

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT

MUR 7530

DATE COMPLAINT FILED: Oct. 30, 2018

DATE OF NOTIFICATIONS: Nov. 1, 2018

DATE OF LAST RESPONSE: Dec. 17, 2018

DATE ACTIVATED: Mar. 21, 2019

EXPIRATION OF SOL: Oct. 17, 2023 (earliest)/

Oct. 30, 2023 (latest)

ELECTION CYCLE: 2018

COMPLAINANT:

End Citizens United

RESPONDENTS:NRCC and Keith A. Davis in his official capacity as
treasurerBalderson for Congress and Matthew J. Yuskewich
in his official capacity as treasurer

Troy Balderson

RELEVANT STATUTES

52 U.S.C. § 30116(a), (d), (f)

AND REGULATIONS:

11 C.F.R. § 106.1

11 C.F.R. § 106.8

INTERNAL REPORTS CHECKED:

Disclosure Reports

AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that the NRCC (f/k/a National Republican Congressional Committee) and Keith A. Davis in his official capacity as treasurer (“NRCC”) and Balderson for Congress and Matthew Yuskewich in his official capacity as treasurer (“Committee”) improperly allocated the cost of a \$355,000 television ad.¹ The Complaint alleges that the ad does not qualify as a “hybrid” communication, which would permit an allocation of the cost of the ad, because it does not contain a “generic party reference,” thus, the NRCC’s payment for half of the

¹ Compl. at 1-2 (Oct. 30, 2018).

1 cost of the ad resulted in the NRCC making, and the Committee knowingly accepting, an
2 excessive contribution.

3 The NRCC and the Committee acknowledge that they evenly split the cost of the ad, but
4 argue that the allocation was proper pursuant to the Commission's time-space approach under
5 11 C.F.R. § 106.1(a). Although the ad did not have a generic party reference, respondents argue
6 that the ad is consistent with Commission precedent that has expanded the scope of ads subject to
7 the Commission's allocation rules.

8 For the reasons set forth below, we recommend that the Commission find reason to
9 believe that the NRCC made, and the Committee knowingly accepted, an excessive in-kind
10 contribution in violation of 52 U.S.C. § 30116(a) and (f). We further recommend taking no
11 action at this time against Troy Balderson pending the results of the proposed investigation.

12 **II. FACTUAL BACKGROUND**

13 Troy Balderson was the Republican candidate in the special election for Ohio's 12th
14 District in August 2018. Balderson was also the Republican candidate for Ohio's 12th District in
15 the 2018 general election. The Committee is his principal campaign committee. The NRCC is a
16 qualified party committee "devoted to increasing the number of Republicans in the U.S. House
17 of Representatives."²

18 The Complaint alleges that, on or about October 17, 2018, until October 30, 2018, the
19 Committee and the NRCC aired a 30-second television ad entitled "Progressive," attacking
20 Balderson's opponent, Daniel O'Connor.³ The script of "Progressive" is as follows:

² About, NRCC, <https://www.nrcc.org/about/> (last visited June 19, 2019).

³ Compl. at 2; *see also* Balderson for Congress, *Progressive*, YOUTUBE (Oct. 17, 2018),
<https://www.youtube.com/watch?v=v7y1xReMejE>.

Speaker	Time	Script
Balderson	0:00-0:01	I'm Troy Balderson and I approve this message
O'Connor	0:02-0:07	I've spent my entire adult life, every bit of my adult life, fighting for progressive values.
Voice Over	0:08-0:11	What kind of progressive values is Danny O'Connor talking about?
	0:12-0:24	Progressives support open borders and sanctuary cities, and they want to abolish ICE, the law enforcement agency protecting our community from gangs, keeping drugs out of our schools, and terrorists out of our country.
	0:25-0:30	Danny O'Connor agrees. Danny O'Connor, just too liberal.

1
2 A written disclaimer at the end of the ad states “Approved by Troy Balderson. Paid for by
3 Balderson for Congress & NRCC.”⁴ The Complaint, citing to a news article referencing
4 statements from Balderson’s campaign spokesman, suggests that the Committee and the NRCC
5 evenly split the \$355,000 cost of the ad.⁵ The NRCC disclosed spending approximately
6 \$180,000 for a series of party coordinated expenditures with Balderson to the vendor Lakeside
7 Communications in June and July 2018, but it is unclear whether these expenditures included the
8 “Progressive” ad.⁶ In July 2018, the NRCC also disclosed disbursements of approximately
9 \$220,000 to the same vendor, Lakeside Communications, but it is similarly unclear whether

⁴ Balderson for Congress, *Progressive*, YOUTUBE (Oct. 17, 2018), <https://www.youtube.com/watch?v=v7y1xReMejE>.

