corruption" interest and an "anti-circumvention interest." The first embraces not only express or implied *quid pro quo* arrangements, but also the threat of undue influence by large donors over elected officials, or the appearance of it, which undermines public confidence in the integrity and fairness of the electoral system. *Buckley,* 424 U.S. at 26-29; *see also Shrink Missouri PAC*, 528 U.S. at 389 ("In speaking of improper influence and opportunities for abuse ... we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."). The second interest is furthered by measures designed to prevent evasion or circumvention of legitimate campaign finance restrictions, so that individuals or organizations may not undermine valid contribution limits indirectly. *See Buckley*, 414 U.S. at 46-47. In-kind contribution limits promote both of these interests.

B. Federal Media Exception

Federal law provides a useful example of how First Amendment values may be accommodated in campaign finance regulation. The Federal Election Campaign Act ("FECA"), 2 U.S.C. §431, *et seq*., was amended shortly after its enactment to provide a specific statutory exception for most media appearances by a candidate. *See* 2 U.S.C. §431(9)(B)(i). When it added the media exception in 1974, Congress indicated that it was intended to make clear that campaign finance regulation would not "limit or burden in any way the First Amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the ... media to cover and comment on political campaigns." H. Rep. No. 93-943, 93d Congs., 2d Sess. at 4 (1974); *see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (discussing rationale for media exception). This special protection of press freedoms is justified not because of any special privilege the press enjoys, but because press entities serve a critical role in our society as a forum for public debate.[3]

Under regulations adopted pursuant to FECA, contributions and expenditures are defined so as to exclude "any cost incurred in covering or carrying a news story, commentary, or editorial by any

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[3] The Supreme Court has explained:

> The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. *Mills v. Alabama*, 384 U.S., at 219, 86 S.Ct., at 1437; *see Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-864, 94 S.Ct. 2811, 2821-2822, 41 L.Ed.2d 514 (1974) (Powell, J., dissenting). But the press does not have a monopoly on either the First Amendment or the ability to enlighten. *Cf. Buckley v. Valeo*, 424 U.S., at 51 n. 56, 96 S.Ct., at 650; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-390, 89 S.Ct. 1794, 1806-1807, 23 L.Ed.2d 371 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964); *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945).

Bellotti, 435 U.S. at 781-82 (footnotes omitted).

broadcasting station ..., Web site, newspaper, magazine, or other periodical publication ..." except when the facility is "owned or controlled by any political party, political committee, or candidate ...." *See* 11 CFR §§100.73(contributions), 100.132 (expenditures). For media facilities owned by a party, candidate, or political committee, federal law exempts only news stories that meet other criteria to ensure fairness.[4] However, fairness, balance, or lack of bias are not requirements for media outlets not owned or controlled by a party, candidate, or political committee. *Id*.

Courts interpreting this provision have set forth a two-part analysis. *Federal Election Comm'n v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981) (citing *Reader's Digest Ass'n v. Federal Election Comm'n*, 509 F.Supp. 1210 (S.D.N.Y. 1981).

> Under the *Reader's Digest* procedure, the initial inquiry is limited to whether the press entity is owned or controlled by any political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question. ... If the press entity is not owned or controlled by a political party or candidate and it is acting as a press entity, the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint.

Phillips Publishing, 517 F.Supp. at 1313 (citations omitted). In other words, provided an independent press entity acts "as a press entity," the content of any political message it disseminates is largely

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[4] For a candidate-owned facility, only a news story:

> (a) That represents a *bona fide* news account communicated in a publication of general circulation or on a licensed broadcasting facility; and
>
> (b) That is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution.

11 CFR §100.73(a)(b).

irrelevant for federal campaign finance purposes. A number of states have adopted similar explicit media exceptions as part of their campaign finance laws to accommodate First Amendment values.

C. Maryland Campaign Finance Law

Regulation of Contributions and Expenditures

The Maryland Campaign Finance Law regulates contributions and expenditures in connection with State elections. *See* Annotated Code of Maryland, Election Law Article, §13-101 *et seq.* Under that law, all campaign finance activity must be conducted through a "campaign finance entity." EL §13-202(a). In addition, the establishment of a campaign finance entity is made an express prerequisite to the filing of a certificate of candidacy for State office. EL §13-202(b).

Once established, the campaign finance entity is to file regular reports with SBE of all contributions received and expenditures made. *See* EL §13-304. SBE publishes a Summary Guide to assist candidates, contributors, officers of campaign finance entities, and others in complying with these requirements. EL §13-103. Campaign finance obligations are continuing in nature. So long as an individual maintains a campaign finance entity registered with SBE, the campaign remains subject to the Title 13's bookkeeping requirements, periodic reporting duties, and contribution limits. *See*, *e.g.*, EL §13-312; *see also* EL §13-305 (treasurer may file affidavit in lieu of report in certain circumstances). Winding down or terminating a campaign finance entity requires compliance with several provisions of the Election Law Article, including those relating to disposition of remaining campaign funds and the filing of a final report. EL §§13-247, 13-310, 13-311.

Contribution Limits and In-kind Contributions

The Campaign Finance Law generally imposes limits on a donor's political contributions based on a four-year election cycle. *See* EL §1-101(w) (defining "election cycle"). In general, during any election cycle, the statute caps a donor's contributions to any one candidate at $4,000, and at $10,000 to all campaign finance entities in the aggregate. EL §13-226. The State election law defines a "contribution" as "the gift or transfer, or promise of gift or transfer, of money *or other thing of value* to a campaign finance entity to promote or assist in the promotion of the success or defeat of a candidate, political party, or question." EL §1-101(o)(1) (emphasis

added). When a contribution is made in a form other than a direct gift of money to the campaign treasurer, it is considered an in-kind contribution.

The Summary Guide provides, in relevant part, the following explanation of an in-kind contribution:

> An in-kind contribution includes any thing of value (except money). For example: a person can contribute bumper stickers to a candidate's committee. The amount of the contribution equals the fair market value of the bumper stickers. An in-kind contribution counts towards the donor's contribution limits.

Summary Guide – Maryland Candidacy & Campaign Finance Laws (revised July, 2006) at 27. In addition to giving a thing of value directly to a campaign, there are two other generic situations in which an in-kind contribution occurs: if a payment is made to a third party to defray a charge incurred by the campaign (*see, e.g.*, EL §13-602(a)(4)(i)), or if spending in support of a candidate is done in "coordination" with the campaign. *Compare* EL §1-101(bb) (defining an "independent expenditure," which is *not* treated as an in-kind contribution). The complaint letter appears to suggest that the broadcast of a talk show hosted by a candidate might be viewed as either a donation of free air-time or as an expenditure by the station made in coordination with the campaign.

II

Analysis

In contrast to federal law and the campaign finance laws of some other states, Maryland statutes do not expressly except from the definition of a "contribution" the imputed cost or fair market value of media coverage of a campaign. *See* EL §13-101(l) (defining "contribution"). Even so, it has been SBE's longstanding administrative practice not to regard traditional media coverage of candidates as in-kind contributions. This policy has been followed without regard to the political content, if any, of the candidate's message. SBE's past practice is thus entirely appropriate in light of the First Amendment concerns outlined above. Intrusive inquiry into the content of a candidate's speech inevitably has a chilling effect on free expression. Faced with a possible campaign violation, some

candidates would doubtless censor their remarks, inhibiting the quantity and quality of public discourse.

On the other hand, the First Amendment does not exempt media outlets from all campaign finance regulation. Unrestricted campaign finance activity could result in the exact type of harm that contribution limits were intended to prevent.[5] Certainly, the possibility exists that elected officials could become too reliant upon or indebted to a media company in the same way this could occur with other private interests. *See, e.g.*, *Citizens United*, 130 S.Ct. at 905 (expressing concerns about unequal treatment of corporations under federal media exception). This concern is legitimate.[6] However, it seems plain that mechanical application of the in-kind rule to prevent possible misconduct by broadcasters would not be sufficiently "tailored" to the problem to meet the First Amendment standard.

As an example, because campaign finance obligations exist so long as a "candidate" maintains a campaign finance entity to support any current or future campaign – regardless of current activity or an intention to run – the in-kind rule could in theory be applied to any past media appearance by the candidate, at any time, throughout the entire course of the candidate's State political career. In addition, the in-kind requirements could be triggered by others as well, including a spokesperson, strategist, consultant, or any other person, acting in coordination with the campaign. Thus, a significant amount of core political speech might be suppressed solely to guard against a mostly theoretical, or at least rare, threat of abuse. This is regulation the First Amendment does not allow. *See, e.g., Citizens United*, 130 S. Ct. at 891 (First Amendment requires

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[5] Candidates often promote their candidacies through paid radio advertisements. If a radio station were to permit a candidate to air a campaign ad for free when it charged other advertisers, including other candidates, the free air time would be an in-kind contribution to the candidate by the radio station. Similarly, if a third party paid for the candidate's ad on behalf of the campaign, that, too, would be an in-kind contribution.

[6] Although we recognize the potential for abuse, in the "free media" context this risk is arguably less as compared to other forms of in-kind contribution. In the case of a public broadcast, there can be no question as to the relationship between the candidate and the broadcaster. This may, in itself, encourage candidates and broadcasters to remain at arms-length with respect to policy issues affecting the company.

giving "benefit of any doubt to protecting rather than stifling speech.") (quoting *WRTL*, 551 U.S. at 469 (2007)).

Our Office is not aware of any similar cases in which a federal or state agency has successfully upheld a finding that media commentary by a candidate (or those coordinating with the candidate's campaign) amounted to an impermissible in-kind contribution. *See, e.g., San Juan County v. No New Gas Tax*, 157 P.3d 831 (Wash. S. Ct. 2007) (criticism of gas tax by radio talk show hosts during regularly scheduled program for which the broadcaster did not normally require payment was not an in-kind contribution to political committee seeking to overturn tax by ballot initiative); 2003 Ariz. Op. Atty. Gen. 12, 2003 WL 23966055 (Ariz. A.G.) (candidate's media appearance not a contribution under statutory exception); *In re Dornan*, MUR 4689, Statement of Reasons ("SOR") of Chm'n Wold and Commr's Elliott, Mason, and Sandstrom (FEC "Matters Under Review," Feb. 14, 2000) (concluding media exception applies to guest host of radio show, whether before or after becoming a candidate for federal office).[7]

Nor does the absence of a statutory media exception require a different outcome. For example, the Arizona Attorney General noted that that Office had reached the same conclusion before the exception was added to the Arizona Code. "In 1988, even though there was not yet a news media exemption in Arizona's campaign finance laws, the Arizona Attorney General opined that 'regulation of newspaper editorials would clearly run afoul of constitutional guarantees of freedom of the press..." 2003 Ariz. Op. Atty. Gen. No. I03-003 at 2 (quoting Arizona Attorney General Opinion No. 188-020 (1988)).

Thus, even if a state lacks an explicit media exception in its campaign finance law, one may be implied in construing the law consistent with constitutional limitations. For example, in *Laffey v. Begin*, 137 Fed. Appx. 362 (1st Cir. 2005), the Rhode Island board of elections brought an enforcement action against an incumbent mayor, alleging that he had received an in-kind contribution when a local radio station allowed him to host a weekly radio show. The mayor sued, claiming that the board action abridged his First Amendment rights. Eventually, the board agreed to suspend its

[7] FEC Advisory Opinions and enforcement actions ("Matters Under Review") are available on-line at the FEC's website: www.fec.gov (last visited May 20, 2010).

enforcement action and the First Circuit remanded the case for an assessment of how the state election law accommodated the First Amendment.

The clear teaching of these authorities is that any enforcement policy that involves close regulation of the content of political speech can impermissibly threaten the values protected by the First Amendment. The Constitution is better served by a content-neutral analysis specifically targeting efforts to evade applicable campaign finance limits. *See, e.g., San Juan County,* 157 P.3d at 841 (observing that Washington Code "limits judicial inquiry into the content of the speech, focusing instead on the content-neutral question of whether the radio station ordinarily would collect a fee for the broadcast")*; compare* EL §13-602(a)(4)(i) (prohibiting persons from defraying costs of campaign finance entity directly or indirectly); *see also Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 250-51 & n.5 (1986) (holding, in part, that a "Special Edition" newsletter expressly advocating election of pro-life candidates was not covered by FECA's media exception and was not akin to the normal business activity of a press entity, relying on content-neutral factors).

It is true that in some earlier cases, the FEC sought to put content restrictions on the on-air statements of candidates. *See, e.g.*, FEC Advisory Op. 1977-42 (limiting candidate's permissible speech as host of public affairs radio program). But that is clearly no longer the case, provided the candidate appears on an "independent" media outlet that is performing its normal press function. *See In re Dornan*, MUR 4689, SOR of Com'r Wold *et al.*; *see also* FEC Advisory Op. 2005-19, at 5 (regarding press exemption for non-candidate despite "lack of objectivity" in coverage). Nor does the identity of the host change the analysis. Whatever control over program content a host might exercise, the relevant consideration under FECA is ownership or control of the station itself. *Id*. Nor is there a constitutionally relevant distinction between programs where a candidate acts as "host," as compared to those where a candidate responds to questions from a friendly interviewer or audience of supporters. For First Amendment purposes, the identity of the speaker should be irrelevant. *Citizens United,* 130 S. Ct. at 898 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some, but not by others.").

To avoid a potential chilling effect on free expression, courts are likely to give considerable leeway to the editorial or programming decisions of media companies, including a company's choice of host. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244 (1974) (holding 'right of reply' statute to be an unconstitutional intrusion into the function of editors).[8] Therefore, generally speaking, the use of objective, content-neutral criteria is an approach better suited to the First Amendment. In this regard, some factors to consider might include whether the program at issue is consistent with the station's usual format, whether it was created well in advance of the campaign season or to provide a campaign vehicle for the candidate, and whether the station would ordinarily have collected a fee for the broadcast. The purpose of these questions would be to help SBE assess whether otherwise protected media activity is in reality an effort to promote a particular candidacy.

III

Conclusion

In light of the more than 35 years' experience of courts and the FEC in interpreting a media exception consistent with the First Amendment, federal law probably offers the most useful guidance on the issue you have asked about. In line with that guidance, we would advise that, in considering possible misconduct relating to the coverage of political discussion by a candidate or potential candidate, the focus should remain on activity by the media outlet that appears to be inconsistent with its ordinary press or broadcast function.

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[8] As the Supreme Court observed in *Miami Herald*:

> "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

418 U.S. at 258 (citations omitted).

Ordinarily, SBE would not analyze the broadcast of a candidate's political remarks as a possible in-kind contribution. The reason advanced for doing so here appears mainly to derive from the participation of former Governor Ehrlich as a host or co-host of the broadcast, and the control over the show's content that circumstance implies. But as is explained above, this consideration does not appear to be decisive, or even greatly relevant, for First Amendment purposes. Similarly, charges of media bias or a lack of balanced coverage do not provide grounds for subjecting a particular media outlet to campaign finance regulation where it would not be otherwise. Consequently, we see no reason in this situation for SBE to depart from its usual practice.

Douglas F. Gansler
Attorney General

Jeffrey L. Darsie
Assistant Attorney General

Robert N. McDonald
Chief Counsel
Opinions and Advice

Editor's Note:

This opinion was originally issued as a letter of advice.

EXHIBIT F

STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION
711 Capitol Way Rm 403, PO Box 40908 • Olympia, Washington 98504-0908 • (206) 753-1111 • FAX: (206) 753-1112

August 29, 1995

SHAWN NEWMAN
924 CAPITOL WAY SOUTH SUITE 209
OLYMPIA WA 09801-1210

Dear Mr. Newman:

You have asked whether a radio/television talk show host who becomes a candidate for state office under the Public Disclosure Law must report the time he is regularly on the air after becoming a candidate as an in-kind contribution from his employer.[1] See RCW 42.17.080 and .090 for reporting requirements. Your question also raises the issue whether the on-air time would be a contribution subject to limit pursuant to Initiative 134. No person may give a candidate for statewide office more than $1,000 per election. RCW 42.17.640(1).

Relevant Statutes and Regulations:

A donation or transfer of anything of value for less than full consideration to financially support a candidate's campaign is considered to be a **contribution** for both reporting and

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[1]The talkshow host would be considered a candidate for purposes of the state Public Disclosure Law at such time as he first:

> Receives contributions or makes expenditures or reserves space or facilities to promote his candidacy;
>
> Announces publicly or files for office;
>
> Purchases commercial advertising space or broadcast time to promote his candidacy; or
>
> Gives his consent to another person to take one of these actions on his behalf.

RCW 42.17.020(8). The individual would not become a "candidate" for FCC purposes until July, 1996 when he files for office. Thus, the "equal time" issue is not pertinent at this time.

limit purposes. RCW 42.17.020(14). The law does exclude a news item, feature, commentary, or editorial given as part of a broadcast media program from the definition of contribution, assuming that certain standards are met.[2] RCW 42.17.020(14)(b)(iv). See also Declaratory Ruling No. 5.

However, a news item, feature, or commentary must be contrasted with "**political advertising,**" which is defined to include any radio or television presentation "used for the purpose of appealing, directly or indirectly, for votes or for financial or other support in any election campaign." RCW 42.17.020(32); WAC 390-05-290. The donation or transfer at less than full market value of political advertising, or the resources to produce and disseminate political advertising (such as free airtime), would be considered a contribution for both reporting and limit purposes. See Declaratory Rulings No. 5 and 5a. Furthermore, the Law imposes sponsor identification requirements on political advertising. RCW 42.17.510.

Relevant Facts:

You have asked specifically about a station employee who, as a talkshow host, expresses his opinion and invites listener comments about the policies and performance of public officials, including officials who may be his opponents in the campaign, and about state and local issues that may be campaign issues.

The Commission has been informed that the following facts are present in this instance:

> The radio host is a long-time employee of the station and clearly was not hired in anticipation of his candidacy.
>
> Neither the station nor its parent company is owned or controlled by the candidate. No one who owns or controls the station or parent company or who produces or has a decision-making role with regard to the show will be associated with the candidate's campaign.
>
> The talk show host has asserted that he will be on the air as part of his regularly scheduled program and that no changes in the production, nature, format, length, or time slot of the show will change after he becomes a candidate or in anticipation of his candidacy. No changes in the terms and

[2]The medium must be a regularly scheduled news medium that is of primary interest to the general public, and the medium must be controlled by a person whose primary business is broadcasting and who is not a candidate or political committee.

conditions of the talk show host's employment or compensation will occur after he becomes a candidate or in anticipation of his candidacy.

The talkshow host does not and will not screen callers based on their opinion. The talkshow host does and will continue to solicit and air opposing viewpoints, including responses of officials who are the topic of discussion on his show.

No paid political ads supporting the talkshow host's candidacy or opposing the candidacy of any of his opponents will air during his program.

The radio host has indicated that he will cease to be on the air after he files his declaration of candidacy in July, 1996, when the FCC's "equal time" requirements come into effect.

These are all pertinent factors to an analysis of the issue, and persons relying on the conclusions herein should determine whether their circumstances are consistent with these underlying facts. If they are not, the Commission should be contacted for further guidance.

Airtime that constitutes a contribution

Given the foregoing facts, the talkshow host will receive a contribution from the radio station if while on the air the talkshow host:

(1) Solicits votes, expressly advocates or expressly discusses his candidacy, or expressly discusses the candidacy of any of his opponents;

(2) Solicits or accepts contributions or campaign volunteers;

(3) Expressly advocates the defeat of opposing candidates;

Such airtime would be a contribution by the radio station since it constitutes something of value to the campaign for which the candidate has not provided consideration. Furthermore, the use of airtime by a candidate to promote his candidacy does not fall within the exception for news items, features, commentaries, and editorials provided in the public interest.

Such airtime would also be considered "political advertising" that must meet the sponsor identification requirements of RCW 42.17.510, since it is being used for the purpose of appealing for votes or for financial or other support.

Valuation

Airtime which constitutes a contribution under the foregoing must be valued in the amount of its fair market value. WAC 390-16-206(3).

The Public Disclosure Commission approved this advisory opinion at its meeting on August 29, 1995. I trust it will be of assistance. Please do not hesitate to contact me if you have additional questions or concerns.

