FEDERAL ELECTION COMMISSION
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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 6685
COMPLAINT FILED: Nov. 1, 2012
LAST RESPONSE RECEIVED: Dec. 31, 2013
ACTIVATED: Sept. 17, 2013

EARLIEST SOL: Oct. 9, 2017
LATEST SOL: Oct. 25, 2017
ELECTION CYCLE: 2012

COMPLAINANT: Tarkanian for Congress

RESPONDENTS: Horsford for Congress and Michael Kern in his official capacity as treasurer
Democratic Congressional Campaign Committee and Kelly Ward in her official capacity as treasurer
Democratic National Committee and Andrew Tobias in his official capacity as treasurer

RELEVANT STATUTES: 2 U.S.C. § 441a(a)
2 U.S.C. § 441a(d)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b
11 C.F.R. § 106.1
11 C.F.R. § 106.8

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

In the weeks leading up to the 2012 general election, Horsford for Congress ("Horsford Committee") and the Democratic Congressional Campaign Committee ("DCCC") (collectively, "Respondents") jointly aired a television advertisement entitled "Fight" that expressly advocated Steven Horsford's election to Congress and also referenced the Democratic Party generally, including photographs of unnamed Democratic state office-holders, one of whom was also a

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candidate for re-election to her state office. Complainant alleges that the DCCC made an excessive in-kind contribution to the Horsford Committee by paying "from about two-thirds to one-half of the costs to air this advertisement" because "the ad has, at best, a de minimis value to generic Democratic candidates or state candidates." Compl. at 1 (Nov. 1, 2012). Complainant also alleges that "through [the] subterfuge" of a hybrid ad, the DCCC accepted a prohibited corporate contribution because it received air time at a discounted "candidate rate" that it was not entitled to receive. *Id.* at 2, 11. The Complaint also notes that logo of the Democratic National Committee ("DNC") appears in the advertisement. Compl. at 7.

In response, the Horsford Committee and the DCCC assert that they properly split the costs of the advertisement evenly between them because the ad devoted equal time and space to Horsford's candidacy and general references to the Democratic Party.[1] DCCC Resp. at 2; Horsford Resp. at 1-2. They further contend that under FCC regulations, they were entitled to the discounted air time rate. *Id.* at 5-6. The DNC responds that it was not involved in the advertisement and the Complaint does not allege that it violated the Act. DNC Resp. at 1-2 (Dec. 28, 2012).

We recommend that the Commission dismiss the allegation that the Horsford Committee violated 2 U.S.C. § 441a(f) by accepting an excessive contribution, and dismiss the allegation that the DCCC violated 2 U.S.C. § 441a(a)(2)(A) by making an excessive contribution or 2 U.S.C. § 441a(d) by making an excessive coordinated party expenditure. Furthermore, we recommend that the Commission dismiss the allegation that the DCCC and the Horsford Committee violated 2 U.S.C. § 441b by accepting an in-kind corporate contribution because the

[1] The DCCC and the Horsford Committee each filed a separate response to the Complaint. *See* DCCC Resp. (Dec. 28, 2012); Horsford Resp. (Dec. 31, 2012). The Horsford Committee's response predominantly relies on the DCCC response, stating that it "join[s] fully in the response to the Complaint submitted by Co-Respondents, and incorporate[s] its Facts, Analysis, and supporting materials, including exhibits." Horsford Resp. at 1.

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Commission lacks jurisdiction to determine whether the Respondents were entitled to the lowest unit charge for the advertisement. Finally, we recommend that the Commission find no reason to believe that the DNC violated 2 U.S.C. §§ 441a(a)(2)(A), 441a(d) or 441(b) because it does not appear that it was involved in the creation or dissemination of the "Fight" ad.

II. FACTS

Steven Horsford was a successful candidate in the 2012 general election in Nevada's 4th Congressional District. His principal campaign committee is the Horsford Committee, and Michael Kern is its treasurer.

During the 2012 election cycle, the Horsford Committee and the DCCC jointly funded a television advertisement entitled "Fight" that aired in Nevada between October 13 and 25, 2012.[2]

[2] The advertisement is available at https://www.youtube.com/watch?v=gQ_mmbGm2zk (last visited June 26, 2014), and is also available in the Voting Ballot Matters folder.