⁵ Compl. at 2, n.6 (citing Jeremy Pelzer, *Going in Halfsies*, CLEVELAND.COM (Oct. 18, 2018), https://www.cleveland.com/open/2018/10/drug-treatment_providers_trade_group.html).

⁶ See Party Coordinated Expenditures, 2017-18, available at https://www.fec.gov/data/party-coordinated-expenditures/?two_year_transaction_period=2018&committee_id=C00075820&candidate_id=H8OH12180&cycle=2018. In its August 2018 Monthly Report, the NRCC stated that “the NRCC has received spending authorization from both the Republican National Committee and the applicable state party committee. The Schedule F expenditures on behalf of Rep. Troy Balderson include amounts for both the August 2018 special general election (aggregate of \$ 89,700) and the November 2018 general election.” NRCC August 2018 Monthly Report at 6 (Aug. 20, 2018).

those disbursements were for the ad “Progressive.”⁷ Aside from their discussion of allocation of expenses for the ad, the responses do not address the cost of the ad.

The Complaint alleges that “Progressive” lacked a “generic party reference” and therefore would not qualify as a hybrid ad, which would permit the NRCC and the Committee to allocate the costs of the ad under the time-space approach without it being considered an in-kind contribution from the NRCC to the Committee.⁸ Absent a “generic party reference,” the Complaint alleges, the ad served to benefit only the Committee, and therefore, the NRCC made, and the Committee knowingly accepted, an excessive contribution in the amount of \$177,500 (half the cost of the ad), less any remaining party coordinated communication contribution limit of \$49,700, less any remaining party contribution limit of \$5,000 per election.

Respondents assert that the ad “is consistent with Commission precedent on hybrid communications and its costs were allocated according” to the time-space approach.⁹ The NRCC and the Committee allocated the time as follows:

- 0:00-0:01 – Compliance (2 seconds)
- 0:02-0:07 – Balderson for Congress (6 seconds)
- 0:08-0:11 – Divided evenly (4 seconds – 2 seconds to each committee)
- 0:12-0:24 – NRCC (12 seconds)
- 0:25-0:30 – Balderson for Congress (6 seconds)

⁷ See Disbursements, 2017-18, available at https://www.fec.gov/data/disbursements/?two_year_transaction_period=2018&data_type=processed&committee_id=C00075820&recipient_name=lakeside&min_date=01%2F01%2F2017&max_date=12%2F31%2F2018. In October of 2018, NRCC disclosed additional disbursements of almost \$200,000 to the same vendor, Lakeside Communications.

⁸ Compl. at 6.

⁹ NRCC Resp. at 1 (Dec. 11, 2018). The Committee and Balderson adopt the NRCC response. Committee Resp. at 1 (Dec. 17, 2019).

According to the NRCC, 14 seconds were allocable to each committee with two seconds allocable to “compliance,” and thus the committees evenly divided the costs of the ad.¹⁰ The NRCC argues that the term “progressives,” coupled with a discussion of progressive policy preferences, was a “beneficial way for [the NRCC] to refer to *other* Democratic Party candidates like Danny O’Connor.”¹¹ Although the ad did not have a generic party reference, the NRCC contends that it “derived a party-wide benefit” from discussing progressive policies in the ad.¹²

III. LEGAL ANALYSIS

The Act defines a contribution as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”¹³ The term “anything of value” includes all in-kind contributions.¹⁴ Contributions from a national or state committee to a candidate committee are limited to a total of \$5,000 per election, and candidates and political committees are prohibited from knowingly accepting contributions in excess of the Act’s limits.¹⁵ The Act grants the national and state committees of a political party authority to also support their general election candidates with coordinated expenditures subject to certain limits, which in the 2018 election cycle was \$49,700 for House nominees in states that have more than one representative.¹⁶ The national committee of a political party and a state committee of a political party may assign their authority to make

¹⁰ *Id.* at 1, n.2.

¹¹ *Id.* at 9 (emphasis in original).

¹² *Id.*

¹³ 52 U.S.C. § 30101(8)(A).

¹⁴ 11 C.F.R. § 100.52(d)(1).

¹⁵ 52 U.S.C. § 30116(a)(2)(A), (f).

¹⁶ *Id.* § 30116(d); Coordinated Party Expenditure Limits for 2018, 83 Fed. Reg. 6022 (Feb. 12, 2018).

1 coordinated party expenditures to another political party committee.¹⁷ Here, the NRCC disclosed
2 receiving authority from both the Republican National Committee and “the applicable state
3 committee.”¹⁸ Because Balderson ran in both the special and general elections in 2018, NRCC
4 had a combined coordinated party expenditure limit of \$198,800.