Sincerely,

Melissa A. Warheit
Executive Director

EXHIBIT G

33 Seattle U. L. Rev. 191

Seattle University Law Review
Fall, 2009

Comment
Joshua M. Duffy [d1]

KING MAKERS?: TALK RADIO, THE MEDIA EXEMPTION, AND ITS IMPACT ON THE WASHINGTON POLITICAL LANDSCAPE

> *The First Amendment protects five freedoms--[those] of religion, speech, press, assembly and petition. All are precious, but why is the political class so piously careful to exempt the press--the journalists who cover the political class--from restrictions the political class writes for others? The question answers itself* [1]

I. INTRODUCTION

Political talk radio is a lucrative and influential business. Rush Limbaugh, the most powerful voice in talk radio [2] signed an eight-year contract extension in 2008 for a total value of about $400 million. [3] Limbaugh's weekly listeners number somewhere between 14 and 20 million. [4] Limbaugh was so influential in the Republican congressional elections of 1994, in which the Republicans took control of the House of Representatives for the first time in 54 years, that the congressional Republicans made him an honorary member of the freshman class. [5]

Limbaugh, and other radio talk show hosts like him throughout the country, exercise their influence in each political season. For instance, in the 2008 presidential primaries, Limbaugh designed a radio campaign to ***192** encourage Republicans to vote for Hillary Clinton in an effort to prolong the bitter primary contest between Clinton and Barack Obama. [6] Although the effect of Operation Chaos, as Limbaugh named this campaign, was difficult to measure, Senator John Kerry accused Limbaugh of "tampering with the [Indiana] primary" and causing Obama's defeat in the primary. [7] Since President Obama's election, Limbaugh has continued to speak both for and against a number of political issues. [8] For example, Limbaugh endorsed the President's selection of Hillary Clinton as Secretary of State and called it "a brilliant stroke by Obama." [9]

Some have argued that because of its influence upon the electorate and upon particular campaigns, such radio commentary should fall within applicable campaign finance regulations. [10] They argue that if this type of commentary is not regulated as a form of campaign contribution or expenditure, media corporations could become king makers, providing their favored candidates and ballot measure advocates with unlimited access to the airwaves. [11]

The ability to provide an unlimited and undocumented platform for selected issues or candidates would seem to be contrary to the policies behind campaign finance regulations. Such regulations have admirable goals: reducing the cost of political campaigns; equalizing the ability of lesser-funded candidates to be heard; and reducing the possibilities for corruption and the appearance of corruption. [12] In spite of these laudable policies, however, opponents of campaign finance regulations have warned that such laws are subject to abuse and may have the result of chilling or otherwise limiting socially useful and constitutionally protected political speech. [13]

It is here, in the conflict between the competing policies of the First Amendment and campaign finance regulations, that the media exemption exists, protecting talk radio from the reach of those regulations. [14] As the ***193** name suggests, the media exemption, or press exemption, exempts press and media entities from campaign finance regulations on contributions and expenditures. [15]

The conflict between the protection of the press and the goals of campaign finance regulations reached a crescendo in Washington State during the 2006 election cycle, culminating with the Washington State Supreme Court 2007 decision in *San Juan Island v. No New Gas Tax*. [16] The Supreme Court held that there is no limit on the extent to which talk radio hosts may advocate or speak against a particular candidate or issue and that their influence is not subject to any campaign finance restrictions. [17] However, the Federal Elections Commission (FEC), the Washington State Public Disclosure Commission (PDC), and the United States Supreme Court have each taken positions regarding the application of the media exemption that are seemingly at odds with aspects of the court's ruling.

This Comment argues that despite the holding of the *No New Gas Tax* court, Washington's version of the media exemption should be narrowed in its application to talk show hosts, allowing it to more fully realize the goals of campaign finance regulations. Although it is difficult to draw a line that balances the competing interests of First Amendment protection and campaign finance regulations, it would be possible to narrow the media exemption so that First Amendment rights are protected, while also better achieving the goals of campaign finance reform. This Comment does not suggest that the individual conduct of a radio talk show host should force the removal of the shield of the media exemption and mandate that the broadcasting station disclose such conduct as an in-kind contribution or expenditure of a political campaign, subject to the same limits and restrictions as other contributions. Rather, this Comment argues that talk show hosts who do not equally present both sides of campaign issues should file a report with the Washington State Public Disclosure Commission showing the duration and value of the air time provided. This approach would protect the purpose of campaign finance disclosures by revealing the equivalent amount of money an opponent would have to spend to buy air time to promote their views or candidacy, while also protecting free speech interests. [18]

***194** Part II discusses the legislative history of federal and Washington State campaign finance laws and the media exemption. Part III examines the media exemption and its application by the Federal Elections Commission. Part IV examines Washington State's application of the media exemption. Part V examines the ramifications of the decision in *No New Gas Tax* on the media exemption and its application to the conduct of radio talk show hosts. Finally, the argument is made that the media exemption could be narrowed to more effectively achieve the policy objectives of campaign finance regulations while preserving the First Amendment protections of the press.

II. LEGISLATIVE HISTORY OF FEDERAL AND WASHINGTON STATE CAMPAIGN FINANCE LAW AND THE MEDIA EXEMPTION

Section A of this part looks to the history of campaign finance legislation to illustrate how the desire for disclosure of campaign contributions and expenditures and the desire to limit the influence of money shaped the current campaign regulatory system. Section B examines the media exemption in federal and Washington State campaign finance regulations. Finally, Section C examines the manner in which the media exemption spans the gap between the policy objectives of campaign finance regulations and the protections of the First Amendment.

The purpose of this part is not to detail each phase of the evolutionary process of Washington State and federal campaign finance law. Rather, the purpose is to provide a framework through which to better understand how campaign finance legislation has been an attempt to control the influence of money on the political process and why such regulations are considered necessary. As will be seen, these regulations are often seemingly at odds with constitutional protections of speech and the press. [19] The regulation of funds to support a political campaign, according to the United States Supreme Court, is the equivalent of regulating speech. [20] It is this tension between the policies behind the regulation of campaign finance and the protection of speech and the press that is at the heart of the media exemption.

***195** *A. A Brief History of Federal Campaign Finance Legislation*

Although modern campaign finance legislation is often considered to have started with the 1971 Federal Election Campaign Act (FECA), campaign finance restrictions have existed in the United States since the nineteenth century. [21] The first federal campaign finance legislation was a narrow 1867 law that prohibited federal officers from requesting contributions from Navy Yard workers. [22] Prior to 1971, Congress enacted multiple laws that sought broader regulation of federal campaign financing. [23] The policies behind these laws included a desire to limit contributions to ensure that certain groups did not have a disproportionate influence on elections, a desire to prohibit certain sources of funds for campaign purposes, a desire to control spending, and a desire to require public disclosure of campaign finances to deter abuse and to educate the electorate. [24]

The campaign finance provisions enacted before 1971, however, were largely ineffective at achieving their policy objectives. [25] Not only did the provisions fail to provide an adequate administrative framework to ensure compliance, but the provisions also contained a number of specific flaws that allowed campaigns to avoid the intended regulatory effect. [26] Congress, reacting to the evasion of the campaign finance and disclosure requirements that had accompanied earlier regulations, passed the more stringent disclosure provisions of the FECA in 1971. [27]

The FECA of 1971 initiated fundamental changes in federal campaign finance laws, requiring full disclosure of campaign contributions and expenditures and limiting spending on media advertisements. [28] The Act, signed into law by President Nixon in 1972, was not without its own ***196** shortcomings, however, as it failed to provide for an independent body to monitor and enforce the law. [29] Ironically, these shortcomings were brought into sharp focus by the Watergate scandal surrounding the 1972 presidential election. [30]

Although most of the crimes related to Watergate had little or nothing to do with campaign financing, public outrage grew as the facts of how Nixon had raised and used money became known. [31] The disclosures of Watergate fed the demand for more effective campaign finance reform. [32] The failure of the FECA of 1971 to provide for effective oversight of campaign finance laws was corrected in 1974 with establishment of the Federal Election Commission (FEC) as part of the 1974 Amendments to the FECA. [33] The FEC was given jurisdiction in civil enforcement matters, authority to write regulations, and responsibility for monitoring compliance with the FECA. [34]

In addition to creating the FEC, the 1974 Amendments established strict disclosure requirements for campaign contributions and set specific limits for those donations. [35] Also, the amended FECA prohibits corporations from making contributions or expenditures from their general treasury funds "in connection with" the election of any candidate for federal office. [36] Under the amendments, a contribution or expenditure includes "direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value." [37] The Act defines "contribution" and "expenditure" to include "anything of value" made for the purpose of influencing any election for federal office. [38] The term "anything of value" includes in-kind contributions. [39] Based on the plain meaning of this portion of the Act, it could be argued that a talk radio ***197** host's endorsement of a candidate or solicitation of support for a ballot initiative would be a contribution to the respective campaign because that support would be of value to the candidate.

Key portions of the 1974 amendments were struck down by the Supreme Court in 1976 in its controversial landmark decision, *Buckley v. Valeo*. [40] In *Buckley*, the Supreme Court upheld individual contribution limits to a federal candidate in each election, [41] but it struck down the FECA's limits on expenditures by candidates as violating the First Amendment. [42] The *Buckley* Court held that campaign finance regulations may burden the exercise of political speech but must be narrowly tailored to serve compelling government interests and must "satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." [43] Untouched by *Buckley*, however, was the media exemption.

Despite the fact that *Buckley* did not specifically address the media exemption, the Court's reasoning seems to provide an avenue to a possible narrowing of the media exemption. Because *Buckley* held that campaign finance regulations may burden the exercise of political speech, the media exemption could be narrowed to better serve the legitimate government interests of campaign finance regulations. This narrowing of the media exemption would be possible so long as it is able to satisfy the exacting scrutiny that would be given to limitations on rights of political expression.

B. The Current Washington State and Federal Media Exemption

The federal media exemption, as well as its Washington State incarnation, was intended to preserve the First Amendment protections of the press from the regulatory effect of campaign finance laws. [44] As campaign finance regulations have been amended and augmented in an effort to more fully achieve their policy objectives, those regulations have continued to exempt the media. [45] To understand more fully how ***198** the media exemption impacts talk radio, as well as to understand what changes would be necessary to effectively realize the policy objectives of campaign finance regulations, it is necessary to examine the federal and Washington State interpretations of the exemption.

The legislative history of the media exemption makes it clear that Congress, in adopting the media exemption, recognized the tension between the First Amendment and campaign finance limits. [46] Congress expressed that its intent was to preserve the media's traditional function of public commentary and not to present legislation to limit or burden the First Amendment freedoms of the press and of association. [47] The exemption would assure the unfettered rights of the newspapers, TV networks, and other media to cover and comment on political campaigns. [48] The United States Supreme Court has also recognized that exempting the media from campaign finance regulations legitimately protects the press's unique role in "informing and educating the public, offering criticism, and providing a forum for discussion and debate." [49]

In an attempt to correct perceived flaws in the campaign finance system, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA). [50] The BCRA substantially amended campaign finance regulations by creating new regulations on "electioneering communication." [51] The BCRA adopts a broad definition of electioneering communication in an effort to regulate more of certain types of speech than under the traditional FECA framework. [52] The BCRA also exempts media entities from its electioneering communication definition. [53] While there was little debate about extending the media exemption to the newly formed provisions on electioneering communication, [54] some argue that this extension signified Congress's commitment to the media exemption. [55]

***199** Washington State campaign finance regulations have largely mirrored federal legislative intent and policy. In 1972, Washington voters passed Initiative 276, later enacted as Washington Revised Code § 42.17, which regulates the financing of political campaigns. [56] In adopting Initiative 276, Washington voters consciously chose to implement campaign contribution disclosure requirements similar to those of the 1971 FECA. [57] The purpose of the measure was to promote "public confidence in government at all levels" through a system of compelled disclosure of campaign contributions and expenditures. [58] Additionally, the public's right to know the financing of political campaigns and the financial affairs of elected officials and candidates was deemed to far outweigh "any right that these matters remain secret and private." [59]

In 1992, Washington voters approved Initiative 134, the Fair Campaign Practices Act (FCPA), which amended Washington Revised Code § 42.17. [60] The FCPA supplemented the previously existing disclosure requirements with certain limitations on campaign contributions and expenditures. [61] The FCPA defines "contribution," in relevant part, as

> [a] loan, gift, deposit, subscription, forgiveness of indebtedness, donation, advance, pledge, payment, transfer of funds between political committees, or anything of value, including personal and professional services for less than full consideration; [62]
>
> The financing by a person of the dissemination, distribution, or republication, in whole or in part, of broadcast, written, graphic, or other form of political advertising or electioneering communication ***200** prepared by a candidate, a political committee, or its authorized agent. [63]

At the same time, however, the definition of "contribution" was amended to expressly exempt certain press activities:

> "Contribution" does not include: ... A news item, feature, commentary or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or political committee. [64]

Following the passage of the BCRA and the United States Supreme Court's decision upholding the new federal regulations of "electioneering communication," [65] the Washington legislature adopted similar regulations of "electioneering communications" and likewise incorporated the media exemption for

> [a] news item, feature, commentary, or editorial in a regularly scheduled news medium that is: (i) Of primary interest to the general public; (ii) In a news medium controlled by a person whose business is that news medium; and (iii) Not a medium controlled by a candidate or a political committee. [66]

Although the federal and Washington State media exemptions have textual differences, Washington's statute expressly incorporated the federal courts' construction of the media exemption. [67] The Washington State Supreme Court found that by adopting the federal courts' construction, the voters intended the state media exemption to be functionally equivalent to, and to be interpreted in accordance with, the federal media exemption. [68]

C. Protection of the Press and the Interpretation of the Media Exemption

The media exemption spans the gap between speech protected by the First Amendment and the regulation of campaign contributions and expenditures. Because the media's role in society is unique, courts have been steadfast in their protection of the press. Such steadfast protection, ***201** however, does not mean that the media exemption is the necessary means of maintaining such protection. While recognizing the necessary function of the press, the courts have repeatedly indicated that certain limits would be permissible.

The Supreme Court has championed the role of the press as fundamental to the protection of free society. In *New York Times v. Sullivan*, [69] for example, the Court stated that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." [70] Two years later, in *Mills v. Alabama*, [71] the Court held that "[suppression of the right of the press to praise or criticize government agents and to clamor and contend for or against change, ... muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." [72] Any efforts that might limit the media function, whether by means of campaign finance regulations or some other mechanism, must therefore be prevented from impinging on the constitutional standing of the press. [73]

The constitutionality of the media exemption is premised upon the special role of press endorsements during elections. [74] In *Austin v. Michigan Chamber of Commerce*, [75] for example, the Court examined a Michigan campaign finance law that barred corporations from engaging in campaign expenditures from corporate treasury funds in support of or in opposition to candidates for state office. [76] The plaintiffs argued that the law's ban on corporate campaign expenditures was a violation of the ***202** Equal Protection Clause because the law contained a media exemption very similar to the FECA's media exemption. [77]

The Court noted, however, that it had consistently recognized the unique role of the press. The Court held that "[a]lthough all corporations enjoy the same state-conferred benefits inherent in the corporate form, media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public." [78] Writing for the majority, Justice Marshall noted that without the media exemption, the Act's definition of "expenditure" could conceivably be interpreted to encompass election related news stories and editorials. [79] Therefore, the Court found that although

the Act's restriction on independent expenditures might otherwise discourage news broadcasters or publishers from serving their crucial societal role, the media exemption ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events. [80] Justice Marshall continued: "Although the press' unique societal role may not entitle the press to greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." [81]

While Marshall's discussion of the unique role of the press suggests that the media's exemption from campaign finance restrictions might be a constitutional requirement, [82] the Court noted that regulations that impinge on the right to engage in political expression may be permissible if narrowly tailored to serve a compelling governmental interest. [83] Additionally, Justice Scalia, in his dissent in *Austin*, suggested that it would be constitutional to end the media exemption entirely. Justice Scalia ***203** noted that the Court did not hold that the media exception was constitutionally required, only permissible. [84]

In his dissent, Justice Scalia noted the media exemption's inherent contradictions to the purposes of campaign finance regulations. [85] He noted that while the majority found Michigan's campaign regulations constitutional because of the compelling state need to prevent amassed corporate wealth from skewing the political debate, the unique role of the press would seem to provide an especially strong reason to include it in Michigan's corporate restrictions. [86]

> Amassed corporate wealth that regularly sits astride the ordinary channels of information is much more likely to produce [too much of one point of view] than amassed corporate wealth that is generally busy making money elsewhere. Such media corporations not only have vastly greater power to perpetrate the evil of over-informing, they also have vastly greater opportunity. [87]

While Justice Scalia wrote for the dissenting justices, his comments ought to give pause as the application of the media exemption to talk radio hosts is considered. As Justice Scalia noted, one of the purposes of campaign finance regulations is to prevent the amassed wealth of corporations from skewing political debate. [88] One must also assume that the amassed power of the media, and of talk radio in particular, is also able to skew political debate.

Although *Austin* reached the Court long before *McConnell v. Federal Election Commission*, [89] the justices' rationale in *Austin* seemed to remain intact even after the BCRA. [90] While the BCRA adopted a broad definition of electioneering communication to regulate even more speech than under the traditional FECA framework, the Court in *McConnell* ***204** continued to exempt the media from such restrictions. [91] Justices Stevens and O'Connor, writing for the majority, dismissed a challenge that the BCRA was fatally under-inclusive because the electioneering communication provisions discriminated in favor of media corporations and gave "free reign to media companies to engage in speech without resort to PAC money." [92] They explained that Congress had the authority to act incrementally in regulating this area. [93] The majority cited *Austin* for the proposition that a valid distinction exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. [94] The Court, while affirming Congress's ability to protect the political speech expressed in media commentary, did not state, however, that such a distinction was constitutionally required. [95] Instead, the Court echoed *Austin*, indicating that it did not consider the media exemption a constitutional requirement, that such an exemption was permissible, [96] and that Congress had the authority to proceed in incremental steps in the area of campaign finance regulation. [97]

As was the case with *Buckley*, the Court in *McConnell* seems to have left the door open to a possible narrowing of the media exemption by Congress. Because the exemption is permissible, but not constitutionally required, Congress could narrow the exemption to better achieve the goals of campaign finance regulations without chilling political speech. The Washington State Supreme Court, as will be discussed in Part V, chose to take the further step of directly stating that a narrower exception would be within the power of the legislature. [98]

IV. THE MEDIA EXEMPTION AND ITS APPLICATION BY THE FEC

Given the protection of speech and of the press within the First Amendment, and given the competing policy objectives of campaign finance regulations, it is necessary to understand when the media exemption is applicable to what would otherwise be a campaign contribution. If a media outlet is acting within the requirements of the exemption, conduct that would otherwise be a violation of campaign finance regulations is protected. By looking at the manner in which the FEC determines the applicability of the media exemption, it is possible to understand why ***205** talk radio commentary can present particular challenges to the application of the exemption. Also, an examination of the aspects of particular instances in which the FEC applied the exemption helps in understanding how a narrowing of the media exemption would better serve the policy objectives of campaign finance regulations.

To determine whether the media exemption applies in individual cases, the FEC must evaluate whether the entity engaging in the activity is a media entity within the meaning of the FECA and the FEC's regulations. [99] As previously noted, the FECA's media exemption applies to "any broadcasting station, newspaper, magazine, or other periodical publication." [100]

After the FEC concludes that there is a qualifying press entity for the purposes of the exemption, the Commission must determine whether the activity at issue was a legitimate press function. [101] To answer this question, the FEC considers two criteria: (1) whether the press entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the press entity is operating within its legitimate press function. [102] If the media entity is independent of any political party, committee, or candidate, and if it was acting as a legitimate media entity at the time of the alleged violation, it is exempt from the FECA's restrictions on corporate contributions and expenditures, and the FEC's inquiry should end. [103] In applying this analysis, the FEC considers whether the entity's materials are available to the general public and are comparable in form to those ordinarily issued by the entity." [104]

***206** *A. Political Control and Legitimate Press Function*

To be exempt from contribution or expenditure requirements under the media exemption, an organization must be engaged in legitimate media activity. [105] This does not mean, however, that for the exemption to apply, the press entity must function exactly as it usually does, [106] nor does legitimate media activity depend on an objective presentation. [107] One commentator has noted that if an organization can convince the commission that it is a genuine press entity that is not under political control, then the commission will not subject its conduct to rigorous scrutiny as to the nature of the press function and likely will conclude that the entity's activity is covered by the exemption. [108] The FEC will determine that the exemption does not apply only if it is clear that the conduct of the press entity was inappropriate. [109]

B. In re Dave Ross

In an analysis of the FEC's application of the media exemption to talk radio hosts involved in political campaigns, the tension between the policy objectives of campaign finance regulations and the protections of the First Amendment is plainly apparent. It is clear that talk radio hosts could engage in conduct that would otherwise be subject to campaign finance regulations but for the media exemption. It is equally apparent, however, that certain conduct should continue to be protected by the media exemption because it does not conflict with the goals of campaign finance legislation. In these cases, the application of the media exemption successfully balances the competing interest of campaign finance regulations with the First Amendment protections.

The FEC has received many complaints and has issued a number of advisory opinions that set out the breadth of the federal media exemption ***207** as applied to broadcast media. [110] The Commission has also specifically addressed the issue of whether the on-air conduct of talk radio hosts, and talk radio station ownership, falls within the media exemption, or whether such conduct should be considered an in-kind contribution or expenditure. [111] An understanding of the rationale used by the FEC aids not only in the understanding of the application of the media exemption in Washington State, but also aids in an understanding of how and why the media exemption might be narrowed for certain on-air commentary.

