FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF VICE CHAIRMAN

STATEMENT OF VICE CHAIRMAN DAVID M. MASON AND COMMISSIONER HANS A. von SPAKOVSKY

ON

FINAL AUDIT REPORT ON BUSH-CHENEY '04, INC.

We write separately to explain our views on the "hybrid ad" issue addressed in the Final Audit Report on Bush-Cheney '04, Inc. ("BC04"), and Bush-Cheney '04 Compliance Committee, Inc. BC04 complied with the applicable regulations and precedent of this Commission and did not violate the law in their allocation of the costs of these hybrid ads that benefited both BC04 and other candidates of the Republican Party.

I. Background

Following the 2004 Republican National Convention, after President Bush and Vice President Cheney had accepted public funding for the general election period, the Bush-Cheney campaign and the Republican National Committee spent $81,418,812 on media advertisements.[1] These costs were shared evenly. The advertisements referred to President Bush and/or Senator Kerry and also included references to either "Democrats," "Republicans," "our leaders in Congress," "Congressional leaders," "liberals in Congress," or "liberal allies." The question facing the Commission was whether these expenses were properly shared, and if not, if BC04 had accepted improper funds during the publicly-funded general election period.

We cast votes in this matter to affirm the permissibility of attributing the costs of these television advertisements to both BC04 and the Republican National Committee.[2] The permissibility of such cost-sharing is well-established by agency precedent, and the

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[1] On September 25, 2004, the Kerry-Edwards campaign and the Democratic National Committee followed suit and launched their own series of "hybrid ads." *See* Liz Sidoti, *Kerry Campaign, DNC to Run Joint Ads*, AP Online (Sept. 24, 2004). This joint effort spent a substantial amount. *See* Michael J. Malbin, ed., *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act* at 32 (2006).

[2] Chairman Toner and Commissioners Mason and von Spakovsky voted to find no violation of the law. Vice Chairman Lenhard and Commissioners Walther and Weintraub voted to find a violation, which in turn would have yielded a finding that BC04 illegally accepted over $40,000,000 in in-kind contributions from the Republican National Committee. The remedy for such a finding would be payment by BC04 of this amount to the U.S. Treasury.

parties acted entirely reasonably and in reliance on prior decisions by the Federal Election Commission.

Some sensibilities may be offended by the sheer size of the advertising buys at issue, but dollar amounts should in no way impact the legal issues at stake. Others may argue that attribution was impermissible because no specific exemption from the general public funding rules exists in our regulations. By the same token, no specific prohibition exists either, and in the face of consistent Commission sanction, the parties involved cannot be faulted for believing their actions to be within the bounds of the law, as in fact they were.

II. Analysis

A. Attribution According To Benefit Derived: 11 CFR § 106.1

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

B. Phone Banks

1. Bush-Cheney 2000 Audit

During the 2000 general election, Bush-Cheney 2000, Inc., and 15 Republican state party committees shared the cost of a phone bank get-out-the-vote effort. The calls urged individuals to "get . . . families and friends . . . out . . . to vote for Governor George W. Bush and all of our great Republican team."[3] The state party committees paid 75% of the costs ($1,495,973) and Bush-Cheney 2000 paid the remaining 25% ($498,658). The Audit Division examined the content of the phone bank script, and determined that "the script was equally devoted in space and time to Governor Bush and 'our great Republican

[3] *See Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc., Office of General Counsel Memorandum (Dec. 2, 2002)* at 3, *available at* http://www.fec.gov/audits/2000/p00-02-05.pdf.

team." The Audit Division concluded that a 50% / 50% attribution was appropriate.[4] As the General Counsel observed, the Audit Division "treated the reference to 'our great Republican team' as another clearly identified candidate," and applied the attribution method set forth in 11 CFR § 106.1.[5]

The Office of General Counsel (OGC) also recommended that the Commission require a 50% / 50% allocation for the phone bank, albeit for different reasons. OGC disagreed with the Audit Division's treatment of "our great Republican team" as a "clearly identified candidate" under 11 CFR § 106.1. But, OGC noted that "[i]n the past, the Commission has permitted allocations that were not provided for in the regulations with respect to expenditures involving multiple purposes."[6] OGC explained:

> In this matter, the phone bank communication appears to have had the multiple purpose of benefiting then-Governor Bush as well as "our great Republican team." This Office does not have information that suggests that the phone bank communication exclusively benefited then-Governor Bush. This Office is not aware of the identity or the number of candidates that were being referenced by the term "our great Republican team" in the phone bank script. However, it appears likely that this reference in the communication provided some benefit to the state party committees as such organizations are generally interested in promoting the election of all federal, state, and local candidates on the Republican ticket. Under the circumstances, this Office believes that it would be reasonable for the Commission to recognize the apparent multiple purposes for which the phone bank expenditures were made, and to accordingly permit allocation of the costs. Given that the script was equally devoted in time and space to then-Governor Bush and "our great Republican team," this Office believes it is reasonable to allocate the costs of the phone bank on a 50% basis. This allocation percentage is consistent with the Commission's treatment of other expenditures involving two purposes.[7]

Ultimately, however, neither proposal garnered the required four votes, and the parties' 25% / 75% allocation was allowed to stand. It is notable that the debate among Bush-Cheney 2000, the Audit Division, and OGC was not about *whether* allocation was permissible, but whether the *particular percentages* used were reasonable and appropriate.