5 Commission regulations at 11 C.F.R. § 106 include both general allocation rules and
6 rules for allocating specific types of expenses in particular circumstances. The general rule is
7 that “[e]xpenditures, including in-kind contributions, independent expenditures, and coordinated
8 expenditures made on behalf of more than one clearly identified Federal candidate shall be
9 attributed to each such candidate according to the benefit reasonably expected to be derived.”¹⁹
10 If either side pays for amounts that exceed their allocated share of the total costs, then those
11 excessive amounts are in-kind contributions to the other candidate(s) involved. For broadcast
12 communications involving more than one clearly identified candidate, the attribution is
13 determined by the proportion of space or time devoted to each candidate as compared to the total
14 space or time devoted to all candidates, and is commonly referred to as the “time-space
15 approach.”²⁰

16 “Hybrid communications” are only explicitly addressed in the phone bank regulation and
17 require a reference to a clearly identified candidate along with “another reference that generically
18 refers to other candidates of the Federal candidate’s party without clearly identifying them,” the

¹⁷ 11 C.F.R. § 109.33(a).

¹⁸ NRCC August 2018 Monthly Report at 6.

¹⁹ 11 C.F.R. § 106.1(a).

²⁰ *Id.*

so-called “generic party reference.”²¹ Under 11 C.F.R. § 106.8, half of the costs of a phone bank communication must be attributed to the clearly identified candidate, and the other half must be attributed to the party committee, regardless of the amount of time devoted to each.²² The Explanation and Justification for this regulation gives examples of generic references to other candidates of the party as “our great Republican team” or “our great Democratic ticket.”²³ Further, it specifically notes that the Commission had considered whether to include other forms of communications, such as mailings, within the regulation’s coverage but “decided to limit the scope of new section 106.8 to phone banks . . . because each type of communication presents different issues that need to be considered in further detail before establishing new rules.”²⁴ Subsequently, in Advisory Opinion 2006-11 (Washington State Democratic Central Committee), the Commission extended the hybrid communication allocation rules to mass mailings.²⁵

Both parties cite at length to the Commission’s consideration of a series of television ads in the Report of the Audit Division on Bush-Cheney ‘04, Inc. (“Audit Report”), where the Commission was unable to agree on whether a 50/50 allocation of costs by Bush-Cheney ‘04, Inc. and the Republican National Committee for television advertisements that clearly identified

²¹ *Id.* § 106.8.

²² *Id.* § 106.8(b).

²³ Party Committee Telephone Banks, Final Rules, 68 Fed. Reg. 64,517, 64,518 (Nov. 14, 2003).

²⁴ *Id.* The Commission initiated a proposed rulemaking in 2007 on hybrid communications, but the Commission lost quorum in late 2007 and a final rule was never adopted. *See* Notice of Proposed Rulemaking on Hybrid Communications, 72 Fed. Reg. 26,569 (May 10, 2007); First Gen. Counsel’s Rpt. at 9, MUR 6685 (Horsford for Congress).

²⁵ Addressing the appropriate allocation of payments for a mass mailing hybrid communication, the Commission used 11 C.F.R. §§ 106.1 and 106.8 as models and concluded that *at least* 50% of the cost of the mailing should be attributed to the clearly identified federal candidate. The Commission, however, noted if the space devoted to the clearly identified candidate exceeded the space devoted to the generically referenced candidates, then the cost attributed to each entity had to reflect the relative proportion of space devoted to that entity (*i.e.*, the cost attributed to the candidate would be greater than 50%). *See* Advisory Op. 2006-11 at 4.

1 candidate George W. Bush (or his election opponent John Kerry) together with generic
 2 references to other political figures such as “Congressional leaders,” “liberals in Congress” and
 3 “liberal allies” complied with the Act and Commission regulations.²⁶ The Complaint argues that
 4 respondents cannot allocate the costs of “Progressive” because the ad does not contain a “generic
 5 party reference,” noting that the Democratic Commissioners in the Bush-Cheney ‘04 Audit
 6 stated that “liberal allies” did not satisfy this requirement.²⁷ Similarly, the Complaint argues that
 7 the references to progressives and progressive values are fundamentally different than the
 8 examples of generic party references given in the Explanation and Justification of “our great
 9 Republican team” or “our great Democratic ticket.”²⁸ The Complaint therefore concludes that
 10 the “NRCC derives no benefit from the advertisement.”²⁹

11 The NRCC contends that Complainant reads the precedent too narrowly, and that the
 12 NRCC reasonably believed that criticizing progressives and progressive policies was another
 13 way of criticizing Democratic candidates other than O’Connor and, therefore, conferred to it a
 14 party-wide benefit.³⁰ The NRCC argues that the examples given in the Explanation and
 15 Justification were not meant to be an exhaustive list.³¹ Quoting the Republican Commissioners’
 16 Statement in the Bush-Cheney ’04 Audit, the NRCC contends that the Commission should

²⁶ See Final Audit Report at 10, Audit of Bush-Cheney ’04, Inc. (Apr. 2, 2007); Statement of Comm’rs Lenhard, Walther, & Weintraub, Audit of Bush-Cheney ’04, Inc. (Mar. 21, 2007); Statement of Comm’rs Mason & von Spakovsky, Final Audit Report on Bush-Cheney ’04, Inc. (Mar. 22, 2007); Statement of Comm’r Weintraub, Report of the Audit Division on Bush-Cheney ’04, Inc. (Mar. 22, 2007).