In a recent Washington State case, the FEC issued an opinion about the on-air conduct of a radio talk show host who was also a congressional candidate. [112] Dave Ross, host of a talk show on radio station KIRO-AM in Seattle, Washington, was a candidate for Washington's Eighth Congressional District in 2004. [113] The Washington State Republican Party filed a complaint with the FEC, alleging that KIRO-AM knowingly and willfully made, and Ross and his campaign committee knowingly and willfully accepted, illegal in-kind contributions. [114] The FEC concluded that the media exemption applied, and it found no reason to believe that the FEC A had been violated. [115]

In that case, Ross had hosted "The Dave Ross Show" on KIRO-AM since 1987. [116] The show aired in Washington's Eighth Congressional District five days a week for three hours a day. [117] On it, Ross discussed news, current events, politics, entertainment, technology, and other subjects. ***208** [118] The complaint alleged that on May 5, 2004, during his show, Ross first publicly contemplated a run for Congress by stating: "I can just assume that [State Democratic Party Chairman Paul Berendt] thinks my name recognition would be a good thing." [119] Additionally, between May 5th and May 20th, 2004, a guest host on the Dave Ross Show asked listeners whether Ross should run for Congress. An online survey on the same topic ran on the station's website; the website also reportedly "heralded Ross's candidacy with headlines stating 'Dave for Congress' and a prominent link to his campaign website." [120] Although Ross announced his decision to run for Congress on May 20, 2004, he remained on the air and continued to host The Dave Ross Show until July 23, 2004. [121] From the time Ross stopped hosting his show, through the general election in November 2004, KIRO-AM continued referring to Ross' daily time slot as "The Dave Ross Show," using a guest host to run it. [122] On September 14, 2004, Dave Ross won the primary election. The next day, the Dave Ross Show featured Dave Ross as a special guest to discuss his primary victory. [123]

In its evaluation of the facts alleged in the complaint and answer, the FEC looked specifically at the alleged corporate contributions and the media exemption. [124] The FEC concluded that the broadcasting station "is the type of media entity covered by the media exemption and is not owned or controlled by a political party, committee or candidate." [125] The FEC concluded that the sole question, then, was whether the station was acting within its legitimate press function. [126]

The FEC found that KIRO-AM was acting within its legitimate press function. [127] The Commission found that the format, distribution, ***209** and production of the show were not altered during the period in question. [128] "In addition to avoiding discussion of his candidacy, Mr. Ross specifically avoided any solicitation of or response to any questions by listeners regarding his candidacy during the call-in portions of the show." [129] Additionally, the FEC noted that other on-air personalities were also given strict directives by the station, prohibiting them from referring to Ross's campaign on the air. [130] Regarding the broadcasts of the Dave Ross Show with guest hosts, the Commission found no indication that those shows were anything other than regularly scheduled programs of news, editorials, or commentary. [131]

The FEC also found that KIRO's broadcasts of the Dave Ross Show within the electioneer communications period [132] qualified for the media exemption for electioneering communications under the same rationale by which they qualified for the media exemption from the definition of "expenditure." [133]

***210** The FEC's conclusion regarding the Dave Ross Show was not unique, as the FEC reached similar conclusions in other opinions. In 1992, for example, the FEC was asked for an advisory opinion concerning the application of the FECA of 1971, as amended, and FEC regulations about "the airing of your radio show while you are a candidate for Federal office." [134] In that case, the candidate, Randall Terry, had been the host of a daily radio talk show, the "Randall Terry Show," that dealt with "all major contemporary issues ... in which the news of the day is discussed." [135]

While the candidate asked the FEC whether he might continue to host his radio show while running for office, the FEC specifically addressed the issues of whether the expenses incurred by Randall Terry Live, Inc., or by the radio stations or network carrying the show, would be in-kind corporate contributions to the campaign. [136] The Commission concluded that the candidate could continue hosting his talk show, without receiving an in-kind contribution, based on the candidate's representations that

he did not intend to use the show to promote or raise funds for his candidacy and that no ads raising funds for or promoting his candidacy would be run during the show. [137]

Although the FEC found the radio stations to be acting within their legitimate press function in *Ross* and *Terry*, it is significant that the FEC issued its opinions based on the fact that neither Ross nor Terry were engaged in on-air commentary about their respective campaigns. Since the hosts were not directly promoting their respective campaigns, they were arguably not making in-kind contributions to those campaigns. Where there are no such contributions, the policy objectives behind campaign finance regulations are not stifled by First Amendment protections. Thus, the application of the media exemption in these cases successfully balanced the competing First Amendment interest and campaign finance purposes. A narrowing of the media exemption to require disclosure of ***211** on-air contributions would seemingly not have applied to the conduct of either Ross or Terry.

V. WASHINGTON STATE'S APPLICATION OF THE MEDIA EXEMPTION

An analysis of Washington State's application of the media exemption to the on-air conduct of radio talk show hosts highlights the troublesome aspects of the media exemption's conflict with the policies of campaign finance regulations. Such an analysis also suggests the manner in which the media exemption might be narrowed to more fully achieve the goals of campaign finance regulations while not limiting the speech of the press in any substantial manner. By looking first to Washington State law, and then to the PDC's application of the media exemption to radio talk show hosts, and finally to the courts' application of the exemption, the complexities of the issue can be clearly understood.

In Washington State, "political advertising" is not included within the media exemption. [138] Political advertising includes, in part, "radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support in any election campaign." [139] The PDC has further defined the term "political advertising" as it relates to the media exemption. Washington Administrative Code § 390-05-290 provides:

> Political advertising does not include letters to the editor, news or feature articles, editorial comments or replies thereto in a regularly published newspaper, periodical, or on a radio or television broadcast where payment for the printed space or broadcast time is not normally required.

Therefore, the media exemption would apply to coverage about a ballot measure or candidate when it takes place during the content portion of a program, when payment is normally not required.

Additionally, in interpreting Washington law, the PDC "considers] the approach of the Federal Elections Commission[.]" [140] As previously noted, federal interpretations of the federal media exemption are helpful because the Washington statute expressly incorporated the federal courts' construction of the media exemption. However, the PDC is not bound by the FEC decisions, "given the different history and text of the Washington State statute." [141]

*212 *A. Is There an In-Kind Contribution When a Radio Station Provides Broadcast Time to a Talk Show Host?*

Although the FEC found in *In Re Ross* that the media exemption applied and that the station did not make an in-kind contribution to the Dave Ross campaign, it did not address the question of whether such an in-kind contribution is made by a talk show host who is a candidate and who voices his support for himself as candidate. In Washington State, this question has been addressed by both the PDC and the Washington State Supreme Court. This section examines the approach taken by each.

While the position adopted by the PDC was overruled by the court in *No New Gas Tax*, the PDC's analysis and determination that a radio station broadcasting a talk show whose host was a candidate for office would make an in-kind contribution to the candidate not only highlights the need for reform in this area, but it also offers a method to determine when such a contribution is made. For a narrowing of the media exemption to be effective in more fully realizing the goal of campaign finance reform, there must be a method to determine what constitutes a contribution that should be disclosed. The PDC has suggested such an approach. [142]

In the context of a radio talk show host who was a candidate for office, the PDC concluded that a radio station would be making an in-kind contribution to the candidate if the candidate used his or her radio show to conduct political advertising. [143] In an advisory opinion, the PDC specifically addressed the question of "whether a radio/television talk show host who becomes a candidate for state office under the Public Disclosure Law must report the time he is regularly on the air after becoming a candidate as an in-kind contribution from his employer." [144] In its opinion, the PDC recognized that the law does exclude a news item, feature, commentary, or editorial given as part of a broadcast media program from the definition of contribution, assuming that certain standards are met. [145] The PDC stated, however, that a news item, feature, or commentary must be contrasted with "political advertising," "which is defined to ***213** include any radio ... presentation used for the purpose of appealing, directly or indirectly, for votes or for financial or other support in any election campaign." [146] The PDC concluded that "the donation or transfer at less than full market value of political advertising, or the resources to produce and disseminate political advertising (such as free airtime), would be considered a contribution." [147]

In its analysis, the PDC found five factors to be pertinent, and it advised that "persons relying on the conclusions herein should determine whether their circumstances are consistent with these underlying facts." [148] First, the PDC found that the radio host was a long-time employee of the station and clearly not hired in anticipation of his candidacy. [149] Second, neither the station nor its parent company was owned or controlled by the candidate, and no one associated with control of the station would be associated with the candidate's campaign. [150] Third, the talk show host would be on the air as part of his regularly scheduled program, and no changes in the production, nature, format, length, or time slot of the show were to take place after he became a candidate or in anticipation of his candidacy. [151] Fourth, no changes in the terms and conditions of the host's employment or compensation were to occur after he became a candidate or in anticipation of his candidacy. [152] And finally, the PDC relied on the fact that no paid political ads supporting the talk show host's candidacy or opposing the candidacy of any of his opponents would air during his program. [153]

Under the PDC's Advisory Opinion, a talk show host, as a candidate, would receive a contribution from the radio station if, while on the air, the host

> Solicits votes, expressly advocates or expressly discusses his candidacy, or expressly discusses the candidacy of any of his opponents;
>
> Solicits or accepts contributions or campaign volunteers;
>
> Expressly advocates the defeat of opposing candidates. [154]

***214** The Commission found that such airtime would be a contribution because it constituted something of value to the campaign for which the candidate did not provide consideration. [155] "Furthermore, the use of airtime by a candidate to promote his candidacy does not fall within the exception for news, features, commentaries, and editorials provided in the public interest." [156] Such airtime, the Commission continued, would be considered "political advertising." [157]

The talk show host referenced in the PDC opinion worked for radio station KVI AM, owned by Fisher Communications. [158] Fisher stated that the Commission's Opinion requiring such disclosure "strikes a reasonable balance between important public policies" and "provides a relatively clear rule that is easily applicable by broadcasters." [159]

While the PDC opinion would provide a relatively clear rule that could be applied by broadcasters, such an approach was rejected by the Washington State Supreme Court in *No New Gas Tax*. [160] However, if the media exemption were narrowed

such that talk show hosts who do not equally present both sides of campaign issues were required to file a report with the PDC showing the duration and value of the air time provided, the public would know the equivalent amount of money an opponent would have to spend to buy air time to promote their views or candidacy. As long as contribution limits do not apply, political speech would not be chilled, and free speech interests would be protected.

B. San Juan County v. No New Gas Tax

Whereas the PDC looked at the use of airtime in support of a candidate, the issue in *No New Gas Tax* concerned the use of airtime in support of a ballot measure. [161] The proposal suggested in this Comment would be equally applicable regardless of whether the airtime was used to support a candidate or a ballot measure because the disclosure of a contribution would be based upon unequal promotion of an issue or candidate.

***215** Subsection 1 briefly examines the events leading to the dispute in *No New Gas Tax*, and specifically, the on-air conduct of two radio talk show hosts. Subsection 2 discusses the initial allegations against the No New Gas Tax political committee and also looks at the initial Superior Court ruling. Subsection 3 examines the legal ramifications of the ruling and surveys the reaction to the Superior Court decision. Finally, Subsection 4 discusses the reasoning and the holding of the Washington State Supreme Court in *No New Gas Tax*.

1. Background

In the spring of 2005, the Washington legislature adopted a 9.5-cent-per-gallon increase in the state gasoline tax to pay for improvements in the state's roads and highway system. [162] During that time, Kirby Wilbur and John Carlson were radio talk show hosts with regularly scheduled programs on 570 KVI AM, a radio station owned by Fisher Communications. [163] As a part of their broadcasts, Wilbur and Carlson typically discussed their view on political and social issues. [164] Fisher charged for political advertising during the commercial segments of its radio programs, but it did not charge for the value of any content time associated with either Wilbur's or Carlson's talk shows. [165]

Wilbur and Carlson strongly criticized the legislature's enactment of the fuel tax [166] and worked to support its repeal. In addition to their support of the repeal of the tax, Wilbur and Carlson's on-air comments indicated that they were involved in the formation of an initiative campaign to repeal the tax. [167]

On May 6, 2005, No New Gas Tax (NNGT) registered with the PDC as a political committee. [168] The purpose of the committee was to support a ballot measure, Initiative 912, that would have repealed the ***216** statewide fuel tax approved by the Washington legislature. [169] The campaign had until July 8, 2005, to gather the required signatures. [170]

Once NNGT had registered as a political committee, Wilbur and Carlson addressed their role in starting the campaign to repeal the tax increase in a newspaper interview. [171] They stated: “Our legal team is writing the initiative .... We hope to file it this week.” [172] Additionally, a KVI press release discussed Wilbur and Carlson's role in forming the initiative campaign, stating: “KVI Country Delivers a Resounding ‘No’ to New Gas Tax. KVI's Wilbur and Carlson raise funds and support for ‘No New Gas Tax’ effort.” [173] During the first several weeks of the campaign, Wilbur and Carlson repeatedly asked their listeners for contributions. [174]

2. Legal Action

On June 22, 2005, the prosecuting authorities for San Juan County and the cities of Auburn, Kent, and Seattle filed an action against NNGT. [175] They alleged that NNGT violated the disclosure provisions of the FCPA by, in part, failing to report “valuable radio announcer professional services and valuable commercial radio airtime” as a campaign contribution under Washington Revised Code § 42.17.020(15)(a) and seeking an injunction to prevent NNGT from accepting in-kind contributions from Fisher

Communications until it complied with the disclosure requirements. [176] The plaintiffs argued that Wilbur and Carlson were spokespersons, officers, and agents for NNGT and that their conduct constituted advertising for the campaign. [177]

***217** In October 2005, the superior court granted the plaintiffs' motion for a preliminary injunction, "Requiring Compliance with Fair Campaign Practices Act." [178] The court ruled that NNGT was required to disclose the value of air time supporting the initiative campaign because it constituted an in-kind contribution of political advertising by Fisher Communications. [179] The trial court issued an oral opinion and entered specific findings in support of the preliminary injunction. [180] The court found: (1) that Wilbur and Carlson were principles in the campaign; (2) that Wilbur and Carlson had intentionally promoted the campaign by advertising on their radio shows; (3) that the on-air advertising was in addition to and different from any editorializing, comment, or discussion by the hosts on their shows; (4) that it had value to the campaign similar to advertising the campaign could have purchased on air; (5) that the value of the advertising had not been disclosed to the PDC in the manner of any other in-kind contribution; and (6) that requiring reporting of that value would not restrict Wilbur or Carlson in their on-air speech in any way. [181] The preliminary injunction required disclosure of contributions prior to May 31, 2005. [182]

The 1-912 campaign substantially complied with the preliminary injunction by identifying the source of its unreported monetary contributions and by disclosing the value of in-kind contributions of broadcast time. [183] The campaign disclosed a $20,000 contribution from Fisher Broadcasting. [184] On July 8, 2005, the 1-912 campaign delivered the necessary ***218** signatures to the Secretary of State to have the initiative placed on the November 8, 2005 ballot, where it was rejected by the voters. [185]

Pending its petition for discretionary review, [186] NNGT filed a request for an emergency stay, in which NNGT claimed that it would have no way to assess whether or when Washington's $5,000 limit on contributions within twenty-one days prior to an election would be crossed by Wilbur and Carlson's discussion of the initiative on the air. [187] The court of appeals denied the stay but expedited the hearing for NNGT's motion for discretionary review. [188]

3. Reaction to the Superior Court Ruling

To many of those who worried about the possible abuse of campaign finance regulations, the superior court ruling in *No New Gas Tax* served to justify their fears. Characterizing the radio hosts' speech as a contribution had two important legal consequences under the campaign finance provisions of the Fair Campaign Practices Act (FCPA). [189] First, the initiative campaign was required to assign a dollar value to the speech and report it to the PDC. [190] Second, the hosts would be precluded from making more than $5,000 worth of such contributions to a candidate or initiative during the twenty-one days immediately preceding the election. [191]

***219** Reaction to the superior court decision was swift and national in its scope. Noted columnist George Will wrote in *Newsweek*: "What has happened in Seattle prefigures what a national Democratic administration might try to do--perhaps also by reviving the 'fairness doctrine' (an 'equal time' regulation)--to strangle conservative talk radio. And what has happened here-- the use of campaign regulations as a weapon of partisanship--is spreading." [192] A *Wall Street Journal* editorial cautioned: "Consider what's going on in Washington State as an early warning." [193] An editorial in the *Pittsburgh Tribune-Review* declared: "A cold front is blowing in from Washington State. Calling it 'chilling' does not do it justice. It should send a shudder down the spine of anyone who still believes in the First Amendment." [194]

Although political talk radio is largely dominated by conservative voices, [195] the legal reaction against the trial court's decision in *No New Gas Tax* came from all sides of the political and ideological spectrums. [196] When the case reached the Washington State Supreme Court, amicus briefs were submitted from the American Civil Liberties Union of Washington, the Cato Institute, the Washington Association of Broadcasters, the Building Industry Association of Washington, and the Center for Competitive Politics. [197]

4. Supreme Court Ruling

The Washington State Supreme Court accepted review of the case based on the trial court's CR 12(b)(6) dismissal of NNGT's counterclaim that the plaintiffs had violated several of the NNGT's constitutional rights by obtaining a preliminary injunction order requiring it to disclose the value of radio broadcasts. [198] Although the propriety of the preliminary injunction was not directly before the court (as the plaintiffs had ***220** voluntarily dismissed their complaint against NNGT and NNGT did not appeal), the court stated that it was necessary to review the issue in order to resolve whether the trial court properly dismissed NNGT's counterclaims. [199]

In its analysis, the court looked to whether the application of the media exemption should have prevented the trial court from issuing the preliminary injunction. [200] The court first considered whether the trial court correctly construed the statutory term "contribution," noting that the definition of contribution included the media exemption. [201] The court rejected the prosecutors' argument that Wilbur and Carlson's broadcasts fell outside the media exemption because the broadcasts constituted "political advertising." [202] Instead, the court stated that it would follow the approach taken by federal courts in applying the media exemption, looking first to whether the media exemption applies to the communication at issue before considering whether the communication fits within the otherwise broad definition of contribution. [203]

To determine whether the media exemption applied to the communication at issue, the court looked at whether the news medium was controlled by a candidate or political committee and whether it was functioning as a regular news medium with respect to the conduct in question. [204] The court found that the phrase "not controlled by a candidate or political committee" modifies "news medium" and does not modify "news item, feature, commentary, or editorial." [205] Therefore, the applicability of the media exemption did not turn on Wilbur and Carlson's relationship to the campaign. [206] "The question is whether the news medium--here, the radio ***221** station--is controlled by a political committee, not whether a political committee authored the content of a particular communication." [207] The court noted that, as with the federal media exemption, control does not change from hour to hour depending on who may be hosting a particular radio program. [208]

Although the PDC had interpreted the applicability of the media exemption differently, the court was not bound by such interpretations. [209] The opinion quickly dismissed reliance on the previous PDC declarations and opinions that stated that the use of air time to solicit votes or funds or to expressly advocate either in favor of one's own campaign or for the defeat of one's opponent constitutes a reportable contribution. [210] The court stated that: "We will not defer to a PDC declaratory order that conflicts with a statute." [211] In their opinion, however, the justices did not examine the rationale employed by the PDC in reaching its conclusions regarding the statute; rather, the court merely rejected PDC's interpretations as contrary to the statutory media exemption. [212]

In ruling on its interpretation of the law, the court gave little consideration to the possible ramifications of its ruling. At oral argument, the prosecutors argued that without the limiting construction imposed by the PDC, media corporations could become "king makers," providing their favored candidates and ballot measure advocates with unlimited access to the airwaves. [213] Instead, the court found that while the term "commentary" is not defined, it plainly encompassed advocacy for or against an issue, candidate, or campaign, whether or not that involved the solicitation of votes, money, or "other support." [214] Such express advocacy, the court continued, is "a core aspect of the media's traditional role." [215]

In ruling that the media exemption applied, the court declared that it was not appropriate to draw distinctions between commentary and political advertising in this context. [216] The court stated that content was largely irrelevant in deciding whether a media entity is exercising its valid press function; the media exemption applied regardless of the content of the publication or the speaker's motivations, intent, sources of information, ***222** or connection with a campaign. [217] Additionally, the media exemption could apply regardless of whether exercise of the media function was fair, balanced, or expressed advocacy. [218]

The court did find, however, that the distinction between "political advertising" and "commentary" might be relevant in deciding whether a media entity was performing a legitimate press function, but it stated that this distinction did not turn on the content of

the communication. [219] Instead, the court reasoned that the distinction turned on whether that communication occurred during the period of the broadcast where payment is normally required. [220] The court explained that if the coverage of a candidate or ballot measure occurred during the content period of a broadcast, as opposed to during the commercial advertising period, the media exemption would apply. [221] Therefore, the mere fact that a broadcast has value to a campaign, or includes solicitation of funds, votes, or other support, does not convert commentary into advertising when it occurs during the content portion of a broadcast for which payment is not normally required. [222]

The court found that this reasoning "appropriately creates a bright-line rule by distinguishing paid and unpaid broadcast time." [223] Such a rule would limit judicial inquiry into the content of the speech and focus instead on the content-neutral question of whether the radio station ordinarily would collect a fee for the broadcast. [224] Because the broadcasts in question occurred during the regularly scheduled content portion of Wilbur and Carlson's radio programs, not during the commercial advertising time for which Fisher ordinarily collected a fee, the court found that Wilbur and Carlson's broadcasts supporting the initiative campaign did fall within the media exemption, "regardless of whether the talk show ***223** hosts acted at the behest of NNGT or solicited votes and financial support for the initiative campaign." [225]

Because the media exemption applied, the court held that the trial court erred in ruling that the radio broadcasts were contributions subject to disclosure under the FCPA. [226] As the broadcasts were not contributions subject to disclosure, the court held that the trial court improperly granted the preliminary injunction because the prosecutors failed to establish a clear and equitable right to disclosure of the value of the radio broadcasts supporting the initiative campaign." [227]

VI. WHERE DOES THE DECISION IN *NO NEW GAS TAX* LEAVE WASHINGTON AND THE MEDIA EXEMPTION?

Although the ruling of the Washington State Supreme Court in *No New Gas Tax* answered the specific issues regarding the NNGT campaign, it is the position of this Comment that the Court failed to satisfactorily resolve the larger questions involved. Campaign finance regulations seek to shed the bright light of publicity on the abuses and excesses of campaign finance through the disclosure of contributions and expenditures. The in-kind contributions made when the media venture beyond the reporting of news and editorial commentary to provide direct political advertising or other support to a campaign are of value to that campaign and should be disclosed.