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The content of the advertisement is summarized below:

Table 1. "Fight" Ad

Time Marker	Length of Segment	Image	Audio
0:00 – 0:04	4 seconds	Horsford driving; in kitchen with family; working at desk; text on screen: "Steven Horsford"	Voiceover: "Overcoming adversity, Stephen Horsford's life shapes his fight for Nevada's future."
0:05 0:07	3 seconds	L: maintenance crew working on airplane; text on screen: "JOBS" R: pictures of three local Democratic officeholders;[3] text on screen: DNC logo	Voiceover: "Horsford and Democrats created new Nevada jobs."
0:08 – 0:09	2 seconds	L: man working in commercial kitchen speaking to camera R: remains the same	Man on Screen: "Thousands of people are back at work."
0:10 – 0:12	3 seconds	L: image of classroom; text on screen: "SCHOOLS" R: remains the same	Voiceover: "Democrats fought for better schools."
0:13 – 0:14	2 seconds	Woman in classroom speaking to camera; text on screen: headline reading "Budget: a Proud Day for Nevada"	Woman on Screen: "Stephen Horsford held his ground."
0:15 – 0:20	6 seconds	L: image of neighborhood as seen through window of car R: image of people in meeting; text on screen: DNC logo	Voiceover: "Democrats know there's more to do to build an economy that will last for the middle class."
0:21 – 0:24	4 seconds	Horsford speaking to camera; text on screen: "Steven Horsford for Congress"	Horsford: "I'm Steven Horsford, and I approved this message. Because people want . . ."
0:25	1 second	Remains the same, but disclaimer is added at bottom: "Approved by Steven Horsford. Paid for by Horsford for Congress & the Democratic Congressional Campaign Committee."	"someone who will fight for . . ."
0:26 – 0:29	4 seconds	Remains the same, but additional text added: "Fighting for the middle class"	"them. It's what I've done all my life, and it's what I'll do in Congress."

Based on "information from the [Complainant's] media buyer, and information obtained from the FCC's Political File," the Complaint asserts that the Horsford Committee and the DCCC together made a total of $1,378,663 in media buys between September 1 and October 31, 2012, for the "Fight" ad. *Id.* at 7. Similarly, Complainant asserts that information from the

[3] The three local officeholders, whose names do not appear on the screen, appear to be Nevada Senator Mo Denis, Nevada Assemblywoman Peggy Pierce, and Nevada Senator Ruben Kihuen. Compl., Exs. 3, 4, 6. Pierce was a candidate for reelection to her Nevada Assembly District 3 seat in the 2012 election.

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FCC's political file and the Horsford Committee's disclosure reports shows that the most the Horsford Committee possibly could have contributed to the costs of the ad is $550,897.11. *Id.* at 7. Thus, the Complaint concludes that the DCCC paid more than $800,000 (more than 60%) of the cost of the "Fight" ad. *Id.* at 8-9.

Respondents assert that the "Fight" ad devoted equal time and space to Mr. Horsford's candidacy and to generic references to the Democratic Party" and accordingly, each entity properly paid 50% of the cost of the ad. DCCC Resp. at 2, 5. In support of its assertion that the costs were evenly split, Respondents submitted four invoices to the DCCC for production costs and production fees related to the "Fight" ad which show that the DCCC was billed for half of the overall costs. *Id.*, Exs. A, B, C, D. Based on these invoices, it appears that Respondents spent at least $238,459 on the "Fight" ad.[4]

III. LEGAL ANALYSIS

A. Alleged Excessive Contribution from DCCC to the Horsford Committee

Complainant alleges that the DCCC made, and the Horsford Committee accepted, an excessive contribution in violation of 2 U.S.C. § 441a(a)(2)(A) by improperly allocating the costs of the "Fight" ad. Compl. at 10-11. 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. 2 U.S.C. § 431(8)(A). The term "anything of value" includes all in-kind contributions. 11 C.F.R. §100.52(d)(1). The Act limits contributions from a national committee to a candidate committee to a total of $5,000 per

[4] This figure was calculated by adding the amounts billed on three of the four invoices provided by the DCCC. DCCC Resp. at Exs. A, C, D. According to the DCCC, the fourth invoice includes costs associated with a separate ad. Specifically, the fourth invoice includes charges of $128,011 for one week's air time from 10/9/12 to 10/15/12; the "Fight" ad did not begin airing until 10/13. DCCC Resp. at 2, Ex. B. The DCCC does not specify whether the three days of air time from 10/13 to 10/15 was exclusively related to the "Fight" ad. Thus, we cannot determine from the invoices exactly how much the DCCC disbursed in connection with the "Fight" ad.