²⁷ Statement of Comm’rs Lenhard, Walther, & Weintraub at 3, Audit of Bush-Cheney ’04, Inc.; Compl. at 6.

²⁸ See Compl. at 5-6; 68 Fed. Reg. at 64,518.

²⁹ Compl. at 7.

³⁰ NRCC Resp. at 9.

³¹ *Id.*

1 “apply any ‘generic [party] reference’ requirement with the flexibility required to avoid dictating
 2 advertising content.”³²

3 At the outset, we note that none of the statements of reasons from the Bush-Cheney ‘04
 4 Audit garnered four votes. Furthermore, even after the Bush-Cheney Audit, the Commission has
 5 never approved a 50/50 time-space allocation absent a generic party reference or a reference to
 6 more than one clearly identified candidate.³³ As discussed below, the allocation rules have not
 7 been expanded to generic critiques of policies, as NRCC urges here. Similarly, the Commission
 8 has not expanded the regulations for hybrid communications to the broadcast communications at
 9 issue in this matter.³⁴

10 “Progressive” differs in several respects from the hybrid communication precedent. First,
 11 at its essence, “Progressive” is an attack ad specifically targeting O’Connor. To the extent the ad
 12 criticizes “progressives,” it does so to attack O’Connor’s progressive values — it is not a general
 13 critique of other Democratic candidates that could arguably be considered a party-wide benefit to

³² *Id.* at 9 (quoting Statement of Comm’rs Mason & von Spakovsky at 6, Final Audit Report on Bush-Cheney ‘04, Inc.).

³³ *See* Advisory Op. 2006-11 at 4; Factual & Legal Analysis at 5, MUR 7169, *et al.* (Democratic Congressional Campaign Committee) (“DCCC”). In MURs 7169, *et al.* (Democratic Congressional Campaign Committee) (“DCCC”), the Commission found no reason to believe that the DCCC or the candidates’ committees misallocated the costs of a series of broadcast ads using the time-space approach under 11 CFR § 106.1(a). The DCCC paid for portions of the ads that expressly advocated against Trump or his policy positions and the clearly identified candidate’s principal campaign committee paid for the portion that “concerned each candidate.”³³ These ads, however, clearly identified more than one candidate — Trump and the relevant Democratic candidate — and therefore, these ads were not analyzed as hybrid communications, but rather whether the allocation was reasonable pursuant to the general allocation rules under 11 C.F.R. § 106.1(a).

³⁴ In MUR 6685 (Horsford for Congress), the Commission split on the question of whether evenly dividing the costs of a hybrid communication was permissible where the Democratic candidate Horsford was clearly identified along with three other state Democratic candidates and the ad included a general reference to the Democratic Party and its policy positions. *See* Certification at 1, MUR 6685 (Horsford for Congress). The First General Counsel’s Report analyzed several possible applications of the time-space approach and determined that respondents’ decision to split the costs evenly was a reasonable application of the rules and relevant precedent. *See* First Gen. Counsel’s Rpt. at 12, MUR 6685 (Horsford for Congress).

the NRCC. The ad introduces the critique of progressive values by stating “What kind of progressive values is *Danny O’Connor* talking about?” This language ties the critique of progressive values only to O’Connor. And the ad concludes: “Danny O’Connor agrees; Danny O’Connor, just too liberal.” Therefore, Balderson — not the Republican Party — received the benefit of the ad, and the Committee should have paid for the full cost of the ad.

Second, “Progressive” does not contain a generic party reference either in its text or by the images displayed onscreen. It instead vaguely refers to progressives and progressive values.³⁵ Therefore, the express language of section 106.1(a) does not apply because there is only one clearly identified candidate. Nor does the phone bank regulation apply, or its extension to mass mailers in AO 2006-11, because “Progressive” lacks a generic party reference.

Finally, assuming that “progressives” or “liberals” can substitute for a generic reference to candidates of the Democratic Party, the reference would not be *to the same party* as the clearly identified candidate as required under section 106.8(a)(3). The Commission has never extended the phone bank regulations to cover generic references to candidates of the *opposing* party.³⁶

For these reasons, “Progressive” is not a hybrid communication that would permit an allocation between a candidate and his or her party pursuant to the time-space approach, and we recommend that the Commission find reason to believe that the NRCC violated 52 U.S.C. § 30116(a) by making, and that the Committee violated 52 U.S.C. § 30116(f) by knowingly

³⁵ While there is a “Congressional Progressive Caucus,” which includes one Member of the United States Senate and several Members of the House of Representatives, the ad does not appear to refer to it or any other group of federal officeholders or candidates. Furthermore, O’Connor, as a candidate for federal office, was not eligible to join the caucus.