After the November 2005 election, but prior to the Washington State Supreme Court ruling in *No New Gas Tax*, Randall Gaylord, the prosecutor for San Juan County in the case, wrote an editorial for *The Seattle Times* in which he said: "Radio talk-show hosts want you to believe the judge trampled their free-speech rights. But [the trial judge] was just confirming that anyone running an initiative campaign, no matter how prominent or powerful, must tell the public who is funding their campaign." [228]

***224** Gaylord stated that the sponsors of Initiative 276 decided that when the media step outside their traditional news-gathering and editorial roles to provide outright political advertising or other support to a campaign, the contribution should be disclosed, just like in-kind corporate contributions of free software, cell phones, or office space. [229] The First Amendment, Gaylord continued,

> is not a shield that can be used to conceal campaign contributions--no matter their source or form .... The citizens who drafted our public-disclosure laws understood the importance of openness and accountability, and thus required media companies to comply when they step into the fray by giving valuable support to a political campaign. [230]

In the *No New Gas Tax* decision, the Washington State Supreme Court articulated a bright-line rule regarding application of the media exemption to what would otherwise be a contribution. As bright a line as the court drew, however, the court was not looking to the question of whether the media exemption should be narrowed; it merely interpreted the law as it existed.

As FEC and PDC opinions indicate, there are other considerations that might apply to an evaluation of the media exemption as it applies to talk radio. In *In re Ross*, for example, to answer the question of whether the station was acting within its legitimate press function, the FEC looked to whether there was any indication that an aspect of the radio show was different because of the nature of the host's candidacy. [231] Likewise, with regard to the Randall Terry program, the FEC concluded that the candidate could continue to host his talk show, without receiving an in-kind contribution, based on the candidate's representation that he did not intend to use the show to promote his candidacy. [232] Similarly, in Washington State, the PDC advised that a talk show host who was a candidate would receive an in-kind contribution from the radio station if, while on the air, the host solicited votes or contributions. [233]

The rulings and opinions of the FEC, the PDC, and even the superior court in *No New Gas Tax*, further highlight the conflict that exists between the application of the media exemption and the policy objectives of campaign finance regulations. Given the court's holding in *No New Gas Tax*, there is seemingly no barrier to the extent to which a candidate with a radio talk show might use his access to public airwaves to solicit ***225** votes, contributions, or other forms of support. In theory, a corporation that owned a radio station and had a particular political leaning could seek to give support to a candidate by providing that candidate with a radio show. So long as the corporation was not controlled by a political committee and the function of the host was viewed as a legitimate press activity, [234] there is presumably no limit to the unregulated self-promotion that such a candidate could do on air.

In a footnote, the *No New Gas Tax* court stated that nothing in its decision foreclosed the state legislature, or the people via the initiative process, from limiting the statutory media exemption. [235] This Comment proposes the form that such a limit should take.

While the elimination of the media exemption might be possible, it is not desirable. Given state and federal limits on corporate contributions, and Washington's imposition of a $5,000 cap on contributions in the final three weeks before an election, [236] if media commentary were an in-kind contribution subject to those limits, broadcasters who chose to air content qualifying as a contribution would, at some point, be required by law to halt their speech. In addition to the possibility that some speech would actually be stopped, the elimination of the media exemption would also likely chill political speech if broadcasters chose to steer clear of topics or hosts that could be seen as subjecting them to such contribution requirements. Also, it has largely been the established press, such as *The New York Times, The Washington Post*, and the *Los Angeles Times* nationally, and *The Seattle Times* and Seattle Press Club in Washington State, that have supported campaign finance reform. [237] As one commentator noted, "there is no surer way to turn the press against campaign finance reform than to subject the press to new restrictions." [238]

It has been argued that the scope of the media exemption should be narrowed by removing endorsements from the exemption's coverage. [239] Removing endorsements would, one author suggested, satisfy two competing interests: maintaining a free press and preventing corruption or the ***226** appearance of corruption. [240] While this proposal might prevent some corruption, removing endorsements from the scope of the exemption would seemingly have much the same chilling effect as doing away with the media exemption as a whole. Bias is inherent in commentary and opinion, and there is no bright line between biased opinion and support or endorsement. The removal of endorsements from the protection of the media exemption would undoubtedly lead to the removal of some comment as well. [241]

In talk radio, such a restriction would have broad application. Regardless of whether Wilbur and Carlson were principals in the NNGT campaign, it is common for talk show hosts to express opinions about controversial topics and to support or oppose candidates and initialives. [242]

Additionally, if endorsements were subject to contribution or expenditure limits, a question of the value of each in-kind contribution for on-air commentary would need to be made. For example, in a national campaign, an endorsement from Rush Limbaugh would be worth more than an endorsement from Kirby Wilbur. [243] If their support was subject to contribution limits, those talk radio hosts who were more popular or powerful would actually be most affected by such contribution limits. The political speech of Rush Limbaugh, for instance, would be more likely to be chilled than the political speech of Kirby Wilbur.

Just as a narrowing of the media exemption to remove endorsements from its scope would have a chilling effect on protected speech, so too would a narrowing of the media exemption to remove the commentary of candidates or principals in a campaign

from the exemption. If the existence of contributions turns on whether the host might be considered a principal of a campaign, then broadcasters would be forced to start monitoring the political behavior of their employees before letting them advocate for or against controversial topics. [244] If broadcasters did not, ***227** they would run the risk of finding out after the fact that otherwise apparently legal broadcasts were actually illegal contributions. [245]

The media exemption could, however, be narrowed to more fully achieve the policy objectives of campaign finance reform, while still preserving the fundamental First Amendment protections of the press. The narrowing could take the form of a requirement that talk show hosts who do not equally present both sides of campaign issues must file a report with the PDC or an alternate regulatory agency. [246] The report would show the duration and value of the air time provided so that the public would know the equivalent amount of money an opponent would have to spend to buy air time to promote their views or candidacy. [247]

Although the question of the valuation of on-air time would need to be resolved, such valuation could easily be made based on advertising rates for the particular host's program and the time the host spent commenting on a particular issue. Using this method of valuation, the calculation would be relatively easy to make. If the reported duration and value were not considered part of the contribution limits, the approach would not conflict with current campaign regulations and would not dampen constitutional rights.

Under this proposal for narrowing the media exemption, a corporation that owned a radio station and had a particular political leaning could still seek to give support to a candidate by providing that candidate with a radio show. That support, however, would be disclosed to the public and have a dollar value for that contribution. Thus, while the public would know who was contributing to a campaign, the corporation would not be limited in its support, nor would the talk show host be limited in his commentary.

As a whole, this approach preserves the policies of campaign finance reform without the result of chilling or otherwise limiting socially useful and constitutionally protected campaign speech. “The electorate ... ha[s] the right to know of the sources and magnitude of financial and persuasional influences upon government.” [248] By narrowing the media exemption as suggested in this Comment, the information base upon which the electorate may make its decisions is enlarged without weakening our First Amendment protections.

***228 VII. CONCLUSION**

One can imagine many circumstances in which the conduct of a radio talk show host should, in some form, be disclosed as a contribution to or expenditure of a political campaign. Given current federal and state limits on expenditure and contributions at various points within a campaign, including the conduct of talk show hosts as a contribution or expenditure would certainly have the effect of limiting that speech. Without question, public disclosure of campaign contributions is a worthy goal, but if achieving such a goal comes at the expense of political speech, such a goal would be both difficult to achieve and undesirable. If not subject to those limits, however, such disclosure would be desirable.

The FEC, PDC, and Washington State courts have taken alternate, and sometimes conflicting, approaches in their efforts to determine the extent of the media exemption as it applies to talk radio. By attempting to shoehorn the particular host's activity into a form of advertising or into a legitimate press function, however, the underlying issues at the heart of the tension between the goals of campaign finance regulations and First Amendment protections are often neglected.

Campaign finance regulations have existed since the nineteenth century and have had, at their core, the notion that the public should know who is contributing to political campaigns. Campaign finance regulations are a policy choice--a choice to control the influence of money in the political process at the expense of a degree of constitutional protection on speech and the press. Likewise, the media exemption is a policy choice--a choice to accord full protection to the First Amendment rights of the press at the expense of countervailing social interests that may be served by campaign finance regulations. If the goals of campaign finance reform are served by requiring disclosure of corporate contributions, they will be better served by requiring the disclosure of in-kind contributions from radio talk show hosts who do not equally present both sides of an issue.

It is possible to more fully achieve campaign-finance policy objectives without further sacrificing those protections we hold dear. By narrowing the media exemption such that disclosure of on-air contributions would be required as part of campaign

finance regulations, while continuing to exempt the media from strict campaign contribution and expenditure limits, it would be possible to better balance the competing interests of campaign finance regulations and the protection of the press. Such a plan would not chill political speech. Instead, the knowledge of who was contributing to political campaigns would be increased and the policy objectives of campaign finance reform would be more fully achieved.

Footnotes

d1 J.D. Candidate, Seattle University School of Law, 2009; B.A., History, University of Washington, 1999. The author would like to thank his primary editor, Ryan Espegard, whose suggestions, encouragement, and dedication made this Comment possible. He would also like to thank Gabriella Wagner and her editing team for their thoughtful and thorough editing. Lastly, the author would like to thank his wife, Rebecca, for her assistance and unending support.

1 George Will, Editorial, *Journalism Exemption Is Not Good for the Gander*, SEATTLE POST-INTELLIGENCER, May 24, 2001, at 24, *available at* http:// seattlepi.nwsource.com/opinion/24362_will24.shtml.

2 Michael Harrison, *2009 Talkers 250 Featuring the Heavy Hundred: The 100 Most Important Radio Talk Show Hosts In America*, TALKERS MAGAZINE, http:// talkers.com/online/?p=267 (last visited July 15, 2009).

3 Brian Stelter, *A Lucrative Deal for Rush Limbaugh*, N.Y. TIMES, July 3, 2008, at C1, *available at* http:// www.nytimes.com/2008/07/03/business/media/03radio.html?_r=1.

4 Zev Chafets, *Late-Period Limbaugh*, N.Y. TIMES MAGAZINE, July 6, 2008, at MM, *available at* http:// www.nytimes.com/2008/07/06/magazine/06Limbaugh-t.html?pagewanted=2&hp.

5 *Id*.

6 *Id*.

7 *Id*. Ten percent of Democratic primary voters in Indiana admitted to exit pollsters that they were actually Republicans. *Id*.

8 Katie Escherich, *Limbaugh Calls Clinton Pick 'Brilliant Stroke' by Obama*, ABC NEWS, Dec. 1, 2008, http:// www.abcnews.go.com/Entertainment/Politics/story?id=6368280.

9 *Id*.

10 Randall Gaylord & Mike Vaska, Opinion, *Even Radio Shock Jocks Must Obey Campaign Laws*, SEATTLE TIMES, Nov. 9, 2005, *available at* http:// community.seattletimes.nwsource.com/archive/?date=20051109&slug=vaska09.

11 San Juan County v. No New Gas Tax, 157 P.3d 831, 840 n.10 (Wa. 2007).

12 Brief of Amicus Curiae ACLU of Washington, San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 77966-0), 2006 WL 1893968.

13 *Id; see also* Cecil C. Kuhne III, *The Diminishing Sphere of Political Speech: Implications of an Overhearing Election Bureaucracy*, 3 GEO. J.L. & PUB. POL'Y 189 (2005).

14 *See, e.g.*, Respondents/Cross-Appellants' (1) Response Brief to NNTG's Appeal; and (2) Opening Brief in Support of Respondents/Cross-Appellants' Cross-Appeal, San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 77966-0), 2005 WL 4049964 [hereinafter "Response Brief].

15 *Id*.

16 San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007).

17 *Id*. at 841.

18 This approach, it appears, was first suggested in a 1999 letter to the PDC. Letter from Vicki L. Rippie, Assistant Director Public Information and Policy Development, Public Disclosure Commission, to Mr. and Mrs. Michael J. Brewer, July 1, 1999, *available at* http:// www.pdc.wa.gov/archive/commissionmeetings/meetingshearings/pdfs/2007/09.27.07.SanJuanCountyDocs.pdf, at 47. In its response to the proposal, the author stated that the PDC did not have the legal authority to undertake such action because of the media exemption. *Id*. The response further stated that while not unsympathetic to the concerns raised, the situation was not one into which the PDC could interject any reporting responsibilities under current law. *Id*. at 48.

19 The First Amendment 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; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

20 Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 657 (1990).

21 For a detailed history of campaign finance reform before 1971, see Melvin 1. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1 (2008).

22 The Federal Election Commission, Thirty Year Report (2005), at 3 n.3, http://www.fec.gov/info/publications/30year.pdf.

23 Urofsky, *supra* note 21, at 33. Additionally, by 1959, forty-three states had some requirements for reporting campaign finance expenditures by candidates, their committees, or committees run by the parties, and thirty-one states had some limits on expenditures. *Id*.

24 *See id*. at 1.

25 *Id*.

26 *Id*. at 34. For example, under the 1925 Federal Corrupt Practices Act, a candidate could avoid the spending limit and disclosure requirements altogether because a candidate who claimed to have no knowledge of spending on his behalf was not liable under the act. *Id*. at 20-21.

27 *Id*. at 33.

28 *Id*. at 49. The law broadened the definitions of both "contributions" and "expenditures" in order to include almost any donation and cost associated with a political campaign. *Id*. The FECA set up specific rules for reporting contributions and expenditures, requiring that the names of all donors or lenders who gave $100 or more be reported and requiring that the names of all committee officials be listed. *Id*. Additionally, candidates now had limits on all media spending, both broadcast and print. *Id*. at 50.

29 The Federal Election Commission, Thirty Year Report (2005), at 4, http://www.fec.gov/info/publications/30year.pdf.

30 Watergate was far more than a botched burglary; it was a worst-case scenario of a badly flawed campaign finance system that failed to forestall corruption or prevent out-and-out criminal activity. President Nixon's reelection committee tunneled illegal corporate contributions into slush funds, paid for break-ins, and traded cash for favors. *Id*. at 50-55.

31 *Id*. at 55.

32 *Id*. at 53.

33 *Id*. at 56. Although known as amendments, the 1974 measure addressed not only the perceived shortcomings of the 1971 FECA, but it also addressed almost every major provision within the 1971 FECA. *Id*. *See also*, Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-55 (2000)).

34 Urofsky, *supra* note 21, at 56.

35 *Id*. at 60-61. In addition, the 1974 Amendments to the FECA also instituted the system of public financing of presidential elections that is used today. *Id*. *See also* 2 U.S.C. §§ 432, 434 (2000).

36 2 U.S.C. § 41b(a)(2008).

37 2 U.S.C. § 441b(b)(2) (2000).

38 *Id*. § 431(8)-(9).

39 11 C.F.R. § 100.52(d)(1) (2005).

40 Buckley v. Valeo, 424 U.S. 1 (1976).

41 *Id*. at 23-25. *See also id*. at 35-36, 38.

42 *See id*. at 39-51. For a detailed examination of the distinction between contributions and expenditures recognized in *Buckley*, see Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 26 (1996).

43 *Buckley*, 424 U.S. at 44-45. *See also* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659 (1990) (recognizing that "the compelling governmental interest in preventing corruption supports the restriction of the influence of political war chests funneled through the corporate form").

44 *See* H.R. REP. No. 93-1239, at 4 (1974); San Juan County v. No New Gas Tax, 157 P.3d 831, 839 (Wa. 2007).

45 The federal media exemption excludes from the definition of "expenditure": "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publications, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i) (2000).

46 H.R. REP. No. 93-1239, at 4 (1974).

47 *Id*.

48 *Id*.

49 Austin v. Mich. Chamber of Commerce, 494 U.S. 652,667 (1990) (holding that a state may exempt media entities from otherwise generally applicable campaign finance regulations).

50 Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act's Press Exemption to Online Political Speech*, 9 VA. J.L. & TECH. 6, 8 (2004).

51 *Id*.

52 *Id*.

53 *Id*.

54 *See id*. at 94 ("It was simply understood [by Congress] that the media should continue to get special protection in order to ensure that they are unfettered in the exercise of their First Amendment rights.").

55 Joshua L. Shapiro, Comment, *Corporate Media Power, Corruption, and the Media Exemption*, 55 EMORY L.J. 161, 173-174 (2006).

56 San Juan County v. No New Gas Tax, 157 P.3d 831, 834 (Wa. 2007). *See also* 1973 Wash. Sess. Laws. ch. 1 § 1.

57 WASH. REV. CODE § 42.17.010(8) (2008). In adopting Initiative 276, Washington voters declared that the "concepts of disclosure and limitation of election campaign financing are established by the passage of the [FECA] of 1971 by the Congress of the United States, and in consequence thereof, it is desirable to have implementing legislation at the state level." *Id*.

58 *Id*. §42.17.010(1),(5) (2008).

59 *Id*. § 42.17.010(10) (2008). *See also* Fritz v. Gorton, 517 P.2d 911 (1974). In *Fritz*, the Washington Supreme Court affirmed the FECA against free speech and other constitutional challenges. The court noted: "The electorate ... has the right to know of the sources and magnitude of financial and persuasional influences upon government." *Id*. at 931. In rejecting the challenge, the court said: "We accept as self-evident ... that the right to receive information is the

fundamental counterpart of the right of free speech .... [The Act] seeks to enlarge the information base upon which the electorate makes its decisions." *Id*. at 924-25.

60 *No New Gas Tax*, 157 P.3d at 834. *See also* 1993 Wash. Sess. Laws. ch. 2 §§ 1-36.

61 Among other changes mandated by Initiative 134, the FCPA made it illegal to either give or receive a contribution of more than $5,000 to any campaign within twenty-one days of an election. WASH. REV. CODE § 42.17.105(8) (2008).

62 *Id*. § 42.17.020 (15)(a)(i) (2008).

63 *Id*. § 42.17.020(15)(a)(iii)(2008).

64 *Id*. § 42.17.020(15)(b)(iv) (2008).

65 McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

66 WASH. REV. CODE § 42.17.020(21)(c) (2008). *See also supra* note 38.

67 San Juan County v. No New Gas Tax, 157 P.3d 831, 838 (Wa. 2007).

68 *Id*. The state media exemption differs from the federal media exemption in that the language "distributed through the facilities of any media source is replaced with "in a regularly scheduled news medium that is of primary interest to the general public." *Id*.. *See also* 2 U.S.C. § 431(9)(B)(i)(2000).

69 New York Times v. Sullivan, 376 U.S. 254 (1964).

70 *Id*. at 270.

71 Mills v. Alabama, 384 U.S. 214, (1966). In *Mills*, Birmingham held an election regarding which form of city government the voters preferred. *Id*. at 215. The editor of a local paper was arrested after he ran an editorial on election day supporting a mayor-council form of government. *Id*. at 215-16.

72 *Id*. at 219.

73 It is worth noting, however, that the framers did not design, nor has the United States Supreme Court recognized, a protection for the press that extends beyond the protection of other speech. In his concurring opinion in *First National Bank v. Bellotti*, 435 U.S. 756 (1978), for example, Chief Justice Burger stated that "the history of the [Press] Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege." *Id*. at 798. *See also* Richard L. Hasen, *Campaign Finance Lans and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1657-58 (1999) (noting that "there is scant evidence that the framers' original intent in writing the Constitution was to give the media greater constitutional protection through the Press Clause than society was to receive through the Speech Clause of the First Amendment").

74 Hasen, *supra* note 73, at 1658.

75 Austin v. Michigan Chamber of Commerce. 494 U.S. 652 (1990).

76 *Id*. at 654.

77 *Id*. at 666. The Michigan law regulating corporate expenditures excluded from the definition of an expenditure any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication of any news story, commentary, or editorial in support of or opposition to a candidate for elective office ... in the regular course of publication or broadcasting." Mich. Comp. Laws Ann. 169.206(3)(d) (West 1989). The court, after quoting this provision, noted that the FECA "contains a similar exemption." *Austin*, 494 U.S. at 667 n.5.

78 *Austin*, 494 U.S. at 667.

79 *Id*. at 668.

80 *Id*.

81 *Id*. It should be noted that the narrowing of the media exemption suggested by this Comment would continue to exempt media entities from the scope of any political contribution or expenditure limitations.

82 *See* Hasen, *supra* note 73, at 1651-52.

83 *Austin*, 494 U.S. at 666. The Court specifically held that Michigan's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political "war chests" amassed with the aid of the legal advantages given to corporations. *Id*.