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1 election. 2 U.S.C. § 441a(a). National committees of a political party may also make an
2 additional amount of coordinated party expenditures in connection with the general election
3 campaign of a candidate for federal office, which in the 2012 election cycle was $45,600 for U.S.
4 House nominees in Nevada.[5] 2 U.S.C. § 441a(d); *see*
5 http://www.fec.gov/info/charts_441ad_2012.shtml.

6 Any amounts paid by the DCCC for the "Fight" ad that exceed its properly allocated
7 share of the total costs constitute an in-kind contribution to the Horsford Committee. Thus, in
8 order to determine whether the DCCC made any in-kind contributions to the Horsford
9 Committee in connection with the ad (and, ultimately, whether the DCCC made an excessive
10 contribution to the Horsford Committee), we must determine whether the Respondents properly
11 allocated the costs of the advertisement when each paid for half of the total costs.

12 The "Fight" ad clearly identifies Horsford as a federal candidate, generically refers to
13 "Democrats," and in one screen shot clearly identifies three state officeholders by photograph,
14 one of whom was running for re-election in the 2012 election. *See supra* note 3; 11 C.F.R. §
15 100.17 (a candidate is "clearly identified" if the candidate's photograph appears). Neither the
16 Act nor Commission regulations directly address the appropriate attribution of costs for such a
17 television advertisement, though the regulations and other Commission guidance, *e.g.*, Advisory
18 Opinions, do provide some guidance on allocating certain types of similar communications.

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

[5] In addition, State and national party committees may assign their spending authority to another political party committee. 11 C.F.R. § 109.33(a). The DCCC indicated on its 2012 Pre-General Report that the Democratic National Committee and Nevada State Democratic Party authorized the DCCC to spend its Horsford limit for the election cycle (also $45,600 each). Amended 2012 Pre-General Report at 22,803 (filed July 19, 2013). This Pre-General Report also disclosed an $88,028 disbursement on behalf of Horsford. *Id.* The available information does not establish whether the disbursement is related to the "Fight" ad.

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that expenditures made on behalf of more than one clearly identified candidate "shall be attributed to each such candidate according to the benefit reasonably expected to be derived." 11 C.F.R. § 106.1(a). For broadcast communications, 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." 11 C.F.R. § 106.1(a). This regulation, however, only addresses communications involving more than one clearly identified candidate, and does not directly address how attribution applies to a communication involving clearly identified candidates in combination with generic references to a political party.

Commission regulations concerning phone banks do address the allocation of a communication that contains a reference to a clearly identified candidate along with a generic reference to other party candidates, a so-called "hybrid communication." *See* 11 C.F.R. § 106.8(a). Under 11 C.F.R. § 106.8, 50% of the costs of a phone bank communication must be attributed to the clearly identified candidate, and the other 50% must be attributed to the party committee, regardless of the amount of time devoted to each. 11 C.F.R. § 106.8(b). The Explanation and Justification of this regulation specifically noted 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." Party Committee Telephone Banks, Final Rules, 68 Fed. Reg. 64,517, 64,518 (Nov. 14, 2003). Although the Commission has not, since then, established any new rules on the proper way to allocate the costs of other types of hybrid communications, it has addressed different types of hybrid communications in a couple of different contexts.

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1 In Advisory Op. 2006-11 (Washington State Democratic Central Committee), the
2 Commission addressed the appropriate allocation of payments for a mass mailing hybrid
3 communication. The Commission used 11 C.F.R. §§ 106.1 and 106.8 as models and concluded
4 that *at least* 50% of the cost of the mailing should be attributed to the clearly identified federal
5 candidate; however, if the space devoted to the clearly identified candidate exceeded the space
6 devoted to the generically referenced candidates, then the cost attributed to each entity had to
7 reflect the relative proportion of space devoted to that entity (*i.e.*, the cost attributed to the
8 candidate would be greater than 50%). AO 2006-11 at 1.