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[4] *See Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc., Report of the Audit Division* at 6-7, *available at* http://www.fec.gov/audits/2000/p00-02-05.pdf.

[5] *See Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc., Office of General Counsel Memorandum (Dec. 2, 2002)* at 3, *available at* http://www.fec.gov/audits/2000/p00-02-05.pdf.

[6] *Id.* at 4.

[7] *Id.* at 5.

2. 11 CFR § 106.8

a. Enactment

In November 2003, the Commission adopted 11 CFR § 106.8 (party committee telephone banks), to "address the proper attribution of a party committee's or party organization's disbursements for communications that refer to a clearly identified Federal candidate when the party's other candidates are referred to generically, but not by name."[8] This rulemaking was obviously prompted by the Commission's experience in the Bush-Cheney 2000 Audit.

Under 11 CFR § 106.8, the costs of a political party phone bank communication that includes (1) a reference to a clearly identified Federal candidate; (2) a generic reference to other candidates of the Federal candidate's party without clearly identifying them; and (3) does not solicit a contribution, should be attributed 50% to the clearly identified Federal candidate. The other 50% is not attributable to any particular candidate, meaning the party may pay that portion of the total cost.

b. Meaning

At least four key conclusions relevant to the matter before us may be drawn from that rulemaking[9]:

1. The Commission extended the mutual benefit theory to communications featuring both a clearly identified Federal candidate and generically referenced candidates, and the benefit to the generically referenced candidates may accrue to those candidates' political party.[10]

2. The rule applies to all Federal candidates, "[b]ecause there is no apparent reason to distinguish presidential and vice presidential candidates from other Federal candidates."[11]

3. The Commission considered requiring a 100% attribution to the clearly identified Federal candidate, but rejected that option. Instead, a 50% attribution requirement was enacted.[12]

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[8] *Final Rule: Party Committee Telephone Banks*, 68 Fed. Reg. 64,517 (Nov. 14, 2003).

[9] Commissioner von Spakovsky was not a member of the Commission when the phone bank regulation was adopted.

[10] *See id.* ("Although the specific mention of the clearly identified Federal candidate provides something of value to the candidate being promoted, it also provides the party with a benefit. The final rules . . . reflect that such communications benefit both the candidate and the party.").

[11] *Id.* at 64,517.

4. The regulation "allows party committees and organizations to treat the portions of disbursements attributed to clearly identified Federal candidates as . . . expenses to be reimbursed by the clearly identified Federal candidates," meaning the costs of these phone bank communications may be shared.[13]

Not one of these conclusions supports the view that the "hybrid ads" of BC04 and the Republican National Committee were unlawful.

c. Scope

Some of our colleagues objected to BC04's reliance on § 106.8 on the grounds that that regulation applies only to phone banks, and the Commission did not extend the regulation to other forms of communications. Some on the Commission seem to believe that the specificity of the phone bank regulation impliedly means that joint communication attribution is not permissible with respect to other media. However, the words the Commission used in 2003 are not so stark:

> In answer to the Commission's question of whether 11 CFR 106.8 should include other forms of communications such as broadcast or print media, the commenter urged the Commission to defer consideration of extending the final rules to include other forms of communications. The Commission has decided to limit the scope of new section 106.8 to phone banks at this time because each type of communication presents different issues that need to be considered in further detail before establishing new rules.[14]

We do not read this language to state that the Commission determined that attribution for any type of communication other than a phone bank is unlawful unless and until subsequent permissive regulations are enacted. Activities that do not violate any specific provision of the Federal Election Campaign Act, or a Commission regulation, do not require express approval from the Commission to make them lawful. With respect to 11 CFR § 106.8, the Commission simply acted to provide guidance on a particular issue that had created confusion in the past. The regulation supercedes the Commission's approach to phone banks taken in the Bush-Cheney 2000 Audit, but nothing more. No broad hidden or implied prohibitions became law upon its enactment.

d. Generic References

Some Commissioners argued that even if the Commission were to apply the phone bank regulation's essential requirements to the matter at hand, the "hybrid ads"

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[12] *Id.* at 64,518 ("Because these phone bank communications contain two references – one to a clearly identified Federal candidate and one that generically refers to other candidates – it is appropriate that the disbursement for the communications be attributed evenly between the two references.").

[13] *Id.* at 64,519.