³⁶ The ads at issue in the Bush-Cheney Audit were ads attacking the opposing party, but the Commission split. One Commissioner issued a Statement briefly raising this issue. *See* Statement of Comm’r Weintraub at 2, Report of the Audit Division on Bush-Cheney ’04, Inc.

1 accepting, an excessive in-kind contribution. We further recommend taking no action at this
2 time against Balderson pending the results of the proposed investigation.

3 **IV. PROPOSED INVESTIGATION**

4 We propose a limited investigation to determine the amount in violation, including the
5 total cost of "Progressive." While the Complaint alleges that the ad cost \$355,000, it is not clear
6 from the disclosure reports of either the NRCC or the Committee whether the \$355,000 figure is
7 accurate, and respondents have not addressed the issue in their responses. It is also unclear what
8 the approximately \$180,000 NRCC disclosed for party coordinated expenditures included. We
9 will seek to establish whether the NRCC's reported party coordinated expenditures included
10 payment for "Progressive" and whether the NRCC had any remaining contribution limits for
11 permissible party coordinated expenditures that would allow it to cover the costs of the ad. We
12 recommend that the Commission authorize the use of compulsory process, including the issuance
13 of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary.

14 **V. RECOMMENDATIONS**

- 15 1. Find reason to believe that the NRCC and Keith A. Davis in his official capacity as
16 treasurer violated 52 U.S.C. § 30116(a) by making an excessive in-kind contribution
17 in connection with the television ad "Progressive;"
18
- 19 2. Find reason to believe that Balderson for Congress and Matthew Yuskewich in his
20 official capacity as treasurer violated 52 U.S.C. § 30118(f) by knowingly accepting
21 an excessive in-kind contribution in connection with the television ad "Progressive;"
22
- 23 3. Take no action at this time against Troy Balderson;
- 24
- 25 4. Approve the attached Factual and Legal Analysis;
- 26
- 27 5. Approve compulsory process; and
28

6. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Acting Associate General Counsel for
Enforcement

6/19/19
Date

Stephen Gura by LGT
Stephen A. Gura
Deputy Associate General Counsel for
Enforcement

Lynn Y. Tran
Lynn Y. Tran
Assistant General Counsel

Nicholas I. Bamman
Nicholas I. Bamman
Attorney

Attachment:
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION**FIRST GENERAL COUNSEL'S REPORT**

RESPONDENTS: NRCC and Keith A. Davis in his official capacity as treasurer
Balderson for Congress and Matthew J. Yuskewich in his official capacity as treasurer

MUR: 7530

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission by End Citizens United. *See* 52 U.S.C. § 30109(a)(1). The Complaint alleges that the NRCC (f/k/a National Republican Congressional Committee) and Keith A. Davis in his official capacity as treasurer (“NRCC”) and Balderson for Congress and Matthew Yuskewich in his official capacity as treasurer (“Committee”) improperly allocated the cost of a \$355,000 television ad.¹ The Complaint alleges that the ad does not qualify as a “hybrid” communication, which would permit an allocation of the cost of the ad, because it does not contain a “generic party reference,” thus, the NRCC’s payment for half of the cost of the ad resulted in the NRCC making, and the Committee knowingly accepting, an excessive contribution.

The NRCC and the Committee acknowledge that they evenly split the cost of the ad, but argue that the allocation was proper pursuant to the Commission’s time-space approach under 11 C.F.R. § 106.1(a). Although the ad did not have a generic party reference, respondents argue that the ad is consistent with Commission precedent that has expanded the scope of ads subject to the Commission’s allocation rules.

¹ Compl. at 1-2 (Oct. 30, 2018).

For the reasons set forth below, the Commission finds reason to believe that the NRCC made, and the Committee knowingly accepted, an excessive in-kind contribution in violation of 52 U.S.C. § 30116(a) and (f).

