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March 27, 1998

*By Facsimile and Regular U.S. Mail*Federal Election Commission
Office of General Counsel
999 E. Street, N.W.
Washington, D.C. 20463Comment to
AOR 1998-05

Dear Sir/Madam:

Re: Written Comment on AOR 1998-05

On behalf of the Michigan Chamber of Commerce and pursuant to 11 CFR §112.3, we hereby submit written comment on AOR 1998-05. AOR 1998-05 was submitted by American Electric Power Service Corporation ("American Electric") inquiring whether the Federal Election Campaign Act¹ preempts the Michigan Campaign Finance Act² with respect to the content of a solicitation for contributions for non-Federal elections to a combined Federal, state and local separate segregated fund.

The non-Federal solicitation requirements at issue are found in Section 55³ of the Michigan Campaign Finance Act ("Section 55"). Section 55 requires that contributions to a separate segregated fund may be solicited or obtained on an automatic basis, including but not limited to, a payroll deduction plan, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year. Apparently, American Electric does not approve of the requirements of Section 55. Consequently, American Electric hopes that the Federal Election Commission (the "Commission") will strike down the non-Federal requirements of Section 55 under the guise of Federal preemption. Our comments to this "backdoor" attempt to eviscerate Section 55 are as follows.

¹ 2 U.S.C. 431 et seq.

² MCL 169.201 et seq.

³ MCL 169.255.

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As an initial point, it must be emphasized that it is American Electric's choice to operate a single separate segregated fund to make contributions to Federal and non-Federal elections. Section 102.5(a)(1) of the Commission's regulations provides "political committees" involved in both Federal and non-Federal elections with two options: (1) A separate Federal account may be established which is treated as a separate "political committee" subject to the requirements of the Federal Election Campaign Act;⁴ or (2) the committee may receive only those contributions which are subject to the prohibitions and limitations of the Federal Election Campaign Act, regardless of whether the contributions are to be used in connection with Federal or non-Federal Elections.⁵ Therefore, if American Electric chooses to operate another separate segregated fund to be used in connection with Michigan elections, the Federal separate segregated fund would be unaffected and an Advisory Opinion pursuant to AOR 1998-05 would be unnecessary.

Whether or not American Electric chooses to voluntarily submit to the requirements of Section 55 by participating in state and local elections in Michigan, Section 55 is not preempted by federal law. With respect to preemption, the Commission has observed:

"The Act supersedes and preempts any provision of state law with respect to election to Federal office. 2 U.S.C. §453. Commission regulations explain that such preemption includes (1) the organization and registration of political committees supporting Federal candidates and (2) the disclosure of receipts and expenditures by Federal candidates and political committees. 11 CFR 108.7(b). The Commission has noted that the legislative history evinces the intent of Congress that the Act should occupy the field with respect to Federal campaign funds."⁶

⁴ 11 C.F.R. §102.5(a)(1)(i).

⁵ 11 C.F.R. §102.5(a)(1)(ii).

⁶ Advisory Opinion 1986-27, Fed. Election Camp. Fin. Guide (CCH), ¶5867 (August 21, 1986).

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Based on the foregoing, it is clear that the Federal Election Campaign Act does not occupy the field with respect to non-Federal campaign funds.

Accordingly, in numerous Advisory Opinions, the Commission recognizes that states are allowed to impose requirements on non-Federal campaign funds, even where such activity is permissible under the Federal Election Campaign Act.

For example, in Advisory Opinion 1993-8,⁷ the principal campaign committee of a Federal candidate intended to incorporate for liability purposes. This principal campaign committee also intended to make contributions of excess funds to both Federal and non-Federal committees, which is permitted under the Federal Election Campaign Act. Tennessee law, however, prohibited incorporated candidate committees from making contributions and expenditures. On the issue of preemption of Tennessee law, the Commission held:

"With respect to contributions of excess funds to Federal candidates or their authorized campaign committees, the Act preempts Tennessee State law. The incorporated committee may make such contributions up to the limits of 2 U.S.C. 5441a(a)(1)(A). This results from the Federal law's sole authority with respect to contributions and expenditures regarding Federal candidates and committees. By this same reasoning, however, the Act does not preempt Tennessee State law with respect to contributions to non-Federal candidates. Section 439a permits contributions to non-Federal candidates if otherwise lawful. In the case of the incorporated committee, however, contributions to non-Federal candidates do not appear to be lawful under the Tennessee Code."⁸

⁷ Advisory Opinion 1993-8, Fed. Election Camp. Fin. Guide (CCH), ¶6089 (July 22, 1993).