84 *Id*. at 691 (Scalia, J., dissenting) ("The Court today holds merely that media corporations may be excluded from Michigan law, not that they must be."). Justice Scalia stated that "[T]he Court's holding on [the media exemption] must be put in the following unencouraging form: 'Although the press' unique societal role may not entitle the press to greater protection under the Constitution, ... it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations.' One must hope, 1 suppose, that Michigan will continue to provide this generous and voluntary exemption." *Id*. at 691-92.

85 *Id*. at 691.

86 *Id*. at 690-91.

87 *Id*. at 691.

88 *Id*. at 690-91.

89 McConnell v. Federal Election Commission, 540 U.S. 93 (2003).

90 Bipartisan Campaign Reform Act of 2002, PUB. L. No. 107-155, 116 Stat. 81, 88-90 (codified at 2 U.S.C. § 431 (Supp. III 2003)). *See also* Zubowicz, *supra* note 50, at 8 (noting that the broad aims of the BCRA were to reduce the perceived influence of non-federal funds on federal elections, to regulate certain electioneering communications, and to alter the government's approach to certain coordinated expenditures).

91 *McConnell*, 540 U.S. at 208.

92 *Id*.

93 *See id*.

94 *Id*.

95 *See McConnell*, 540 U.S. 93.

96 *Id*. at 108.

97 *Id*. at 158.

98 San Juan County v. No New Gas Tax, 157 P.3d 831, 840 n. 10 (Wa. 2007).

99 *See, e.g.*, FEC, Advisory Op. 2005-16, 5 (2005), *available at* http:// saos.nictusa.com/saos/searchao. From this link, enter the Advisory Opinion number in the "Go to AO number" box. *See also* FEC, Advisory Op. 2004-07 (2004), *available at* http://saos.nictusa.com/saos/searchao.

100 2 U.S.C. § 431(9)(B)(i) (2000). For a comprehensive look at the FEC process for determining a press entity, see *Fed. Election Comm'n v. Mass. Citizens For Life. Inc.*, 479 U.S. 238 (1986).

101 Fed. Election Comm'n v. Phillips Publ'g, Inc., 517 F. Supp. 1308, 1312-13 (D.D.C. 1981).

102 *See. e.g.*, FEC, Advisory Op. 2005-16, 5 (2005), *available at* http://saos.nictusa.com/saos/searchao.

103 *See id*.

104 *Id*. This test was first promulgated in *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210 (1981). The district court noted that "[n]o explicit reference is to be found in the statue to this two-step process. It seems to me, however, to be the necessary accommodation between, on the one hand, the Commission's duty to investigate possible violations and, on the other, the statutory exemption for the press combined with a First Amendment distaste for government investigations of press functions." *Id*. at 1215. *See also* Fed. Election Comm'n v. Phillips Publ'g, Inc., 517 F. Supp 1308 (D.D.C. 1981). The court in *Phillips* outlined a similar two-part test to determine whether the media exemption is available with respect to a particular communication. The court explained:

> [T]he initial inquiry is limited to whether the press entity is owned or controlled by a political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question. If the press entity is not owned or controlled by a political party or candidate and is acting as a press entity, the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint.
>
> *Id*. at 1313.

105 McConnell v. Fed. Election Comm'n, 540 U.S. 93, 208 (2003).

106 Dave Ross, MUR 5555, 4 (FEC Mar. 17, 2006) (statement of reasons), *available at* http://eqs.sdrdc.com/eqsdocs/000050CC.pdf. *See also* Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 251 (1986) (holding that the press exemption did not apply to a special edition of a newsletter because it was not comparable to any single issue of newsletter).

107 FEC, Advisory Op. 2005-19, 5 (2005), *available at* http:// saos.nictusa.com/saos/searchao. Therefore, a media entity otherwise eligible for the media exemption would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the content expressly advocates the election or defeat of a clearly identified candidate for federal office.

108 Zubowicz, *supra* note 50, at 19.

109 *Id*.

110 *See, e.g.*, FEC, Advisory Op. 2000-13 (2000), *available at* http:// saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=656 (considering whether the media exemption applied to gavelto-gavel coverage of the Republican and Democratic national conventions; concluding that "gavel-to gavel-coverage of national party conventions that includes interviews and commentary by journalists, by an entity that covers governmental and political affairs, readily fits into the categories of news story and commentary set out in the Act"). *See also*, FEC, Advisory Op. 2005-19 (2005), *available at* http:// saos.nictusa.com/saos/searchao. The FEC considered three scenarios: (1) a program host mentions a candidate on the air, (2) a candidate is interviewed on a program, and (3) a person calling into a program mentions a candidate. The FEC concluded that all of these activities "would be legitimate press functions; [and] would come within the press exemption[.]" *Id*.

111 *See, e.g.*, Dave Ross, MUR 5555, (FEC, Jan. 10, 2006) (First General Counsel's Report), *available at* http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

112 *Id*.

113 *Id*. at 2.

114 *Id*. at 1.

115 Dave Ross, MUR 5555, 1 (FEC Mar. 17, 2006) (statement of reasons), *available at* http://eqs.sdrdc.com/eqsdocs/000050CC.pdf.

116 The Dave Ross Show, http://www.mynorthwest.com/?sid=21762&nid=130 (last visited Mar. 23, 2009). Dave Ross has also had a daily commentary on CBS Radio Network since 1983, which is heard nationally. He also substitutes regularly for Charles Osgood on "The Osgood File" on CBS News Radio, which is carried on approximately 240 stations nationwide, including KIRO-AM. *Id*.

117 Dave Ross, MUR 5555, 4 (FEC, Nov. 19, 2004) (Joint Response of Friends of Dave Ross et al. to the Complaint by Chris Vance), *available at* http://eqs.sdrdc.com/eqsdocs/000050C2.pdf.

118 *Id*.

119 Dave Ross, MUR 5555, 2 (FEC, Oct. 5, 2004) (Complaint Against Mr. Dave Ross et al.), *available at* http:// eqs.sdrdc.com/eqsdocs/000050BF.pdf.

120 Dave Ross, MUR 5555, 3, (FEC, Jan. 10, 2006) (First General Counsel's Report), *available at* http://eqs.sdrdc.com/ eqsdocs/000050C7.pdf.

121 *Id*. The FEC, in its First General Counsel's Report, did note, however, that Ross announced his candidacy during an event called "Battle of the Talk Show Hosts," broadcast on KIRO-AM in the evening of May 20, 2004. The station's response to the FEC stated that Ross's announcement was in response to a direct question asked of him by the emcee of the evening concerning rumors she had heard. Neither KIRO nor [its corporate owner] had prior knowledge that such an event would occur. *Id*. at 3 n.2. Ross officially became a candidate for federal office on June 2, 2004, when he received contributions aggregating in excess of $5,000. *Id*. at 3 n.3.

122 *Id*. at 3. Also, during August 2004, Ross gave nineteen commentary pieces for CBS News radio, which may have aired in Washington's Eighth Congressional district on CBS affiliate KIRO-AM. *Id*. at 3-4.

123 *Id*. at 4.

124 *Id*. at 5.

125 *Id*.

126 *Id*.

127 *Id*. at 7.

128 *Id*. Although the Commission stated that the issue in *Ross* did not turn on the question of whether anything about Ross's talk show changed after Ross became a candidate and stayed on the air, the FEC found little indication that anything about the Dave Ross Show changed after Ross became a candidate and stayed on the air. *See* Dave Ross, MUR 5555, 5 (FEC Mar. 17, 2006) (statement of reasons), *available at* http:// eqs.sdrdc.com/eqsdocs/000050CC.pdf, and Dave Ross, MUR 5555, 6, (FEC, Jan. 10, 2006) (First General Counsel's Report), *available at* http:// eqs.sdrdc.com/ eqsdocs/000050C7.pdf.

129 Dave Ross, MUR 5555, 7, (FEC, Jan. 10, 2006) (First General Counsel's Report), *available at* http://eqs.sdrdc.com/ eqsdocs/000050C7.pdf.

130 *Id*. As to the two instances that Ross did in fact reference his candidacy or potential candidacy (one statement that he was considering running, and a second acknowledging that he was running), the FEC concluded that "these incidents do not appear to take either [of those two specific shows] outside the station's legitimate press function." *Id*. With regard to the poll taken on the KIRO website asking whether Ross should become a candidate, the Commission also found that to fall within the media exemption. *Id*. at 8. Because the show regularly featured discussions about news, politics, and current events, "it falls within the range of what qualifies as 'legitimate press activity' for such a show to post on its web site surveys regarding issues in politics, current events, and popular culture." *Id*. The FEC concluded that because there was no apparent attempt to use the results in an actual determination of Ross' possible candidacy, the poll should not be treated as a "testing the waters" contribution or expenditure. *Id*. at 8-9. *See also* 11 C.F.R. §§ 100.131(a), 101.3 (2003). It is worth noting that the FEC found that the same media exemption analysis it applied with regard to Ross's

appearance on KIRO-AM also applied to his appearance on CBS News Radio. Dave Ross, MUR 5555, 10, (FEC, Jan. 10, 2006) (First General Counsel's Report), *available at* http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

131 Dave Ross, MUR 5555, 8, (FEC, Jan. 10, 2006) (First General Counsel's Report), *available at* http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

132 An electioneering communication occurs where a broadcast, cable, or satellite communication targeted to the relevant electorate clearly identifies a federal candidate within thirty days of a primary election or sixty days of a general election. 11 C.F.R. § 100.29(a) (2005). The FEC noted that Ross stopped hosting the Dave Ross show more than thirty days before the primary election and more than sixty days before the general election. Dave Ross, MUR 5555, 11, (FEC, Jan. 10, 2006) (First General Counsel's Report), *available at* http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

133 Dave Ross, MUR 5555, 11, (FEC, Jan. 10, 2006) (First General Counsel's Report), *available at* http://eqs.sdrdc.com/eqsdocs/000050C7.pdf.

134 FEC, Advisory Opinion 1992-37 (1992), *available at* http:// saos.nictusa.com/saossearchao.

135 *Id*. The show, entitled "Randall Terry Live," was broadcast on approximately ninety-five stations nationwide, but on only one station in New York State, where Terry was a candidate. In his letter to the FEC, Terry stated that the signal from the state station reached areas west of the district for which he was a candidate, but that "the signal is almost extinct" at the district boundary. *Id*. Additionally, Terry informed the FEC that he was a contractual employee of Randall Terry Live, Inc., and not an owner in any form; a family member was the sole incorporator, and neither the family member nor the corporation had made any donations or in-kind contributions to the campaign. *Id*.

136 *Id*.

137 *Id*. The Commission also stated that it interpreted the candidate's representation to include a commitment to refrain from attacks on his opponents and from soliciting funds or airing ads for those purposes. *Id*.

138 WASH. REV. CODE § 42.17.020(15)(b)(iv) (2008).

139 WASH. REV. CODE § 42.17.020(38) (2008).

140 Edelman v. State *ex rel*. Pub. Disclosure Comm'n, 99 P.3d 386, 393 (2004).

141 *Id*.

142 PDC, Advisory Op., 45 (Aug. 29, 1995), *available at* http:// www.pdc.wa.gov/archive/commissionmeetings/meetingshearings/pdfs/2007/09.27.07.SanJuanCojntyDocs.pdf.

143 *Id*. at 44.

144 *Id*. at 43. The PDC also addressed the issue of whether the on-air time would be a contribution subject to limit pursuant to Initiative 134, which stated, inter alia, that no person may give a candidate for statewide office more than $1,000 per election. *Id*. The PDC's opinion was specifically addressed with regard to a "station employee who, as a talk show host, expresses his opinion and invites listener comments about the policies and performance of public officials, including

officials who may be his opponents in the campaign, and about state and local issues that may be campaign issues." *Id*. at 44.

145 *Id*.

146 *Id. See also* WASH. REV. CODE § 42.17.020(32) (2008); WASH. ADMIN. CODE § 390-05-290 (2008) (defining "political advertising").

147 PDC, Advisory Op., 44 (Aug. 29, 1995), *available at* http:// www.pdc.wa.gov/archive/commissionmeetings/meetingshearings/pdfs/2007/09.27.07.SanJuanCountyDocs.pdf.

148 *Id*. at 43-45.

149 *Id*. at 44.

150 *Id*.

151 *Id*.

152 *Id*. at 44-45.

153 *Id*. at 45.

154 *Id*.

155 *Id*.

156 *Id*.

157 *Id*. The PDC stated that airtime that constituted a contribution in this context must be valued in the amount of its fair market value. *Id*. at 46. *See also* WASH. ADMIN. CODE § 390-16-206(3) (2008).

158 Response Brief, *supra* note 14, at 2.

159 *Id*.

160 San Juan County v. No New Gas Tax, 157 P.3d 831, 840 (Wa. 2007).

161 Prior to *No New Gas Tax*, the PDC had not been asked to adopt a rule or issue an advisory opinion about how the media exemption applied to a talk show host who could potentially be a political committee supporting or opposing a ballot measure. Amicus Curiae Brief of the Attorney General, at 13 n.2, San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 05-2-01205-3), 2005 WL 4158306.

162 Response Brief, *supra* note 14, at 4.

163 *No New Gas Tax*, 157 P.3d at 834.

164 *Id*.

165 *Id*.

166 *Id*.

167 In early May 2005, Wilbur told his listeners: "[Carlson] and I have been meeting with a number of people .... We a group of people have established an organization known as No New Gas Tax. We have a website nonewgastax.com." "[Carlson] and I got together based on our experiences and some others, we said okay look we are going to ask the audience to step forward and pledge money and time at nonewgastax.com and that's a website, nonewgastax.com, and we said if we got 25,000 dollars of seed money and 1,000 volunteers [the campaign would be launched]." Several days later, Wilbur and Carlson told their listeners that "according to the numbers uh that we got over the weekend, over 81,000 dollars was raised in three and a half days." Response Brief, *supra* note 14, at 5.

168 *No New Gas Tax*, 157 P.3d at 834.

169 *Id*

170 Response Brief, *supra* note 14, at 4.

171 *Id*. at 5. *See also* Richard Roesler, *Anti-gas-tax activists encounter legal hurdles*, SPOKESMANREVIEW.COM, July 2, 2005, *available at* http://www.spokesmanreview.com/tools/story_pf.asp?ID=78291.

172 Response Brief, *supra* note 14, at 5.

173 *Id*. KVI's general manager acknowledged in an internal memorandum the role Wilbur and Carlson played in the campaign, stating that "the press release sent this week gives the appearance that we [KVI] are sponsoring this No New Gas Tax initiative." *Id*. at 5-6.

174 *Id*. at 6. For example, Carlson told his listeners: "So, if you're with me, check out this website here ... and sign up make a donation and let's undue this thing. We got six weeks to get the signatures and make this thing happen." *Id*.

175 San Juan County v. No New Gas Tax, 157 P.3d 831, 834 (Wa. 2007).. The complaint further alleged that NNGT failed to adequately disclose the identities of Internet contributors and that it made material misstatements regarding the fuel tax at issue. Id. at 834 n.2.

176 *Id*. at 834.

177 *Id*. NNGT asserted fourteen counterclaims against the plaintiffs, alleging that they violated its civil rights by bringing the enforcement action and obtaining the preliminary injunction. *Id*. at 835-36 n.5. NNGT sought a declaratory judgment

that the prosecutors violated its constitutional rights, injunctive relief prohibiting the prosecutors from continuing to commit the alleged violations, vacation of the preliminary injunction order, and an award of attorneys' fees. *Id*. at 835-36.

178 Response Brief, *supra* note 14, at 8. The trial court found that there was "inadequate time or opportunity for [the county and city prosecutors] to resolve this matter through the PDC." *Id*. at 7. Also, in response to questions from the 1-912 campaign attorney, the court stated that it was not requiring the campaign to do anything other than comply with existing disclosure laws. *Id*. at 8. The trial court dismissed NNGT's counterclaims and denied the plaintiffs' request for attorneys' fees. Additionally, the trial court granted the prosecutors' motion for voluntary dismissal of its remaining claims. *No New Gas Tax*, 157 P.3d 831, 835-36.

179 *No New Gas Tax*, 157 P.3d at 837.

180 Response Brief, *supra* note 14, at 8.

181 San Juan County v. No New Gas Tax, No. 05-2-01205-3, 2005 WL 5167975 (Wash. Super. Ct. Oct. 26, 2005).

182 *No New Gas* Tor, 157 P.3d at 835.

183 Response Brief, *supra* note 14, at 10.

184 *No New Gas* Tax, 157 P.3d at 835. The preliminary injunction provided that if the campaign could not provide an exact valuation of the in-kind contribution, it should make a reasonable and good-faith effort to make such a valuation. Response Brief, *supra* note 14, at 10. The trial court declined to further clarify its order, stating: "you have the same problem that any other candidate or campaign has in trying to understand how to make full reporting." *No New Gas Tax*, 157 P.3d at 835.

185 1-912 was rejected by margin of 54.6% to 45.4%. *See* Wash. Secretary of State 2005 Initiative Measures, *available at* http:// www.vote.wa.gov/Elections/Results/Measures.aspx?e816913c8-43d7-4b77-be19-3d794615271e.1

186 NNGT first sought discretionary review of the trial court order and requested a stay pending its resolution. A court of appeals commissioner denied the request, finding that NNGT was not harmed by the lack of stay because the order required NNGT to disclose only the contributions received before May 31, 2005, and NNGT had complied with the order. *No New Gas Tax*, 157 P.3d at 835.

187 *Id*. at 835. Fisher Communications' general manager slated that he "will have to direct Mr. Carlson and Mr. Wilbur to not discuss 1-912 during the content portions on their programs to avoid [the risk of violating the contribution limit] because Fisher Seattle Radio does not wish to face a possible prosecution for violation of the Fair Campaign Practices Act." *Id*. In its opening brief to the Washington State Supreme Court, the plaintiffs argued that the lack of any limitation on free speech or "chilling" was demonstrated by events during the twenty-one days prior to the general election. The plaintiffs noted that the talk show hosts continued to raise money for the campaign, asking listeners to donate in the name of Judge Christopher Wickham, the trial court judge. Response Brief, *supra* note 14, at 17.

188 *No New Gas Tax*, 157 P.3d at 835.

189 Brief of Amicus Curiae ACLU of Washington at 3, San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 77966-0), 2006 WL 1893968. The FCPA is also known as the Public Disclosure Act. *Id*.

190 *Id.; see also* WASH.REV.CODE § 42.17.090 (2008).

191 Brief of Amicus Curiae ACLU of Washington, *supra* note 189, at 3. *See also* WASH.REV.CODE § 42.17.105(8) (2008).

192 George F. Will, *Speechless in Seattle: What has Happened in Seattle Prefigures What a National Democratic Administration Might Try to Do to Stifle Conservative Talk Radio*, NEWSWEEK, at 24, Oct. 9, 2006, *available at* http:// www.newsweek.com/id/44879/page/l.

193 Brian C. Anderson, Commentary, *Shut Up, They Explained*, WALL ST. J., Jan. 25, 2006, at E4, *available at* http:// www.opinionjournal.com/extra/? id=110007867.

194 Dimitri Vassilaros, Editorial, *Well, Shut My Mouth!*, PITTSBURGH TRIBUNE-REVIEW, Nov. 28, 2005, at D2, *available at* http:// www.pittsburghlive.com/x/pittsburghtrib/s_398015.html.

195 *See* Michael Harrison, *2009 Talkers 250 Featuring the Heavy Hundred: The 100 Most Important Radio Talk Show Hosts in America*, TALKERS MAGAZINE, http://talkers.com/online/?p=267 (last visited July 15, 2009). Talkers Online Magazine annually ranks the top 100 "most important" talk radio hosts in America. The majority of that list is composed of conservative talk show hosts. *Id*.

196 Michael Bindas, Editorial, *Preserving the Right to Free Speech*, SEATTLE POST-INTELLIGENCER, May 25, 2006, at E3, *available at* http:// seattlepi.nwsource.com/opinion/271432_freespeech25.html.

197 *Id*.

198 San Juan County v. No New Gas Tax, 157 P.3d 831, 833 (Wa. 2007).

199 *Id*. at 836-37. The court stated that because many of NNGT's counterclaims originated from the preliminary injunction order, and the trial court dismissed the counterclaims based on legal determinations it made in the preliminary order, it must determine whether the trial court erred in entering the injunction. *Id* at 836.. The court also noted that the standard of review regarding the grant or denial of preliminary injunctions is the abuse of discretion standard. *Id*. at 837.

200 *Id*.

201 *Id*.

202 *Id*. at 839.

203 *Id*. The court stated that this approach accords with the purpose of the media exemption, which is to avoid burdening the First Amendment right of the press. *Id*.

204 *Id*.

205 *Id*. In its amicus brief to the court in support of *No New Gas Tax*, the Washington State Association of Broadcasters noted that this distinction was critical because it provides a clear rule whereby the entity that provides the financing, i.e., the broadcaster, may also control compliance with the exemption. By way of contrast, if the person who controls the news medium were deemed to be the talk show host, then the broadcasting corporation might find itself in the position

of having unwittingly financed illegal contributions if the host is later determined by a court to have been a "principal" of a campaign. Brief of Amicus Curiae Washington State Association of Broadcasters at 18-19, San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 77966-0), 2006 WL 2303733.