II. FACTUAL BACKGROUND

Troy Balderson was the Republican candidate in the special election for Ohio’s 12th District in August 2018. Balderson was also the Republican candidate for Ohio’s 12th District in the 2018 general election. The Committee is his principal campaign committee. The NRCC is a qualified party committee “devoted to increasing the number of Republicans in the U.S. House of Representatives.”²

The Complaint alleges that, on or about October 17, 2018, until October 30, 2018, the Committee and the NRCC aired a 30-second television ad entitled “Progressive,” attacking Balderson’s opponent, Daniel O’Connor.³ The script of “Progressive” is as follows:

Speaker	Time	Script
Balderson	0:00-0:01	I’m Troy Balderson and I approve this message
O’Connor	0:02-0:07	I’ve spent my entire adult life, every bit of my adult life, fighting for progressive values.
Voice Over	0:08-0:11	What kind of progressive values is Danny O’Connor talking about?
	0:12-0:24	Progressives support open borders and sanctuary cities, and they want to abolish ICE, the law enforcement agency protecting our community from gangs, keeping drugs out of our schools, and terrorists out of our country.
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² About, NRCC, <https://www.nrcc.org/about/> (last visited June 19, 2019).

³ Compl. at 2; *see also* Balderson for Congress, *Progressive*, YOUTUBE (Oct. 17, 2018), <https://www.youtube.com/watch?v=v7y1xReMejE>.

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 4 evenly split the \$355,000 cost of the ad.⁵ The NRCC disclosed spending approximately
 5 \$180,000 for a series of party coordinated expenditures with Balderson to the vendor Lakeside
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 12 therefore would not qualify as a hybrid ad, which would permit the NRCC and the Committee to
 13 allocate the costs of the ad under the time-space approach without it being considered an in-kind

⁴ Balderson for Congress, *Progressive*, YouTube (Oct. 17, 2018),
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https://www.cleveland.com/open/2018/10/drug-treatment_providers_trade_group.html.

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contribution from the NRCC to the Committee.⁸ Absent a “generic party reference,” the Complaint alleges, the ad served to benefit only the Committee, and therefore, the NRCC made, and the Committee knowingly accepted, an excessive contribution in the amount of \$177,500 (half the cost of the ad), less any remaining party coordinated communication contribution limit of \$49,700, less any remaining party contribution limit of \$5,000 per election.

Respondents assert that the ad “is consistent with Commission precedent on hybrid communications and its costs were allocated according” to the time-space approach.⁹ The NRCC and the Committee allocated the time as follows:

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According to the NRCC, 14 seconds were allocable to each committee with two seconds allocable to “compliance,” and thus the committees evenly divided the costs of the ad.¹⁰ The NRCC argues that the term “progressives,” coupled with a discussion of progressive policy preferences, was a “beneficial way for [the NRCC] to refer to *other* Democratic Party candidates like Danny O’Connor.”¹¹ Although the ad did not have a generic party reference, the NRCC contends that it “derived a party-wide benefit” from discussing progressive policies in the ad.¹²

⁸ Compl. at 6.

⁹ NRCC Resp. at 1 (Dec. 11, 2018). The Committee adopts the NRCC response. Committee Resp. at 1 (Dec. 17, 2019).

¹⁰ *Id.* at 1, n.2.

¹¹ *Id.* at 9 (emphasis in original).

¹² *Id.*

1 **III. LEGAL ANALYSIS**

2
 3 The Act defines a contribution as “any gift, subscription, loan, advance, or deposit of
 4 money or anything of value made by any person for the purpose of influencing any election for
 5 Federal office.”¹³ The term “anything of value” includes all in-kind contributions.¹⁴
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 7 of \$5,000 per election, and candidates and political committees are prohibited from knowingly
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 9 committees of a political party authority to also support their general election candidates with
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 11 for House nominees in states that have more than one representative.¹⁶ The national committee
 12 of a political party and a state committee of a political party may assign their authority to make
 13 coordinated party expenditures to another political party committee.¹⁷ Here, the NRCC disclosed
 14 receiving authority from both the Republican National Committee and “the applicable state
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 16 had a combined coordinated party expenditure limit of \$198,800.

17 Commission regulations at 11 C.F.R. § 106 include both general allocation rules and
 18 rules for allocating specific types of expenses in particular circumstances. The general rule is

¹³ 52 U.S.C. § 30101(8)(A).

¹⁴ 11 C.F.R. § 100.52(d)(1).

¹⁵ 52 U.S.C. § 30116(a)(2)(A), (f).

¹⁶ *Id.* § 30116(d); Coordinated Party Expenditure Limits for 2018, 83 Fed. Reg. 6022 (Feb. 12, 2018).

¹⁷ 11 C.F.R. § 109.33(a).

¹⁸ NRCC August 2018 Monthly Report at 6.