⁸ Id.

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Similarly, in Advisory Opinion 1986-5,⁹ a principal campaign committee of a Federal candidate intended to transfer excess campaign funds to an Indiana candidate committee. While ruling that the transfer of excess campaign funds was permissible under the Federal Action Campaign Act, the Commission warned:

"Finally, the Commission emphasizes that if any provisions of Indiana law are applicable to the proposed transfer, such provisions would not be preempted by 2 U.S.C. 5453 and 11 CFR 108.7. Thus, the application of any Indiana Law concerning, for example, the amount of such a transfer or the reporting of it by the transferee committee would not be superseded or preempted by the Act or regulations of the Commission."¹⁰

Again, in Advisory Opinion 1981-18,¹¹ a multibank holding company intended to establish a single separate segregated fund to be used in connection with both Federal and non-Federal elections. In ruling that the separate segregated fund may make contributions to both Federal and non-Federal campaigns, the Commission concluded as follows:

"Thus, insofar as the Act is concerned, [the separate segregated fund] is not limited to using contributions which it solicits, receives, and reports pursuant to the requirements of the Act and regulations, for the purpose of making contributions solely in connection with federal elections. The Commission notes that [the separate segregated fund's] use of such contributions in connection with non-federal elections, although not within the purview of the Act, would be subject to applicable State law. The

⁹ Advisory Opinion 1986-5, Fed. Election Camp. Fin. Guide (CCH), ¶5847 (February 27, 1986).

¹⁰ Id.

¹¹ Advisory Opinion 1981-18, Fed. Election Camp. Fin. Guide (CCH), ¶5607 (May 8, 1981).

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provisions of the Act and Commission regulations do not preempt provisions of State law with regard to non-federal elections."¹²

Accordingly, the "Commission emphasizes that State regulation of funds received by a [non-Federal committee] from a [Federal committee] may not be avoided by relying on the Federal preemption provisions of 2 U.S.C. §453 and Commission regulations."¹³

With respect to AOR 1998-05, the Federal Election Campaign Act does not require annual renewal of a payroll deduction for contributions to a separate segregated fund. As the above-cited Advisory Opinions indicate, however, the Commission consistently holds that states are allowed to impose requirements on non-Federal campaign funds, even where such activity is permissible under the Federal Election Campaign Act. Therefore, Section 55, which applies only to non-Federal elections, is not preempted or superseded by the Federal Election Campaign Act.¹⁴

¹² Id.

¹³ Advisory Opinion 1978-37, Fed. Election Camp. Fin. Guide (CCH), ¶5335 (August 28, 1978). See also, Advisory Opinion 1986-27, Fed. Election Camp. Fin. Guide (CCH), ¶5867 (August 21, 1986) ("The Act does not, however, preempt state law with respect to the reporting of receipts and disbursements of funds used for non-Federal election purposes or the registration and reporting of non-Federal accounts or state committees."); Advisory Opinion 1978-94, Fed. Election Camp. Fin. Guide (CCH), ¶5379 (December 15, 1978) (Where the "Act does not apply, State law regulating activity connected with State and local elections may be applicable."); Advisory Opinion 1979-82, Fed. Election Camp. Fin. Guide (CCH), ¶5458 (February 8, 1980) (If "Ohio law regulating State and local elections is applicable in this situation, the preemption provisions in 2 U.S.C. §453 and Commission regulations at 11 CFR 108.7 would not preclude the application of Ohio law.").

¹⁴ To hold otherwise would allow a sponsoring organization, such as American Electric, to avoid any non-Federal election requirements of State law it was not inclined to follow - by merely maintaining a single separate segregated fund pursuant to 11 C.F.R. §102.5(a)(1)(ii).

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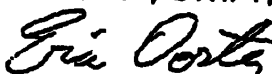
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Thank you for the opportunity to provide written comment on AOR 1998-05. Your consideration of our comments is greatly appreciated. If you have any questions, please contact the undersigned.

Sincerely,

FOSTER, SWIFT, COLLINS & SMITH, P.C.



Eric E. Doster

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cc: Michigan Chamber of Commerce
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