206 *No New Gas Tax*, 157 P.3d at 839.

207 *Id*.

208 *Id*.

209 *Id*. at 840.

210 *Id*.

211 *Id*.

212 *Id*. The court further declared that there "is no express advocacy or solicitation limitation to the media exemption." *Id*.

213 *Id*. at 840 n.10.

214 *Id*. at 840.

215 *Id*.

216 *Id*.

217 *Id*.

218 *Id*.

219 *Id*. at 841.

220 *Id*. The court cited the PDC definition of political advertising as it relates to the media exemption: Political advertising does not include letters to the editor, news or feature articles, editorial comment or replies thereto in a regularly published newspaper, periodical, or on a radio or television broadcast where payment for the printed space or broadcast time is not normally required. *Id. See also* WASH. ADMIN. CODE § 390-05-290 (2008).

221 *No New Gas Tax*, 157 P.3d at 841.

222 *Id*.

223 *Id*. (citing *Wash. Stale Republican Party v. Wash. Pub. Disclosure Comm'n*, 4 P.3d 808, 821-22 (Wa. 2000), which rejected "context" analysis in favor of Buckley's bright-line express advocacy test to avoid excessive "regulatory and judicial assessment of the meaning of political speech").

224 *Id*.

225 *Id*. While the court articulated this bright-line rule, it thought it important to note in its findings that the broadcasts in question were typical of Wilbur's and Carlson's regularly scheduled programs. *Id*.

226 *Id*. at 842.

227 *Id*. Because it held that the radio broadcasts were not a contribution, the court did not address the issue of whether the disclosure requirements of the FCPA were unconstitutional as applied to NNGT. *Id*. The court also reversed the order dismissing NNGT's counterclaims and remanded to the trial court for further proceedings. *Id*.. The Court affirmed the trial court's denial of attorneys' fees to San Juan County. *Id*.

228 Randall Gaylord & Mike Vaska, Opinion, *Even Radio Shock Jocks Must Obey Campaign Laws*, SEATTLE TIMES, NOV. 9, 2005, *available at* http:// community.seattletimes.nwsource.com/archive/?date=20051109&slug=vaska09. Mike Vaska is an attorney with Foster Pepper & Shefelman who represented the plaintiffs in the No New Gas Tax litigation. *Id*.

229 *Id*.

230 *Id*.

231 *See supra* note 111 and accompanying text.

232 *See supra* note 134 and accompanying text.

233 *See supra* note 144 and accompanying text.

234 As previously noted, the standard for what constitutes legitimate press activity is very low. *See* Zubowicz, *supra* note 50, at 19.

235 San Juan County v. No New Gas Tax, 157 P.3d 831, 840 n.10 (Wa. 2007) (stating that whether and to what extent the media exemption is constitutionally required is beyond the scope of its opinion).

236 WASH. REV. CODE § 42.17.105(8) (2008).

237 Hasen, *supra* note 73, at 1664. *See also* Randall Gaylord & Mike Vaska, Opinion, *Even Radio Shock Jocks Must Obey Campaign Laws*, SEATTLE TIMES, Nov. 9, 2005, *available at* http://community.seattletimes.nwsource.com/archive/?date=20051109&slug=vaska09 (stating that *The Seattle Times* endorsed Initiative 276 and the Seattle Press Club was one of its sponsors).

238 Hasen, *supra* note 73, at 1664.

239 Shapiro, *supra* note 55, at 188.

240 *Id*.

241 Would removing endorsements from the protections of the media exemption actually make a difference? Professor Hasen has argued that it is the slant of the news, rather than endorsements, that gives the media unequal power to influence political outcomes. Thus, one can end special treatment for the press, but it will not affect the power of the media to follow an electoral or legislative strategy. Hasen, *supra* note 73, at 1659.

242 *See supra* text accompanying notes 4-7.

243 *See* Michael Harrison, *2009 Talkers 250 Featuring the Heavy Hundred: The 100 Most Important Radio Talk Show Hosts In America*, TALKERS MAGAZINE, http://talkers.com/online/?p=267 (last visited July 15, 2009).

244 Brief of Amicus Curiae Washington State Association of Broadcasters at 5, San Juan County v. No New Gas Tax, 157 P.3d 831 (Wa. 2007) (No. 77966-0), 2006 WL 2303733.

245 *Id*.

246 *See supra* note 18 and accompanying text.

247 *Id*.

248 Fritz v. Gorton, 517 P.2d 911,931 (1974).

33 SEAULR 191

EXHIBIT H

93 N.J.A.R.2d (ELE) 33 (N.J. Adm.), 1993 WL 548393

Office of Administrative Law

State of New Jersey

PEOPLE FOR WHITMAN COMMITTEE, COMPLAINANT
V.
FLORIO '93, INC., RESPONDENT.

Election Law
OAL Docket No. ELE 9768-93
Agency Docket No. PF 06-93(G)
Initial Decision: October 26, 1993
Final Agency Decision: October 29, 1993

Peter G. Verniero, Esq., for complainant
Angelo J. Genova, Esq., for respondent (Genova Burns, attorneys)

WEISS, ALJ:

PROCEDURAL HISTORY

***1** This is a contested election law case which commenced on or about October 12, 1993, with the filing of a verified complaint by People for Whitman Committee with the Election Law Enforcement Commission of New Jersey (hereafter "ELEC"), wherein complainant alleged that the respondent, Florio '93, Inc., the principal gubernatorial campaign committee for incumbent Governor James J. Florio, had filed its 29-day preelection report on October 4, 1993, and which failed to include a required allocation for costs associated with the visits to New Jersey by United States Attorney General Janet Reno on September 13, 1993, by United States Interior Secretary Bruce Babbitt on September 28, 1993, and by President William Clinton on October 8, 1993. According to complainant, all three of these visits were "political" in nature and pursuant to N.J.S.A. 19:44A-1 et seq. and N.J.A.C. 19:25-15.27 all or part of the costs associated with them should have been allocated against the expenditure limit for candidate Florio and reimbursement made to the appropriate government agency or agencies.

On October 14, 1993, ELEC issued an Order to Show Cause requiring the respondent to appear before the Office of Administrative Law on October 20, 1993 for a plenary hearing regarding the allegations of the complaint and to file any answering pleadings by October 18, 1993. Thereafter, an answer on behalf of the respondent was filed timely in which the allegations of violations of the election laws and ELEC regulations were denied.

A plenary hearing was conducted before the undersigned administrative law judge on October 20, 1993 and posthearing briefs were submitted on October 22, 1993. Previously, by letter dated October 19, 1993, ELEC requested that the matter be treated by OAL on an "emergent" basis and that my initial decision be issued in time for the Commission, in its discretion, to review it on one of three preelection dates when it planned to meet, including October 28, 1993. Thus, this decision has been expedited and will be issued on October 26, 1993 so that it will be received by ELEC and counsel in time for ELEC, if it wishes, to consider the case if it meets on October 28.

At the outset of the hearing, counsel for respondent immediately moved to dismiss so much of the verified complaint as referred to President Clinton's visit to New Jersey on October 8, 1993. Counsel maintained that any costs associated with that visit, if they had to be reported at all, need not be reported until 5 p.m. on October 22, 1993, the deadline date for the filing of the 11-day preelection report. *See* N.J.S.A. 19:44A-16(b). Since that filing date had not yet occurred as of the hearing, counsel

for respondent maintained that any consideration of the cost for the President's visit was premature. Counsel for complainant responded that the respondent already had determined not to allocate the cost of the Clinton visit and pursuant to N.J.S.A. 19:44-8(a)(2) could not do so at that point in any event. I agreed with respondent that since allocation of the cost of President Clinton's visit still could be included on the 11-day preelection report, and since the time for the filing had not yet expired, it would be premature for me to consider that portion of the case and I therefore dismissed it, without prejudice. Accordingly, no further attention was directed to that issue at the hearing, nor will it be the subject of any further discussion in this initial decision. However, as I noted at the hearing, if following the time deadline on October 22, 1993 complainant still believed that an issue existed in regard to the President's visit, it promptly could file a new complaint regarding the same. I am informed that such a complaint has been filed and will be heard by another administrative law judge.

***2** No oral testimony was offered at the hearing by complainant. Its case consisted of the following documents:

(1) The 1993 Gubernatorial Election Financial Summary Report (Form G-1) filed with ELEC by Florio '93, Inc. on October 4, 1993—the so-called “29-day preelection report” (Exhibit P-1);

(2) A photocopy of a document captioned as the Florio '93, Inc. “Campaign Schedule” for Tuesday, September 28, 1993, which also had been attached to the verified complaint filed with ELEC (Exhibit P-2);

(3) A certification by James Kennedy, Esq., attesting to the authenticity of the facsimile signature of one Julie Caudell appearing on the copy of a “certification of authenticity” signed by her (Exhibit P-4(a));

(4) The “certification of authenticity” by Caudell wherein she reported that an excerpt attached to it revealed that in 1989 a $10,000 reimbursement had been made by the gubernatorial campaign account of James Courter, the Republican nominee for Governor, which payment pertained to the Courter campaign's share of expenses for a general election visit made to New Jersey by President George Bush on Friday, November 3, 1989 (Exhibit P-4(b));

(5) A certification of David Schratwieser and filed by respondent with the Office of Administrative Law on October 19, 1993, regarding Attorney General Reno's visit (Exhibit P-5);

(6) A certification of David Applebaum and filed by respondent with the Office of Administrative Law on October 19, 1993 regarding Secretary Babbitt's visit (Exhibit P-6).

CASE FOR COMPLAINANT

Since complainant bears the burden of proving the allegations of its verified complaint by a preponderance of the credible evidence it proceeded first. As noted, no oral testimony was offered; rather, complainant's case solely consisted of the introduction in evidence of the exhibits mentioned above. In particular, they reveal the following. The gubernatorial election financial summary report (Exhibit P-1) did not allocate any costs of the visits of the two cabinet members to the Florio '93, Inc. Campaign Fund (Exhibit P-1). The “campaign schedule” issued by respondent on September 27, 1993, with respect to the Governor's schedule for the following day contained specific references to a reception for Secretary Babbitt at 10:25 a.m. and a press conference at 12 noon (Exhibit P-2). The certification by Kennedy (Exhibit P-4A) and the attached “certification of authenticity” by Caudell (Exhibit P-4B), dated October 19, 1993, sets forth that she is employed by the Republican State Committee and prepares and maintains election law records. At the request of the complainant, Caudell produced a copy of an excerpt from the Republican State Committee's fourth quarter 1989 ELEC report. The third item on that excerpted page revealed a reimbursement from “Friends of Jim Courter” to the Republican State Committee in the amount of $10,000 on November 7, 1989, for a “political rally.”

The last two exhibits, the certifications of Schratwieser and Applebaum, had been filed by Florio '93, Inc., in connection with its prehearing submissions in opposition to the verified complaint in this case (Exhibits P-5, P-6). Schratwieser's certification set

forth that he is the assistant communications director for the Office of the Governor and familiar with Attorney General Reno's visit to New Jersey on September 13, 1993. Schratwieser had been assigned to handle the details of the visit and noted that a scheduler in the Attorney General's office made clear to him that her visit was "governmental" and considered to be "official business" of the Department of Justice. The scheduler also had advised that the Attorney General would make no reference to either the gubernatorial election nor to the Governor as a candidate for reelection and that she had final approval as to all details of her schedule. It was agreed in advance that Attorney General Reno would speak on three specific topics, a national ban on assault weapons, community policing and violence in the schools, and that the trip was part of a commitment made by her toward a national effort organized by the Secretary of Education, Richard W. Reilly. Thus, according to Schratwieser, six members of the President's cabinet had agreed to visit different schools on September 13, 1993, to highlight education reform and Secretary Reilly had asked the Attorney General to highlight safe and drug-free schools in her appearances.

***3** According to Schratwieser, the Attorney General arrived in New Jersey on September 12, 1993, and visited a personal friend in Ridgewood where she stayed that evening. On the morning of September 13, 1993, she traveled from Ridgewood to Hackensack where she spoke at approximately 9:30 a.m. at a press conference about New Jersey's ban on assault weapons and the need for a similar national ban. The Governor arrived about 10 minutes after the Attorney General at the press conference which was attended by approximately 75-100 law enforcement officials from throughout New Jersey. Following the conference the Attorney General and Governor Florio traveled to Hackensack High School and thereafter to the Quibbletown School in Piscataway. The last stop on the Attorney General's schedule was at a Trenton police ministation where, according to Schratwieser, she highlighted Trenton's community policing program which was part of a federally funded effort.

Schratwieser's certification then noted that throughout Attorney General Reno's visit all scheduling arrangements were made through the Office of the Governor—the Florio campaign played no role at all in any of the scheduling nor, to Schratwieser's knowledge, did it decide who was to be invited to any of the events. His only contact with the Florio campaign staff was to inform them of the Governor's schedule for the day and to provide them with a copy of the press release issued by the Office of the Governor.

The Applebaum certification (Exhibit P-6) noted that he is an executive assistant to the Governor and director of policy. Among his responsibilities was coordination of the visit of Interior Secretary Babbitt to New Jersey and development of a schedule for the same. According to Applebaum, sometime prior to August 1, 1993, Secretary Babbitt contacted the Office of the Governor and expressed a desire to visit the State. Efforts to schedule the visit in August or early September were not successful. Thus, throughout September, Applebaum and/or members of his staff were in contact with representatives of the Department of Interior in order to establish a date to schedule the Babbitt visit. None of these arrangements were made, he said, with the participation or involvement of any one affiliated with the Governor's reelection campaign.

Ultimately, based upon the schedules of both Secretary Babbitt and Governor Florio, the Office of the Governor and Babbitt's office jointly decided that September 28, 1993, would be the date for the visit. It further was agreed that the Secretary would focus attention during his trip on preservation of the New Jersey Highlands, an area consisting of more than 1,000 square miles and stretching from the Hudson River to the Delaware River. The itinerary for the day was jointly decided upon by Applebaum with input from other members of the Office of the Governor and the New Jersey Department of Environmental Protection and Energy, as well as with employees of Secretary Babbitt's office. The intent was to provide an opportunity for the Secretary to meet with New Jersey environmental leaders and to provide both the Secretary and the Governor with a forum to announce newly awarded federal and state grants.

***4** Applebaum developed a nonpartisan list of state and environmental leaders to be invited to a private meeting with Secretary Babbitt and Governor Florio and the agenda was developed by those leaders. The meeting was held at Ringwood State Park and was followed by a reception. Approximately 30 persons attended the reception, no formal program was developed and no formal speeches were given. Following the reception, the Governor and Secretary Babbitt traveled to Alpine for a meeting with the former president of the Palisades Interstate Park Commission. The purpose of that meeting, according to Applebaum, was to enlist the support of the federal government for the purchase of Sterling Forest. A press conference was held outside the

Park Commission's Administration Building, at which time the Secretary announced federal grants and other assistance to help preserve open spaces in this state. The Governor also announced a new state planning grant for the Highlands. Secretary Babbitt left the state by 1:00 p.m. and at no time during his visit did he make any mention of the Governor's campaign.

Applebaum concluded his certification with the statement that during the entire discussion with federal officials concerning the Babbitt visit, all scheduling and coordinating of events was done by Applebaum and/or his staff. At no time did any of the Florio campaign personnel become involved in the planning. None of the invitations to any meetings attended by the Secretary were distributed by or with the help of the campaign committee personnel and at no time during the visit was any public discussion held, or speeches made, regarding the Governor's reelection campaign. As Applebaum put it, “the Governor's candidacy was not even involved.”

CASE FOR RESPONDENT

The respondent, Florio '93, Inc.'s case consisted of the admission into evidence of five exhibits and the testimony of Ms. Erin Callahan, deputy press secretary to Jo Astrid Gladding, the campaign's press secretary. In her position as deputy, Callahan noted that prior to September 10, 1993, the campaign would issue separate “advisories” pertaining to each scheduled campaign event (Exhibit R-1). These would be sent to a preexisting list of state and national reporters, usually on the day prior to the scheduled event so that they would know about it. The information contained on the advisory also could be found on releases issued by the Office of the Governor (Exhibit R-1(a)).

According to Callahan, the reporters were unhappy with the “advisory” procedure since the releases were not complete as to the full schedule for the following day. Thus, in order to accommodate the press concerns, it was determined that the campaign would contact the Office of the Governor in order to obtain a copy of the Governor's schedule. Thus, beginning on or about September 10, 1993, the campaign began to use a new format which essentially tracked the schedule put out by the Office of the Governor (Exhibit R-2(a)).

***5** When it began to include the full daily schedule in September, the respondent labeled the release it promulgated as the “Campaign Schedule.” Thus, on September 27, 1993, the day prior to the Babbitt visit, a schedule was promulgated with that caption (Exhibit R-2(a)). According to Callahan, Gladding was unhappy with the nomenclature since it could be interpreted potentially as connecting the campaign to the official functions of the Office of the Governor. Thus, she directed that a new release be prepared captioned as a “Public Schedule” rather than as a “Campaign Schedule.” Callahan then prepared a new schedule with that name change (Exhibit R-2(b)). No release had been prepared for the Reno visit on September 13 since it was well-known that the Attorney General would be in the state on that date.

On cross-examination, Callahan stressed that the reason for the change from the advisory format to the full schedule format had to do with the desire to accommodate the press and the fact that members of the press had complained about the incompleteness of the prior procedure. She also noted that the content of the campaign committee's “Public Schedule” is not decided by her. Indeed, it is her understanding that the contents of that schedule issued by the campaign are identical to and track the schedule promulgated by the Office of the Governor simply because that is a source of the information.

UNDISPUTED FACTS

The background facts necessary for a decision in this case are not in dispute. In particular, the answer filed by Florio '93, Inc., admitted that it is the principal gubernatorial campaign committee for Governor Florio and that the 29-day preelection report which it filed on October 4, 1993 (Exhibit P-1), did not allocate against its expenditure limit the cost of the visits to New Jersey of either Attorney General Reno or Secretary Babbitt. Of course the respondent's answer, in addition to that admission, went on to observe that no such allocations were appropriate or required. It also is not disputed that both complainant and respondent applied for and accepted public matching funds and therefore are subject to the statutory expenditure limits. Further,

no one disputes that the primary election was held on Tuesday, June 8, 1993, and the general election is to be held on Tuesday, November 2, 1993.

With respect to the visit of Attorney General Reno, it is understood that the visit took place on September 13, 1993, and was reported in the newspapers. With respect to the visit of Interior Secretary Babbitt, that visit took place on September 28, 1993 and similarly was reported in the newspapers.

DISCUSSION

Complainant relies upon a variety of statutory, regulatory and other sources of authority to support the proposition that some or all of the costs associated with the trips of Attorney General Reno and Interior Secretary Babbitt must be allocated to the Florio campaign's expenditure limit.

The first argument is that the legislative intent articulated throughout the Campaign Contributions and Expenditures Reporting Act itself, N.J.S.A. 19:44A-1 et seq., requires this result. In particular, counsel argues that the expenses of the Reno and Babbitt trips constituted an "other thing of value" spent "in aid of the candidacy" of Governor Florio since they clearly provided him with an opportunity not available to other candidates for significant public media access through which he could reach eligible voters with his "message" in a time frame in close proximity to the general election. *See* N.J.S.A. 19:44A-2, 44A-3. Cited in support of this argument is the decision in *N.J. Election Law Enforcement Commission v. Brown,* 206 *N.J. Super.* 206 (App. Div. 1985). In that case the court determined that since a newsletter published by three successful candidates for reelection to the Asbury Park Board of Education contained photographs and laudatory, noncritical profiles of the candidates, it represented the contribution of an "other thing of value," within the scope of N.J.S.A. 19:44-11. In my view, the *Brown* case is not applicable to the instant matter. First, the record before me essentially is silent with respect to what, if anything, Attorney General Reno and/or Interior Secretary Babbitt even said about Governor Florio's "campaign agenda," laudatory or otherwise. The newsletter in evidence in the *Brown* case palpably was designed to, and did provide, accolades to the three candidates since, as the court noted, their backgrounds and accomplishments were "presented in glowing terms," as were their "future objectives and aspirations." As the court further observed, the candidate profiles contained in the newsletter "unmistakably urged appellants' reelections upon the eligible electorate." *Brown, supra,* at 209. Although the board members in *Brown* did not sign the newsletter profiles and were not directly involved in its publication as such; nevertheless, the court determined that their personal participation and involvement in the development of the laudatory, non-critical front page coverage, coupled with the timing of publication during the school board election campaign, was enough to bring them within the language of the statute. Such active participation and involvement by candidate Florio plainly is absent in this case.

***6** In its decision in *Brown* the court also made reference to an earlier Appellate Division decision which has been cited by counsel in this case; *In Re John L. Dawes,* 156 *N.J. Super.* 195 (App. Div. 1978). There, Dawes, an unsuccessful incumbent candidate for the General Assembly, appealed from an ELEC determination fining him $100 for negligently omitting a campaign contribution from his report related to a newsletter which he had drafted and signed although ostensibly it was sent out in his capacity as chairman of a local utilities authority. *See* N.J.S.A. 19:44A-16(a). ELEC's determination that the cost of the newsletter should have been reported was affirmed by the Appellate Division since: (a) it implied that Dawes exerted influence in areas requiring approval by state agencies; (b) Dawes took personal credit for the receipt by the utility authority of state funding; and (c) the newsletter contained "expansive praise" of the candidate both as the utility authority's chairman and as an assemblyman. The totality of the text of the newsletter therefore constituted activity which had to be reported since clearly it was designed to "aid or promote" the election of the candidate.