9 The Commission considered hybrid television advertisements in the Report of the Audit
10 Division on Bush-Cheney '04, Inc. (approved March 22, 2007) ("Audit Report"). The Audit
11 Report included as an "additional issue," but not a "finding," a factual and legal discussion
12 concerning a media program, whose costs were shared equally by Bush-Cheney '04, Inc. and the
13 Republican National Committee, with television advertisements that clearly identified candidate
14 George W. Bush (or his election opponent John Kerry) together with generic references to other
15 political figures such as "Congressional leaders" and "liberals in Congress."[6] Audit Report at 10.
16 There were not, however, four votes among the Commissioners to make a finding as to whether
17 the 50% allocation complied with the Act and Commission regulations. *Id.*, Ex. A at 1; *see also*
18 Statement of Comm'rs. Lenhard, Walther, & Weintraub, Audit of Bush-Cheney '04, Inc.;

[6] In a earlier legal analysis of the Preliminary Audit Report ("PAR"), this Office recommended that the Audit Division raise the hybrid communication issue in its cover memo to the PAR rather than include it as a finding in the report so that the Commission could consider the issue, noting that "neither the [Act] nor the Commission's regulations definitively address the allocation of broadcast advertisements referencing only one clearly identified federal candidate . . . and a vague reference to their political allies in Congress." Memorandum from James A. Kahl, Deputy Gen. Counsel, FEC, to Joseph F. Stoltz, Ass't. Staff Dir., FEC at 2 (May 26, 2006). OGC made the same recommendation with regard to hybrid communications discovered in the audit of McCain Palin 2008, Inc., but the issue was not included in the Final Audit Report. Memorandum from Christopher Hughey, Acting Gen. Counsel, FEC, to Joseph F. Stoltz, Ass't. Staff Dir., FEC at 14 (Dec. 1, 2010).

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Statement of Comm'rs. Mason & von Spakovsky, Final Audit Report on Bush-Cheney '04, Inc.; Statement of Comm'r. Weintraub, Report of the Audit Division on Bush-Cheney '04, Inc.

Following the Audit Report, the Commission began a rulemaking on hybrid communications, seeking comment on different alternatives of a proposed rule to expand 11 C.F.R. § 106.8 beyond phone banks. The proposals included three attribution alternatives: (1) a fixed percentage (proposed at 25%, 50%, or 75%); (2) a fixed percentage of 100%, requiring the entire amount of each disbursement for the communication to be attributed to the Federal candidate of the political party making the communication; and (3) the greater of either a fixed percentage (proposed at 25%, 50%, or 75%), or a percentage based on space or time attribution. *See* Hybrid Communications, 72 Fed. Reg. 26,569, 26,573-74 (proposed May 10, 2007) (to be codified at 11 C.F.R. § 106.8) ("NPRM"). Although the Commission received comments and held a public hearing on the issue, *see generally* FEC Online Rulemaking System, REG 2007-01 Hybrid Ads, it did not vote on a final rule because it lost its quorum in late 2007, and the rulemaking has been dormant since. Thus, there is no definitive guidance on the appropriate way to allocate the costs of hybrid television advertisements.

In this matter, Respondents analogize the "Fight" ad to the mass mailing in AO 2006-11 and contend that it allocated the costs according to the space and time devoted to each entity, *i.e.*, equally. DCCC Resp. at 3-5. They disagree with Complainant's characterization of the "Fight" ad as a Horsford ad with fleeting references to Democrats and assert that "each spoken mention of Mr. Horsford is balanced by a spoken mention of 'Democrats'" and that "each visual image of Mr. Horsford is similarly offset by an image of the Democratic Party's logo and images that represent other Democratic candidates." *Id.* at 4. Respondents also point to the value of the ad's

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support for the Democratic Party as a whole, in that the party faced several competitive and high-profile elections in Nevada in 2012. *Id.* at 5.