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.”¹⁹

If either side pays for amounts that exceed their allocated share of the total costs, then those excessive amounts are in-kind contributions to the other candidate(s) involved. For broadcast communications involving more than one clearly identified candidate, the attribution is determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates, and is commonly referred to as the “time-space approach.”²⁰

“Hybrid communications” are only explicitly addressed in the phone bank regulation and require a reference to a clearly identified candidate along with “another reference that generically refers to other candidates of the Federal candidate’s party without clearly identifying them,” the so-called “generic party reference.”²¹ Under 11 C.F.R. § 106.8, half of the costs of a phone bank communication must be attributed to the clearly identified candidate, and the other half must be attributed to the party committee, regardless of the amount of time devoted to each.²² The Explanation and Justification for this regulation gives examples of generic references to other candidates of the party as “our great Republican team” or “our great Democratic ticket.”²³ Further, it specifically notes that the Commission had considered whether to include other forms

¹⁹ 11 C.F.R. § 106.1(a).

²⁰ *Id.*

²¹ *Id.* § 106.8.

²² *Id.* § 106.8(b).

²³ Party Committee Telephone Banks, Final Rules, 68 Fed. Reg. 64,517, 64,518 (Nov. 14, 2003).

1 of communications, such as mailings, within the regulation’s coverage but “decided to limit the
 2 scope of new section 106.8 to phone banks . . . because each type of communication presents
 3 different issues that need to be considered in further detail before establishing new rules.”²⁴
 4 Subsequently, in Advisory Opinion 2006-11 (Washington State Democratic Central Committee),
 5 the Commission extended the hybrid communication allocation rules to mass mailings.²⁵
 6 Both parties cite at length to the Commission’s consideration of a series of television ads
 7 in the Report of the Audit Division on Bush-Cheney ‘04, Inc. (“Audit Report”), where the
 8 Commission was unable to agree on whether a 50/50 allocation of costs by Bush-Cheney ‘04,
 9 Inc. and the Republican National Committee for television advertisements that clearly identified
 10 candidate George W. Bush (or his election opponent John Kerry) together with generic
 11 references to other political figures such as “Congressional leaders,” “liberals in Congress” and
 12 “liberal allies” complied with the Act and Commission regulations.²⁶ The Complaint argues that
 13 respondents cannot allocate the costs of “Progressive” because the ad does not contain a “generic
 14 party reference,” noting that the Democratic Commissioners in the Bush-Cheney ‘04 Audit

²⁴ *Id.* The Commission initiated a proposed rulemaking in 2007 on hybrid communications, but the Commission lost quorum in late 2007 and a final rule was never adopted. *See* Notice of Proposed Rulemaking on Hybrid Communications, 72 Fed. Reg. 26,569 (May 10, 2007); First Gen. Counsel’s Rpt. at 9, MUR 6685 (Horsford for Congress).

²⁵ Addressing the appropriate allocation of payments for a mass mailing hybrid communication, the Commission used 11 C.F.R. §§ 106.1 and 106.8 as models and concluded that *at least* 50% of the cost of the mailing should be attributed to the clearly identified federal candidate. The Commission, however, noted if the space devoted to the clearly identified candidate exceeded the space devoted to the generically referenced candidates, then the cost attributed to each entity had to reflect the relative proportion of space devoted to that entity (*i.e.*, the cost attributed to the candidate would be greater than 50%). *See* Advisory Op. 2006-11 at 4.

²⁶ *See* Final Audit Report at 10, Audit of Bush-Cheney ‘04, Inc. (Apr. 2, 2007); Statement of Comm’rs Lenhard, Walther, & Weintraub, Audit of Bush-Cheney ‘04, Inc. (Mar. 21, 2007); Statement of Comm’rs Mason & von Spakovsky, Final Audit Report on Bush-Cheney ‘04, Inc. (Mar. 22, 2007); Statement of Comm’r Weintraub, Report of the Audit Division on Bush-Cheney ‘04, Inc. (Mar. 22, 2007).

1 stated that “liberal allies” did not satisfy this requirement.²⁷ Similarly, the Complaint argues that
 2 the references to progressives and progressive values are fundamentally different than the
 3 examples of generic party references given in the Explanation and Justification of “our great
 4 Republican team” or “our great Democratic ticket.”²⁸ The Complaint therefore concludes that
 5 the “NRCC derives no benefit from the advertisement.”²⁹

6 The NRCC contends that Complainant reads the precedent too narrowly, and that the
 7 NRCC reasonably believed that criticizing progressives and progressive policies was another
 8 way of criticizing Democratic candidates other than O’Connor and, therefore, conferred to it a
 9 party-wide benefit.³⁰ The NRCC argues that the examples given in the Explanation and
 10 Justification were not meant to be an exhaustive list.³¹ Quoting the Republican Commissioners’
 11 Statement in the Bush-Cheney ’04 Audit, the NRCC contends that the Commission should
 12 “apply any ‘generic [party] reference’ requirement with the flexibility required to avoid dictating
 13 advertising content.”³²

14 At the outset, we note that none of the statements of reasons from the Bush-Cheney ’04
 15 Audit garnered four votes. Furthermore, even after the Bush-Cheney Audit, the Commission has
 16 never approved a 50/50 time-space allocation absent a generic party reference or a reference to

²⁷ Statement of Comm’rs Lenhard, Walther, & Weintraub at 3, Audit of Bush-Cheney ’04, Inc.; Compl. at 6.