In my view, neither *Brown* nor *Dawes* has any pertinence to the instant matter as the specific facts underlying the decisions in those matters were, on their face, quite different from the facts in this case. As the contents of the Schratwieser and Applebaum certifications, in particular, make eminently clear, these two decisions are relevant only to highlight the fact-sensitive nature of each case and the need to approach each one on an individualized basis.

Another major argument presented by complainant in support of its position is that the "Political Communication Rule," N.J.A.C. 19:25-11.10, while not directly applicable to the circumstances in this case, provides persuasive "guidance" under which the costs of the trips should be determined to be allocable against the Governor's campaign expenditure limit. Thus, according to complainant the post-primary visits to New Jersey by the two cabinet members and their appearances with the Governor during which they spoke about common goals and objectives clearly promoted the Florio campaign agenda through "broadcast" to eligible New Jersey voters. Recently, the provisions of this regulation received close attention from Administrative Law Judge Beatrice S. Tylutki. Thus, in a decision issued last week she determined that a public service television message by Governor Florio and broadcast on a Philadelphia television station on seven separate dates did not constitute a political communication pursuant to N.J.A.C. 19:25-11.10(b). *See, People for Whitman Comm. v. Florio '93, Inc.,* OAL Docket No. ELE 8789-93, decided October 22, 1993. In that case, the complainant argued that even though the message was framed as a public service announcement, the statements made by the Governor coincided with a political statement issued by him on the subject of welfare and, therefore, the television message had to be construed as a "political" communication under the rule. In rejecting that contention Judge Tylutki reviewed the regulatory history of the rule, including its adoption in 1989 and its amendment in 1991, applied the four-part test contained in the rule to the message and found that the record before her was inadequate to provide her with a basis upon which to determine that the message was broadcast at such times when it was most likely to be seen and heard by an audience which consisted of a substantial number of eligible voters. *See* N.J.A.C. 19:25-11.10(b)(2).

***7** Judge Tylutki also rejected the assertion that the television message was a communication that contained a statement or reference concerning governmental or political objectives or achievements of the candidate under N.J.A.C. 19:25-11.10(b)(3). In that respect she noted that the message primarily was designed to support a public service project designed to draw attention to child abuse and to urge parents to inform their children about that problem. As she put it, "the motivation was not to promote the candidacy of the Governor." *People for Whitman Committee v. Florio '93, Inc., supra,* OAL Docket No. ELE 8789-93, at p. 13. Thus, Judge Tylutki's decision makes plan that the rule is not to be given an interpretation which would expand its application beyond reason and the framers' intent. *See also, Friends of Governor Tom Kean v. ELEC,* 114 *N.J.* 33, 38-39 (1989).

In this case I agree with respondent that even if the "Political Communication Rule" applied to the instant circumstances (which it does not), there was no "broadcast" of a political communication. First, there is no proof as to any radio or television dissemination of the visits made by the cabinet members. As far as the record reveals, the only media attention was the fact that it was reported in the press. As respondent's counsel noted during the course of oral argument, a candidate does not exercise authority and control over what the print media says or does not say about various and sundry events involving gubernatorial participation. Thus, in order to constitute a "broadcast" under the rule there must have been some direct participation by or on behalf of the candidate which can be characterized as "initiation" of the activity. The fact that the media may choose to cover visits does not thereby bring the reporting of them within the scope of the regulation. In short, the Political Communication Rule does not apply to this case and, even if it did, the four objectives by which a communication is tested to determine if it is "political" have not been met.

In further support of its position, complainant makes reference to four advisory opinions issued by ELEC, including: (a) Advisory Opinion 43-1981; (b) Advisory Opinion 06-1984; (c) Advisory Opinion 01-1985; and (d) Advisory Opinion 04-1985. In my view, none support the proposition advanced. First, in Advisory Opinion 43-1981, the issue before ELEC had to do with two patently campaign-oriented appearances in New Jersey by Vice President Bush in connection with the campaign of then candidate Thomas Kean. Those visits clearly were designed to advance or promote that candidacy (described as "fund raising" and "party building") and constituted situations which totally were distinct from the one before me.

Advisory Opinion 06-1984 involved a request for an opinion by a candidate for a school board election who anticipated publication of a newsletter in which the candidate would include an "open letter" stating his position on school issues. Since the contents of the newsletter clearly would convey the candidate's views on school election issues and be communicated directly to prospective voters, ELEC entertained no doubt that the circumstances constituted an expenditure on behalf of his candidacy. Clearly, the circumstances in that matter have no relation to the instant case either.

***8** The two 1985 Advisory Opinions similarly are distinguishable. Thus, in Advisory Opinion 01-1985 the Commission was asked again to consider whether the publication and circulation of a newsletter subjected a candidate to the reporting requirements of the Act. In that matter a person who anticipated filing to become a candidate in the 1985 June primary election for a council seat in Rockaway Township, and who had previously published and distributed a newsletter throughout the township in his position as a committee person, asked whether he could continue to publish the newspaper bearing the legend that he paid for it. ELEC responded that even if the newsletter was characterized as "informational" in nature and contained no specific reference to any election nor encouraged the election or defeat of any candidate, including the inquirer; nevertheless, by providing a platform for the candidate to express his views on issues that could be relevant to his candidacy and by circulating his name to the electorate in the jurisdiction in which he was seeking elective office, the expenditures associated with its publication would be subject to campaign reporting requirements under the Act. In reaching that conclusion the Commission referred specifically to the decision in the *Dawes* case, *supra.* Thus, since the inquirer exercised control over the contents of the newsletter, and it was political in nature, there was no question but that the expenditures for its publication and distribution were related to his candidacy and came within the purview of the Act. Again, the facts in that case are totally different from the matter *sub judice.*

The fourth Advisory Opinion cited by the complainant is Opinion 04-1985. In that matter a newsletter was proposed to be published by three assemblymen representing a legislative district in Hudson County. ELEC determined that even if the newsletter contained no reference to the election, it would "have the effect of placing the names of the candidates and their views before the electorate in a time frame pertinent to the 1985 primary election," and therefore would "provide a platform for the candidates to express their views to the electorate concerning issues that presumably will be relevant to their candidacies in the approaching primary election." Those circumstances, according to the Commission, brought the proposed newsletter clearly within the purview of the Act. Here again, on its face, the underlying factual context is decidedly different from the matter before me.

Thus, contrary to complainant's contention, none of the Advisory Opinions establish, no less lend substantive support to the contention that the mere appearance by high-ranking federal cabinet officials in proximity to an election must always be deemed political and thereby implicate reportable expenses even though no appeal for votes for a candidate occurs. If that was the intent of the Legislature or ELEC, it certainly is not articulated in any statute, advisory opinion, rule or regulation of which I am aware.

***9** Complainant also relies upon a claimed "past practice" with respect to the visits in this case. Thus, one of the exhibits offered at the hearing (Exhibit P-4(b)) had to do with the $10,000 reimbursement in 1989 to the Republican State Committee from the campaign fund of gubernatorial candidate James Courter for a preelection visit by President Bush. Whether one such incident even arguably constitutes a "past practice" surely is seriously debatable. Beyond that, it is clear from the four corners of the exhibit itself that the expenditure obviously was in connection with a wholly "political" event since it designated the reason for the expense as a "political rally." In short, that one incident, even if it constituted a "past practice," would not require an allocation given the facts in this case.

Another argument made by complainant is that although not controlling, the provisions of 11 *C.F.R.* § 110.8(e)(2)(ii) point the way to the proper result in this case. That rule according to counsel establishes a rebuttable presumption that appearances by a presidential candidate on or after January 1 of the year of the election are political in nature. In my view, there is no New Jersey analogue which can be applied to the circumstances in the instant case. Indeed, for me to determine in this decision that a similar criterion should apply here would be rulemaking—a function which administrative law judges may not exercise. If the Legislature or ELEC under its delegated authority from the Legislature want to establish such a rule, they certainly are free to consider doing so.

I also must note that in its brief the respondent raises certain constitutional questions; *i.e.,* that if I should determine that N.J.A.C. 19:25-11.10(b) applies, then and in that event I should declare the rule to be void under the constitutional doctrines of "vagueness" and "overbreadth." As Judge Tylutki noted in her initial decision in the recent case involving a public service announcement on a Philadelphia television station, administrative law judges do not decide constitutional questions. Accordingly, even if I had determined that the Political Communication Rule did apply in this case I still would not reach the

constitutional issues. However, I, too, as did Judge Tylutki, will note the existence of the constitutional claims to preserve them for the record.

It may very well be that visits to this state by cabinet members or other high-level Federal officials during the course of a gubernatorial election campaign even, as here, for strictly non-political purposes and not in aid of any candidacy, nevertheless ought to implicate the Campaign Reporting and Expenditures Act so that a fully prophylactic impact will be obtained and no questions permitted to arise such as have generated the controversy in this case. However, as an administrative law judge it is my function to apply the statutes and the regulations as they are written, not to write or rewrite them myself. Perhaps in order to obtain such an effect and to guarantee a "level playing field" fair to incumbents and challengers alike steps should be taken which would interfere temporarily with normal governmental activities during a period of time in close proximity to an election. Potentially, such a rule might have a salutary benefit which justifies the sacrifices that would have to be made. Indeed, the federal regulation cited by complainant appears to do that. However, if that is deemed to be a sound course of action, the agency for adoption and implementation is not through the Office of Administrative Law in its quasi-judicial capacity.

***10** Finally, with respect to the "campaign" or "public" schedules released by respondent and about which Callahan testified (Exhibits R-2(a), R-2(b)), I would observe that although the judgment exercised by certain staff people of the campaign committee may perhaps be criticized, the mere fact that the schedules were identical to one another does not make the activity one which is "in aid of" the Florio candidacy. Keeping the press informed about a candidate's whereabouts and activities on a daily basis is an essential part of what a campaign does. The fact that the Florio '93 schedule coincided with a schedule promulgated by the Governor's Office does not make the one equal to the other in terms of the Act. Rather, whether the visits in this case give rise to an allocation requirement depends, I suggest, upon factors which do not include what a press office of a candidate says about the candidate's schedule, particularly where the candidate is an incumbent governing official. As counsel for respondent accurately observes, the identity of the two schedules is no more pertinent to a decision in this case than the absence of both or either one would be.

CONCLUSION AND ORDER

Accordingly, for the reasons set forth herein, I determine that the complainant has failed to establish by a preponderance of the credible evidence on the record before me that the circumstances of the visits to New Jersey on September 13, 1993 and September 28, 1993, by Attorney General Reno and Interior Secretary Babbitt, respectively, were such as to require that all or a portion of the costs thereof be allocated against the campaign expenditure fund of Governor Florio pursuant to the Campaign Contributions and Expenditures Reporting Act or the regulations promulgated pursuant to it. To the contrary, the circumstances of those visits have not been shown to have violated any provision of the Act, any regulation of ELEC, any past practice or any other legal source. Accordingly, I ORDER that the verified complaint filed by the People for Whitman Committee should be DISMISSED.

I hereby file my initial decision with the New Jersey Election Law Enforcement Commission for its consideration. This recommended decision may be adopted, modified or rejected by the New Jersey Election Law Enforcement Commission which by law is authorized to make a final decision in this matter. If the ELEC does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become final pursuant to N.J.S.A. 52:14B-10.

Pursuant to the request of the Election Law Enforcement Commission for expedited treatment, this decision will be delivered to the agency and to the parties this date so that the Commission, in its discretion, may review and act upon it prior to the date of the general election scheduled for November 2, 1993. If counsel wish to file exceptions to this determination they should coordinate said filing with the Commission.

FINAL AGENCY DECISION

McNANY, Chairman:

***11** This matter having come before the New Jersey Election Law Enforcement Commission (hereafter, the Commission) at its public meeting of October 28, 1993, and the Commission having considered the complaint of People for Whitman Committee (hereafter, the Complainant) against Florio '93, Inc. (hereafter, the Respondent) and this matter having been transferred to the Office of Administrative Law for hearing, OAL DKT. NO. ELE 9768-93, and having been heard by the Hon. Stephen G. Weiss, ALJ, and an Initial Decision by the Hon. Stephen G. Weiss, ALJ, having been rceived by the Commission on October 26, 1993;

And, no written exceptions having been received by the Commission;

And, the Commission having considered at its public meeting conducted on October 28, 1993, the oral arguments of Peter G. Verniero, Esq., on behalf of People for Whitman Committee, Complainant, and Angelo J. Genova, Esq., on behalf of Florio '93, Inc., Respondent;

And, the Commission having considered and accepted the Findings of Fact and Conclusions of Law contained in the Initial Decision which is incorporated by reference herein;

The Commission, by a vote of 3-0, hereby adopts the Initial Decision of the Hon. Stephen G. Weiss for the reasons expressed in the Initial Decision as the Final Decision in this case pursuant to the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq.

93 N.J.A.R.2d (ELE) 33 (N.J. Adm.), 1993 WL 548393

End of Document

EXHIBIT I

2013 WL 12371242 (N.J. Adm.)

Office of Administrative Law

State of New Jersey

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION, Petitioner,
v.
WILLIAM BROWN, Respondent.

Election Law
OAL DKT. NO. ELE 07619-12
AGENCY DKT. NO. C-9 0324 01 01-P2010
Record Closed: July 1, 2013
Decided: August 8, 2013

FINAL DECISION

Michele R. Levy, Esq., for petitioner
George Saponaro, Esq., for respondent (Saponaro & Sitzler, attorneys)

BEFORE PATRICIA M. KERINS, ALJ:

***1** THIS MATTER comes before the New Jersey Election Law Enforcement Commission (the "Commission") pursuant to the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 to 47 (the "Act"), following an INITIAL DECISION of the Office of Administrative Law, Honorable Patricia M. Kerins, ALJ which concluded in a summary decision that Respondent, William Brown, admitted that he was a candidate who filed his "Candidate Sworn Statement" late in violation of the Act, and that the appropriate penalty for the violation was a penalty of $450.00 and reimbursement of $48.00 for Sheriff service fees. The INITIAL DECISION was issued on August 8, 2013 and mailed to the parties on that date. No exceptions were filed by the parties to the INITIAL DECISION. This matter was considered by the Commission at its meeting conducted on September 17, 2013. The deadline for the Commission to render its FINAL DECISION is September 23, 2013.

THEREFORE, the Commission adopts as its FINAL DECISION in this case, the INITIAL DECISION of the Honorable Patricia M. Kerins, ALJ.

PENALTY

THEREFORE, pursuant to N.J.S.A. 19:44A-22 and N.J.A.C. 19:25-17.1 et seq., the Commission hereby REPRIMANDS the Respondent William Brown and imposes a penalty in the amount of $350.00 for late filing of Candidate Sworn Statement (Form A-1), a $100.00 subpoena surcharge, and reimbursement of $48.00 for Sheriff service fees. The Respondent submitted payment of $450.00. Payment of the balance, in the amount of **$48.00** is now due.

PAYMENT

Payment may be made by check or money order payable to "Treasurer, State of New Jersey," and should be submitted to:

New Jersey Election Law Enforcement Commission

P.O. Box 185

Trenton, New Jersey 08625-0185

To insure proper credit, write the Final Decision number in the above heading on your check or money order.

RIGHT TO APPEAL

PLEASE BE ADVISED that if you wish to appeal this Final Decision, you must file a notice of appeal with the New Jersey Superior Court, Appellate Division "within 45 days from the date of service of the decision or notice of the action taken" pursuant to New Jersey Court Rule 2:4-1(b). If you have any questions about filing the notice of appeal, contact the Clerk's Office of the New Jersey Superior Court, Appellate Division at (609) 292-4822.

Date of Mailing: September 19, 2013

RONALD DEFILIPPIS
Chairman

INITIAL DECISION

STATEMENT OF THE CASE

The New Jersey Election Law Commission (Commission) moves for summary decision in this matter based on William Brown's failure to fulfill his candidate filing requirements in a timely fashion.

PROCEDURAL HISTORY AND FACTUAL DISCUSSION

***2** William Brown was a candidate in the 2010 primary election for municipal office in Mount Laurel Township, Burlington County. The 2010 primary election was held on May 26, 2010. On June 27, 2011, the Commission issued a three-count complaint against Brown alleging failure to file campaign reports for the 2010 primary election in violation of the Campaign Contribution and Expenditures Reporting Act (Act), N.J.S.A. 19:44A-1 to -47. On January 19, 2012, the petitioner received respondent's "Candidate Sworn Statement" (Form A-1), see N.J.A.C. 19:25-8.4, dated November 22, 2011, along with an answer to the complaint. In response to Brown's request for a hearing, the case was transferred to the Office of Administrative Law (OAL) on June 5, 2012, for hearing as a contested case. The Commission has filed a motion for summary decision and respondent has filed an opposing brief. The parties were provided an opportunity for oral argument on the motion.

The Commission has filed extensive and detailed motion papers setting forth the material facts and the procedural history of this matter. Respondent does not dispute those facts or the procedural history, and for purposes of this motion they are accepted and incorporated herein. Brown was a candidate in the 2010 primary election for municipal office in Mount Laurel Township, Burlington County. Brown neither raised nor spent funds during his campaign. All candidates are required under the Act to file campaign finance reports, and Brown did not file as required for the election until January 19, 2012, after petitioner had filed a complaint as a result of his noncompliance.

Respondent, while not disputing the fact of his failure to comply with the filing requirements under the Act, argues in his reply brief that he relied on others in his campaign to fulfill the statutory filing requirements. In his brief he details his interactions with those upon whom he relied to file the required forms. [1] Brown further contends that enforcement of the Act would be a miscarriage of justice contrary to legislative intent, as he neither raised nor spent any money for his campaign. Brown argues that the New Jersey Supreme Court has interpreted the Act's intent, which is to regulate and monitor those likely to have the greatest impact upon the outcome of legislation and to expose the sources and amount of significant moneys used to affect the

legislative process. Respondent further argues that there is a material dispute of facts as to whether petitioner's prosecution of respondent is in conflict with the legislative intent of the Act.

LEGAL ANALYSIS

The rules governing motions for summary decision in an OAL matter are embodied in N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 of the New Jersey Court Rules. See Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Under N.J.A.C. 1:1-12.5(b), a motion for summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The opposing party, in order to prevail, must submit responding affidavits showing that there is indeed a genuine issue of material fact which can only be determined in an evidentiary proceeding. Failure to do so entitles the moving party to summary decision. A judge is to scrutinize the competent evidential materials presented, in the light most favorable to the non-moving party, and consider whether a rational factfinder could resolve the issue in favor of the non-moving party. Brill, supra, 142 N.J. at 540. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary decision if the evidence is "so one-sided that one party must prevail as a matter of law." Id. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed.2d 202, 214 (1986)). If the non-moving party's evidence is merely colorable, or is not significantly probative, summary decision should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). The New Jersey Supreme Court's standard for summary decision is thus designed to "liberalize the standards so as to permit summary [decision] in a larger number of cases," due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, supra, 142 N.J. at 539 (citation omitted).

***3** As Brown does not contest the fact that he failed over a significant period of time to meet the filing requirements of the Act, this matter is appropriate for summary decision. While he presented facts in mitigation of his action, those facts are more appropriate for a determination of penalty, and even if accepted do not disturb the material fact of his noncompliance.

In an action by the Commission for a violation of the Act, the Commission carries the burden of proof, by a preponderance of the evidence. Election Law Enforcement Comm'n v. Williams, 93 N.J.A.R.2d (ELE) 4. The Act provides that a candidate or candidate committee shall certify as correct and file with the Election Law Enforcement Commission a full cumulative report of contributions and expenditures on the 29th day preceding an election, the 11th day preceding an election, and the 20th day following an election, N.J.S.A. 19:44A-16(b), reporting all "moneys, loans, paid personal services or other things of value, made to him ... and all expenditures paid out of the election fund of the candidate ...." N.J.S.A. 19:44A-16(a). A candidate who collects and spends under the threshold amount may file with the Commission a "Candidate Sworn Statement" no later than 29th day before an election. N.J.S.A. 19:44A-16(d). The Act specifies that if no moneys, loans, paid personal services or other things of value were contributed, the report should so indicate. N.J.S.A. 19:44A-16(a). And if no expenditures were paid or incurred, the report shall likewise so indicate. Ibid.

[A]s a matter of public policy, N.J.S.A. 19:44A-1, there is not even liberality of construction to be accorded. The straightforward intent of the language must be honored. The wording is indisputable that the Legislature set a date for reports, or where two thousand dollars or less is involved, a sworn statement (Form A-1). Candidates may not superimpose conditions which they find equitable in their setting. They must abide by the terms of the Act.

[Williams, supra, 93 N.J.A.R 2d (ELE) at 6.]