[14] *Id.* at 64,518.

distributed by BC04 and the RNC did not satisfy the "generic reference" requirement, which requires that the communication "generically refer[] to other candidates of the Federal candidate's party." They understand this provision to require a reference to the name of a political party, *i.e.*, "our great Republican team." The "hybrid ads" aired by BC04 and the Republican National Committee more typically used phrases such as "our leaders in Congress," "Congressional leaders," "liberals in Congress," and "liberal allies."[15]

In the past, it is true that the "generic references" with which the Commission has considered have tended to include specific political party references, *e.g.*, Republican, Democratic, Green. However, it should be remembered that the "generic reference" standard is intended primarily to indicate that it does not benefit any particular candidate, but instead benefits generally a group of candidates. We see no reason then, why *only* a generic reference that includes the name of a political party should be viewed as potentially beneficial to a political party.[16] If a political party believes that it is benefited most by promoting "our leaders in Congress," why should the Commission object? And while the phone bank regulation requires the generic reference to be "to other candidates of the Federal candidate's party," it is also true that casting aspersions on "liberals in Congress" would be viewed by many as beneficial to a Republican party committee. The Commission should apply any "generic reference" requirement with the flexibility required to avoid dictating advertising content.

C. Coordination and Attribution: Advisory Opinion 2004-1 (Bush / Forgy Kerr)

On January 8, 2004, BC04, along with Alice Forgy Kerr for Congress, sought the Commission's guidance on how to run advertisements featuring President Bush endorsing Ms. Kerr in a special congressional election that took place within the then-applicable coordinated communication window (*i.e.*, within 120 days of Kentucky's presidential primary). The Commission concluded that certain advertisements described would qualify as "coordinated communications," but that if those advertisements were properly attributed according to the methods set forth in 11 CFR § 106.1, no in-kind contribution to President Bush would occur.

In other words, BC04 was permitted to reimburse the Kerr campaign for its attributable share of the advertisements, thereby "negating" any in-kind contribution that would otherwise flow to the campaign as a result of these coordinated communications. This Advisory Opinion clearly affirmed the viability of making joint, coordinated

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[15] *See Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc., Report of the Audit Division* at 10, *available at* http://www.fec.gov/audits/2000/p00-02-05.pdf.

[16] "Generic" means "relating to or descriptive of an entire group or class; general." *American Heritage Dictionary: New College Edition* (1976). The term permits a broad usage and does not require any particular linguistic formulation.

communications that are allocated in such a way so as to avoid making an in-kind contribution to one party.

In light of the result of the Bush-Cheney 2000 audit, the subsequently enacted phone bank regulation, and Advisory Opinion 2004-1, BC04 and the Republican National Committee were on firm legal ground when they ran joint advertisements in the fall of 2004. The Commission had assented to joint communications in the 2000 Audit, with both the Audit Division and OGC arguing that allocation of a joint-message phone bank was reasonable and appropriate. Shortly thereafter, the Commission affirmed that view by enacting the phone bank allocation regulation (11 CFR § 106.8), which is based on the assumption that a communication can benefit two parties, and that those two parties may split the costs of that communication. The following year, in 2004, the Commission upheld a proposal in which two Federal candidates appeared in a coordinated advertisement, with the costs allocated to prevent one party from making an in-kind contribution to the other. And if this were not enough to consider the issue settled, in 2006 the Commission specifically approved a jointly funded, coordinated mass mailing paid for and distributed by the state party and a Federal candidate – *i.e.*, a communication legally indistinguishable from the hybrid ads at issue here.

D. Advisory Opinion 2006-11 (Washington Democratic State Central Committee)

Although Advisory Opinion 2006-11 was issued in April 2006, long after the events of the Audit took place, this Advisory Opinion very clearly establishes that the attribution method of 11 CFR § 106.1 may be used by candidates and political party committees that distribute mutually beneficial, joint communications. In fact, at the time this Advisory Opinion was approved, we understood it to settle the basic legal issue surrounding the "hybrid ads" in this Audit.[17]

III. Conclusion

BC04 relied on the position that the Commission took in prior audits and Advisory Opinions that clearly allowed a 50% allocation of the costs of advertisements that featured a clearly identified Federal candidate and a generic reference to the candidates of his political party. After this Agency had completed the substantial work of this particular audit, and the Commissioners were well aware of this issue, the Commission adopted an Advisory Opinion approving a similar 50% allocation of the same type of advertising conducted by the Washington State Democratic Central Committee in connection with the 2006 Congressional elections. It is too late to now attempt to claim that BC04's actions were somehow unlawful or not reasonably based on prior Commission actions or that BC04 should be required to repay the cost of these

[17] Of course, Advisory Opinions are limited to the facts presented. At the same time, though, the Commission seeks to consistently apply its legal precedents.

advertisements. That is simply not the case, and to the extent that the Kerry Campaign may have engaged in the same type of activity, as has been reported publicly in the press, we also do not believe they violated the law or our regulations on this specific issue.

March 22, 2007

Commissioner Hans A. von Spakovsky

Vice Chairman David M. Mason