²⁸ See Compl. at 5-6; 68 Fed. Reg. at 64,518.

²⁹ Compl. at 7.

³⁰ NRCC Resp. at 9.

³¹ *Id.*

³² *Id.* at 9 (quoting Statement of Comm’rs Mason & von Spakovsky at 6, Final Audit Report on Bush-Cheney ’04, Inc.).

1 more than one clearly identified candidate.³³ As discussed below, the allocation rules have not
 2 been expanded to generic critiques of policies, as NRCC urges here. Similarly, the Commission
 3 has not expanded the regulations for hybrid communications to the broadcast communications at
 4 issue in this matter.³⁴

5 “Progressive” differs in several respects from the hybrid communication precedent. First,
 6 at its essence, “Progressive” is an attack ad specifically targeting O’Connor. To the extent the ad
 7 criticizes “progressives,” it does so to attack O’Connor’s progressive values — it is not a general
 8 critique of other Democratic candidates that could arguably be considered a party-wide benefit to
 9 the NRCC. The ad introduces the critique of progressive values by stating “What kind of
 10 progressive values is *Danny O’Connor* talking about?” This language ties the critique of
 11 progressive values only to O’Connor. And the ad concludes: “Danny O’Connor agrees; Danny
 12 O’Connor, just too liberal.” Therefore, Balderson — not the Republican Party — received the
 13 benefit of the ad, and the Committee should have paid for the full cost of the ad.

14 Second, “Progressive” does not contain a generic party reference either in its text or by
 15 the images displayed onscreen. It instead vaguely refers to progressives and progressive

³³ See Advisory Op. 2006-11 at 4; Factual & Legal Analysis at 5, MUR 7169, *et al.* (Democratic Congressional Campaign Committee) (“DCCC”). In MURs 7169, *et al.* (Democratic Congressional Campaign Committee) (“DCCC”), the Commission found no reason to believe that the DCCC or the candidates’ committees misallocated the costs of a series of broadcast ads using the time-space approach under 11 CFR § 106.1(a). The DCCC paid for portions of the ads that expressly advocated against Trump or his policy positions and the clearly identified candidate’s principal campaign committee paid for the portion that “concerned each candidate.”³³ These ads, however, clearly identified more than one candidate — Trump and the relevant Democratic candidate — and therefore, these ads were not analyzed as hybrid communications, but rather whether the allocation was reasonable pursuant to the general allocation rules under 11 C.F.R. § 106.1(a).

³⁴ In MUR 6685 (Horsford for Congress), the Commission split on the question of whether evenly dividing the costs of a hybrid communication was permissible where the Democratic candidate Horsford was clearly identified along with three other state Democratic candidates and the ad included a general reference to the Democratic Party and its policy positions. See Certification at 1, MUR 6685 (Horsford for Congress). The First General Counsel’s Report analyzed several possible applications of the time-space approach and determined that respondents’ decision to split the costs evenly was a reasonable application of the rules and relevant precedent. See First Gen. Counsel’s Rpt. at 12, MUR 6685 (Horsford for Congress).

1 values.³⁵ Therefore, the express language of section 106.1(a) does not apply because there is
2 only one clearly identified candidate. Nor does the phone bank regulation apply, or its extension
3 to mass mailers in AO 2006-11, because “Progressive” lacks a generic party reference.

4 Finally, assuming that “progressives” or “liberals” can substitute for a generic reference
5 to candidates of the Democratic Party, the reference would not be *to the same party* as the clearly
6 identified candidate as required under section 106.8(a)(3). The Commission has never extended
7 the phone bank regulations to cover generic references to candidates of the *opposing* party.³⁶

8 For these reasons, “Progressive” is not a hybrid communication that would permit an
9 allocation between a candidate and his or her party pursuant to the time-space approach, and the
10 Commission finds reason to believe that the NRCC violated 52 U.S.C. § 30116(a) by making,
11 and that the Committee violated 52 U.S.C. § 30116(f) by knowingly accepting, an excessive in-
12 kind contribution.

³⁵ While there is a “Congressional Progressive Caucus,” which includes one Member of the United States Senate and several Members of the House of Representatives, the ad does not appear to refer to it or any other group of federal officeholders or candidates. Furthermore, O’Connor, as a candidate for federal office, was not eligible to join the caucus.

³⁶ The ads at issue in the Bush-Cheney Audit were ads attacking the opposing party, but the Commission split. One Commissioner issued a Statement briefly raising this issue. *See* Statement of Comm’r Weintraub at 2, Report of the Audit Division on Bush-Cheney ’04, Inc.