In this matter, summary decision is appropriate, as there are no material factual disputes. The respondent admits that he was a candidate who had filed his "Candidate Sworn Statement" late, in violation of the Act. Respondent's argument that the Act was not intended to prosecute candidates who collected and expended no funds is unpersuasive. The Legislature has considered that possibility and stated that reporting is required. N.J.S.A. 19:44A-16. The plain words of the statute cannot be ignored, and the Commission is entitled to summary decision as a matter of law.

***4** By way of his brief, respondent asserts that he relied upon others to make the appropriate filings on his behalf. However, even if he did so, and even if he was misled by them, respondent failed for a number of months after he was aware that the Commission had filed a complaint against him to comply with the statute. Given those facts, the Commission's request for a penalty of $450 and reimbursement of $48 for sheriff-service fees is reasonable.

ORDER

Petitioner's motion for summary decision is **GRANTED**. It is further **ORDERED** that pursuant to N.J.S.A. 19:44A-22 and N.J.A.C. 19:25-17.1 et seq., a penalty of $450 is imposed, and respondent shall reimburse petitioner $48 for sheriff-service fees.

I hereby **FILE** my initial decision with the **NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION**, which by law is authorized to make a final decision in this matter. If the New Jersey Election Law Enforcement Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION, 28 West State Street, PO Box 185, Trenton, New Jersey 08625-0185**, marked “Attention: Exceptions.” A copy of any exceptions must be sent to the judge and to the other parties.

PATRICIA M. KERINS, ALJ

Footnotes

1 Although represented by counsel, respondent, a law student, submitted a responsive brief in his own name. His factual assertions are part of his brief, and were not submitted under affidavit or certification.

2013 WL 12371242 (N.J. Adm.)

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EXHIBIT J

2005 WL 389135 (N.J.B.P.U.)

Re Comcast of Central New Jersey, LLC

Docket No. CE04111461

New Jersey Board of Public Utilities

January 13, 2005

Before Fox, president, and Butler, Hughes, and Alter, commissioners.

BY THE BOARD:

CABLE TELEVISION

ORDER DENYING EMERGENT RELIEF

SERVICE LIST ATTACHED

The New Jersey Board of Public Utilities (‘Board‘) and its Office of Cable Television (‘OCTV‘), pursuant to *N.J.S.A.* 48:5A-1 *et seq*., have been granted general supervision and regulation of and jurisdiction and control over all cable television systems which operate within the State of New Jersey, subject only to the limitations of Federal law. Pursuant to this authority, the within matter was opened to the Board by the filing by Comcast of Central New Jersey, LLC (‘Comcast‘) of a petition for temporary and emergent relief and a Verified Complaint, seeking immediate access to a multifamily housing complex currently under construction, known as the Mews at Princeton Junction (‘Mews ‘) in West Windsor, New Jersey, for the purpose of installing Comcast's equipment and facilities (‘plant‘) for the use in cable television service. This petition was also served upon the builder and owner of Mews, Toll Brothers, and seeks to provide Comcast with the opportunity to install its plant within the Mews prior to the closing of underground utility trenches and before the walls of the individual units are finished, thereby allowing for a much easier installation then would be required in a finished facility.

Comcast notes in its application that the Mews consists of 14 buildings and will include a total of 653 residential units as well as a clubhouse. Comcast alleges that the complex is still under construction, and that, at the time of the petition, the trenches to the public right-of-way were still open and available for the connection of the cable plant. Comcast claims it requested access from Toll Brothers and was denied or otherwise ignored. Specifically, Comcast requested formal access via a letter, dated October 15, 2004. Comcast claims that Toll Brothers never responded. Comcast also notes that Toll Bothers indicated that broadband communications services were being supplied to the Mews through an uncertified satellite master antenna television (‘SMATV ‘) system that is affiliated with the builders.

Based upon this information, Comcast has filed the present application; seeking a Board Order allowing for immediate approval to install plant during the construction phase, rather than after the construction is complete, when the installation of plant will be much more expensive and destructive. As such, Comcast seeks emergent relief.

Toll Brothers filed an opposition to this request, including an answer to the Verified Complaint as well as a copy of the letter sent by Toll Brothers in response to the letter seeking access sent by Comcast. In this letter, Toll Brothers notes that the actual owner/builder of the Mews is Toll Brothers Realty Trust, and also responds to the specific elements of the request for service. Specifically, the letter notes that the request for access from Comcast did not specify any particular building or buildings on the site, and included a form of access agreement that was unacceptable to Toll Brothers. Likewise, Toll Brothers states that the $1.00 offered is not ‘just compensation and failed to provide reasonable compensation for Comcast's impact to the project.‘ Toll Brothers indicates that Comcast failed to provide proof of insurance and other indemnification protections, and notes that the trenching for utility access took place not on November 18, 2004, but on October 18, 2004, and that as Comcast was involved in

a number of meetings prior to that date, Comcast should have been aware of the schedule. Nevertheless, Toll Brothers indicates a willingness to discuss appropriate terms and conditions for access.

On December 20, 2004, Comcast filed a reply to Toll Brothers' opposition papers. Comcast notes its belief that Toll Brothers has no intention of providing access to the property and that Toll Brothers took any number of steps to delay and avoid this matter. Additionally, Comcast refutes the objections raised by Toll Brothers as to the methods of construction, the indemnification aspects, and the specificity of service. Comcast also refutes some of the details as to prior discussions on utility service, on the timetable for trenching, and reiterates its belief as to the scope and intent of the Cable Act's grant of a right of access for cable television operators. Based upon this, as well as a claim of a settled legal right to access the buildings, Comcast again requests that the emergent relief be granted.

Prior to the Board's December 22, 2004 Board Meeting, Comcast requested, with the consent of Toll Brothers, that this matter be carried for an agenda cycle to allow for continued discussion and briefing on the part of the participants. No indication of a settlement has been forthcoming, and thus the Board finds that acting upon the Petition at this time is appropriate.

***DISCUSSION*:**

With a request for emergent relief, under *N.J.A.C.* 1:1-12.6, the moving party must make a showing of the criteria set forth in a series of cases flowing from the Court's determination in *Crowe v. DeGioia*, 90 *N.J.* 126, 132-34 (1982). These criteria include the requirement that the movant establish: (1) a likelihood of success on the merits; (2) irreparable injury to the movant absent the relief; (3) no substantial harm to other parties; and (4) no harm to the public interest. The granting of an emergent relief is the exception rather than the rule and is a prime example of the exercise of sound judicial discretion in that the propriety of granting the relief is dependent upon the entire circumstances of a particular case, and 'considerations of justice, equity and morality.'*Virginia Railway Co. v. United States*, 272 *U.S.* 658, 672-73, 47 *S. Ct.* 222, 228, 71 *L. Ed.* 463, 471 (1926); *Coskey's T.V. & Radio Sales v. Foti*, 253 *N.J. Super.* 626. 639 (App. Div. 1985) (quoting *Zoning Bd. of Adj. of Sparta Tp. v. Service Electric Cable Television of N.J., Inc.*, 198 *N.J. Super.* 370, 379 (App. Div. 1985)). Notably, within these requirements, mere monetary loss alone does not constitute irreparable harm. *Morton v. Beyers*, 822 F.2d 364, 372 (3rd Cir. 1987).

Here, Comcast is unable to satisfy the requirements for emergent relief. First, as pointed out by Toll Brothers, Comcast has yet to receive a request for service from a tenant as no tenants yet exist. The Mews are still under construction and no tenants have yet taken possession of the units. Under *N.J.S.A.* 48:5A-49, a request from a tenant for service appears to be a requirement. Specifically, the statute notes:

> No owner of any dwelling or his agent shall forbid or prevent any tenant of such dwelling from receiving cable television service, nor demand or accept payment in any form as a condition of permitting the installation of such service in the dwelling or portion thereof occupied by such tenant as his place of residence …. [*N.J.S.A.* 48:5A-49.]

The explicit requirement of a tenant as set forth in this statute makes the present situation, at best, an extension of the present state of the law, as seen by the absence of precedent on the issue. Accordingly, this is an inappropriate situation for emergent relief as Comcast is unable to show the necessary likelihood of success on the merits.

Similarly, the requirement of showing irreparable injury is also unsatisfied. Comcast has indicated a level of expense and inconvenience related to the retrofitting of cable plant in the event of a denial of access at this time as well as a perception that difficulty in convincing customers to forego the incumbent SMATV may minimize subscription opportunities. Nevertheless, and as Comcast concedes, the plant can be placed at a later date, albeit subject to a financial disincentive. As to the loss of

possible customers due to the presence of the incumbent SMATV, this is an issue of loss of revenue. Thus, Comcast is essentially claiming financial losses — which, based upon case law such as *Morton v. Beyers*, 822 *F.*2d 364, 372 (3rd Cir. 1987), should not serve as a foundation for the granting of emergent relief.

Accordingly, based upon the foregoing, the Board *HEREBY FINDS* that emergent relief is inappropriate in the current situation, and instead directs this matter be transmitted to the Office of Administrative Law as a contested case, to allow for the necessary development of the record, and, hopefully, to provide the parties the opportunity to reach a negotiated settlement. As such, the Board *HEREBY DENIES* the application for emergent relief. DATED: 1/13/05

I/M/O THE PETITION OF COMCAST OF CENTRAL NEW JERSEY, LLC FOR ACCESS TO CERTAIN PREMISES KNOWN AS 'MEWS AT PRINCETON JUNCTION,' LOCATED IN THE TOWNSHIP OF WEST WINDSOR, COUNTY OF MERCER, STATE OF NEW JERSEY

SERVICE LIST

Celeste M. Fasone, Director Office of Cable Television Board of Public Utilities Two Gateway Center Newark, New Jersey 07102 Richard P. De Angelis, Esq. Stryker, Tams & Dill, LLP Two Penn Plaza East Newark, New Jersey 07105 James C. Meyer, Esq. Riker, Danzig, Scherer, Hyland & Perretti, LLP Headquarters Plaza One Speedwell Avenue Morristown, New Jersey 07962-1981 Seema M. Singh, Esq. Ratepayer Advocate Christopher J. White, Esq. Jose Rivera-Benitez, Esq. Division of the Ratepayer Advocate 31 Clinton Street, 11th Floor P.O. Box 46005 Newark, New Jersey 07101 Kenneth J. Sheehan Deputy Attorney General State of New Jersey, Division of Law 124 Halsey Street P.O. Box 45029 Newark, New Jersey 07101 William H. Furlong, Chief Bureau of Inspection & Enforcement Office of Cable Television Board of Public Utilities Two Gateway Center Newark, New Jersey 07102 Dave Lanigan Bureau of Inspection & Enforcement Office of Cable Television Board of Public Utilities Two Gateway Center Newark, New Jersey 07102 Lawanda Gilbert, Esq. Counsel's Office Board of Public Utilities Two Gateway Center Newark, New Jersey 07102

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GENOVA BURNS LLC
Angelo J. Genova, Esq. (005501979)
Daniel A. Lebersfeld, Esq. (022552004)
Harrison C. Clewell, Esq. (338302021)
Katherine Szabo, Esq. (411662022)
494 Broad St.
Newark, New Jersey 07102
(973) 533-0777
Attorneys for Respondent
Townsquare Media, Inc.

IN THE MATTER OF SPADEA FOR GOVERNOR, A SINGLE CANDIDATE COMMITTEE FOR THE 2025 PRIMARY ELECTION	**CERTIFICATION OF SAMUEL GAGLIARDI IN OPPOSITION TO NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION'S ORDER TO SHOW CAUSE**

I, Samuel Gagliardi, of full age, hereby certify as follows:

1. I am the Vice President of Content for radio station New Jersey 101.5. New Jersey 101.5 is owned by Townsquare Media Trenton, LLC, which is in turn a wholly owned subsidiary of Townsquare Media, Inc. ("Townsquare") I am fully familiar with the facts set forth herein.

2. I make this certification in opposition to the New Jersey Election Law Enforcement Commission's ("ELEC" or the "Commission") Order to Show Cause, which is scheduled to be heard by the Commission on June 28, 2024.

3. I have been the Vice President of Content for New Jersey 101.5 since December 2023 and have worked with Townsquare since May 2023. I have worked in media and radio since 1989.

4. William G. Spadea ("Bill Spadea" or "Spadea") has hosted a talk-program for station WKXW, Trenton, New Jersey, broadcasted on New Jersey 101.5 since December 2015. During the four-hour program, which runs from approximately 6:00 AM to 10:00 AM on

weekdays, he discusses issues and current events that impact the residents of New Jersey, including both political and non-political topics such as local sports, restaurants, community events, and entertainment.

5. Once Townsquare became aware of Spadea's intention to seek the Republican nomination for Governor of New Jersey, Townsquare conferred with counsel and subject matter experts to prepare guidelines (the "Guidelines") designed to ensure that Spadea's employment with Townsquare remains within the bounds of New Jersey and Federal election laws.

6. Spadea signed the Guidelines on June 14, 2024 and Regional Vice President Brian Lang signed for Townsquare on June 15, 2024. Attached hereto as **Exhibit A** is a true and correct copy of the Guidelines.

7. The Guidelines state, in part, that their objective is to ensure that Spadea "not use [his] broadcast platform to advance [his] candidacy." **See** Exhibit A, p. 2.

8. The Guidelines prohibit Spadea from soliciting campaign contributions, endorsements, resources, or other support for his candidacy during his broadcast. He is also not permitted to discuss his candidacy or the candidacies or qualifications of any other person who has announced their candidacy, or intention to run for governor of New Jersey in the 2025 election. **See** Exhibit A, p. 2.

9. While Spadea is permitted to discuss political issues on his program, the Guidelines make clear that he must avoid linking his opinions to his agenda as a candidate or hypothetical actions as Governor. **See** Exhibit A, p. 2.

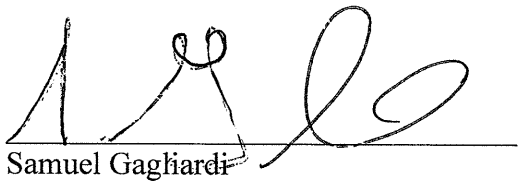
10. Spadea publicly declared his candidacy on June 17, 2024 following the conclusion of his program.

11. As Spadea announced his candidacy for New Jersey Governor in the 2025 election, Townsquare prepared a disclaimer to air before his program which our station voice talent recorded and I produced. Since June 18, 2024, this disclaimer, printed below, has been broadcasted over the airwaves at approximately 6:08 AM, just after the first reporting of the day's traffic and weather and just before the beginning of Spadea's program.

> Townsquare Media, and New Jersey 101.5 do not support, endorse, advocate, encourage, fund, or appeal for the election or defeat of any candidates for public office, including Bill Spadea specifically, who has announced his intention to run for the Office of Governor of New Jersey. Townsquare Media, its affiliates, executives, officers, agents and employees, including New Jersey 101.5 did not request, suggest, invite or encourage Bill Spadea to decide to seek to become a legally qualified candidate for the Office of Governor of New Jersey. As a result of Mr. Spadea's decision to run for Governor, Townsquare Media and New Jersey 101.5 have implemented parameters, restrictions and guidelines on the content of this broadcast to eliminate any communication and broadcast of any content endorsing, supporting, encouraging, advocating, promoting, or appealing for the nomination, election or defeat of any candidates for public office, and in particular Bill Spadea.

12. The recorded disclaimer will be played directly before Spadea's show for the remainder of his time on air as a candidate.

I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Samuel Gagliardi

Dated: June 24, 2024

EXHIBIT A

CONFIDENTIAL

townsquare

Bill Spadea: Post Announcement Guidelines

Background:

- You, Bill Spadea, are employed by Townsquare as a talk-program host for FM broadcast station WKXW, Trenton, New Jersey ("WKXW" or "the Station"), which Townsquare owns and operates.

- You have informed Townsquare that you are planning to run for the office of Governor of the State of New Jersey in the 2025 election for that office. You have further advised Townsquare that your first step will be to run in the primary election seeking the Republican Party's nomination to be its candidate in the general election on November 4, 2025. You also have informed Townsquare that you plan to make a public announcement of your candidacy in June 2024.

- As discussed, and to confirm, once you become a "legally qualified candidate" – as defined by the Federal Communications Commission ("FCC") and New Jersey Election Law – you will no longer be permitted to appear on the Station as the host of your current program or any Townsquare affiliated program.

- Based on information available at this time, it is understood that to appear on the Republican Primary ballot, you must be a "legally qualified candidate" by no later than April 3, 2025. In developing these guidelines, and in the interests of both the Station and in your own interests, Townsquare has relied upon your representations of your intentions to become a "legally qualified candidate." Note, however, that these Guidelines should not be viewed as providing you with Townsquare's advice and counsel, legal or otherwise, with respect to your decisions and characterization of how, when, and if you choose to become a "legally qualified candidate."

Purpose:

- Running for political office while maintaining a role as a radio host involves navigating complex federal and state campaign finance laws and communications laws, including FCC regulations to ensure that your broadcast activities do not constitute illegal campaign contributions or expenditures and do not violate the FCC's rules around "plugola" and "equal time" obligations, among others.

- The purpose of these Guidelines is to set forth content parameters and standards under which you may continue to appear in your current capacity on the Station from the time you publicly announce your candidacy for governor of New Jersey until you become a "legally qualified candidate" (the "Relevant Time"). This is the only timeframe that these Guidelines are designed to cover. Once you become a "legally qualified candidate," you will not be permitted to continue to appear on your program as its host and you will be

treated by the Station no differently than any other "legally qualified candidate" when it comes to equal broadcast opportunities.

- Please note that the development of these Guidelines is an iterative process that may evolve over time as new issues emerge. Townsquare hopes and expects to work collaboratively with you and your team to ensure compliance with all applicable rules and respond to issues as they arise.

Guidelines:

- The fundamental objective of these Guidelines is that you not use your broadcast platform to advance your candidacy. As such, these Guidelines are designed to create curbs to your doing so during the Relevant Time while you continue with the Station prior to your becoming a "legally qualified candidate." These Guidelines should be read, be interpreted, and applied with that in mind.

- You may not solicit campaign contributions, endorsements, resources, or other support for your candidacy during your show. Fundraising activities must be kept entirely separate from your broadcasting platform.

- You may not discuss the candidacies or qualifications of any other person who has announced that he or she is running or planning to run for governor of New Jersey in the 2025 election, whether as a Democrat, a Republican, a member of another political party, or as an Independent.

- You may not use your radio platform to directly or indirectly endorse or advocate for your own candidacy or attack your opponents.

- You may not discuss your candidacy on the show and may not invite or encourage others to do so.

    - This includes guests appearing on your show, callers who call into his programs, and other Townsquare employees or contractors. Townsquare will issue a directive to this effect to other Station employees.

- You may continue to talk about political issues on your show – both national and local in nature. You can continue to state your opinions on such issues. However, you will be sensitive and mindful about not conflating or connecting your opinions with any political agenda affiliated and advancing with your candidacy.

- You should refrain from explicitly stating or discussing what you would or would not do if you were the Governor or the Republican candidate for Governor. Townsquare wants to avoid accusations that you or the Station are engaged in any form of campaigning or communications advancing of your candidacy.

- Townsquare will have the staff of your show screen callers before they are put on the air. Staff will instruct callers not to mention your candidacy or that of any other candidate for Governor. If, despite such warnings, a caller does bring up your candidacy, please redirect the conversation of the call without substantively commenting on your candidacy or the caller's comments.

    - Townsquare realizes that your show is live and knows that you are a professional; Townsquare asks that you do the best you can under the circumstances. For example, if someone goes on air and says "I am so glad you are running for governor," you should respond "Thank you" and change the topic.

- You may not solicit any donations or signatures on petitions in support of your candidacy, or promote any event where donations or signatures will be solicited.

- You may not discuss or mention any campaign events or activities where you will be appearing in the capacity of a candidate or that in any way relate to or support your candidacy – either prior to or after any such event.

    - However, it is understood that you may continue to discuss events which do not relate to or support your candidacy on air, provided that you adhere to the aforementioned guidelines (e.g., no solicitation of donations, signatures, and no mention or promotion of your candidacy). You agree to provide Station management with a list of upcoming events which you plan to discuss on air in advance to ensure compliance with these Guidelines.

- Promos for the Station or Station events may not mention or promote your candidacy or any event that relates to or supports your candidacy.

- Your campaign may purchase advertising on the Station, but must adhere to all relevant Station rules around political reporting and shall be treated the same as any other candidate.

- Pre-recorded endorsements can proceed as long as they are not political in nature.

- You must adhere to these Guidelines for any and all content affiliated with Townsquare or any of its affiliates, including podcasts, social media content, online articles, and online videos.

- Please plan to regularly review pre-planned content and segments with both your team and Townsquare's legal department, as necessary, to ensure that we stay ahead of issues that may fall into legal gray areas.

- You acknowledge and understand that Townsquare will not indemnify or reimburse you for any legal fees or costs, fines or penalties directed at you or your campaign related to legal challenges or regulatory investigations resulting from your presence on air during the Relevant Time.

townsquare

- Townsquare reserves the right to revisit the decision of whether you may remain on air during the Relevant Time in response to legal or other challenges at any time.

You acknowledge that you will adhere to the guidelines set forth above.

Bill Spadea

6/14/2024
Date

DocuSigned by:
Brian Lang
5CA58D2C69D24DE...
Brian Lang
Regional Vice President, Townsquare Media

6/15/2024
Date