We recommend applying the general principles presented in both 11 C.F.R. §§ 106.1 and 106.8 to allocate the costs of the "Fight" advertisement, as the Commission did in AO 2006-11. Under this approach, portions of the ad exclusively focused on Horsford would be attributed to him, and portions focused on a generic party message would be attributed to the DCCC. Portions of the ad where Horsford is pictured together with a Democratic Party logo would be split evenly. This allocation approach, excluding the time (8 seconds) devoted to the disclaimer, *see infra* discussion of disclaimer, results in an approximate allocation of 40% to Horsford (8.5 seconds out of 21 seconds) and 60% to the DCCC (12.5 second out of 21 seconds).[7] If the Commission applies the regulations in the same manner that it did in AO 2006-11, where a minimum of 50% of the cost is allocated to the candidate, an appropriate allocation of the costs of the advertisement would be 50% to each entity.[8]

As noted, the above allocation does not include the 8 seconds containing the "Fight" ad's disclaimer. The Act requires that television advertisements that are paid for or authorized by the candidate include a statement, both spoken by the candidate and appearing in writing at the end of the ad for at least four seconds, identifying the candidate and stating that he or she has

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[7] Under this approach, we attribute the following segments to Horsford: 0:01-0:04, half of 0:05-0:07, 0:13-0:14, and 0:24, aggregating a total time of 8.5 seconds; and the following segments to the DCCC: half of 0:05-0:07, 0:08-0:12, and 0:15-0:20, aggregating a total time of 12.5 seconds. *See supra* Table 1.

[8] As noted, the "Fight" ad clearly identifies a non-federal candidate in addition to clearly identifying Horsford. *See supra* note 3. In the NPRM, the Commission generally excluded communications clearly identifying non-federal candidates as outside of the scope of the proposed expansion of section 106.8. *See* NPRM at 26,571. Thus, one could argue that the ad is properly allocated to those two candidates pursuant to the general allocation rule at 11 C.F.R. § 106.1 simply as a multi-candidate ad. Nevertheless, we do not recommend that approach here because the reference to the state candidate is fleeting. The photo is one of three small head shots shown at the same time on half of the screen, and it appears for only three seconds. The state candidate is not otherwise mentioned or identified in the ad and her likeness would likely cause a "reasonable viewer" to conclude that it is a reference to the "party as a whole." DCCC Resp. at 4.

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1 approved the communication. 2 U.S.C. § 441d(d)(1)(B). In the "Fight" advertisement, the
2 spoken segment of the disclaimer lasts 3 seconds (0:21-0:23) (*i.e.*, the portion where Horsford
3 says he "approved this message") and the written segment lasts 5 seconds (0:25-0:29). There is
4 no guidance on how this disclaimer should be calculated into the time or space devoted to each
5 entity. In the NPRM for hybrid advertisements, the Commission sought comment as to "whether
6 the space or time devoted to a clearly identified Federal candidate in any general 'stand by your
7 ad' disclaimer required by the Act and Commission regulations should be considered when
8 calculating a space or time analysis . . . .". NPRM at 26,574.

9 If included in the time/space analysis, the disclaimer could be attributed in a number of
10 ways. For example, all 8 seconds could be attributed to Horsford because he appears on the
11 screen for all eight seconds, resulting in an overall attribution of 57% of the ad to the Horsford.[9]
12 A second alternative is to split the 8 seconds equally between the two entities because the
13 disclaimer requirement could be seen as a compliance measure and not necessarily part of the
14 ad's messaging, resulting in an overall allocation of 43% of the ad to Horsford.[10] A third
15 alternative is to attribute the first 3 seconds of the disclaimer solely to Horsford and split equally
16 the 5 seconds containing the written disclaimer because both Horsford and the DCCC are
17 mentioned, resulting in an overall allocation of slightly less than 50% of the ad to Horsford.[11]

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[9] The total time attributed to Horsford would be 16.5 seconds out of a total of 29 seconds, compared to the Democratic Party's 12.5 seconds, yielding an allocation of 57% to the Horsford Committee (16.5/29) and 43% to the DCCC (12.5/29).

[10] The total time attributed to Horsford would be 12.5 seconds out of a total of 29 seconds, compared to the Democratic Party's 16.5 seconds, yielding an allocation of 43% to the Horsford Committee (12.5/29) and 57% to the DCCC (16.5/29). We note that in this ad, Horsford continues speaking for the entire duration of the disclaimer, stating "I'm Steven Horsford, and I approved this message. Because people want someone who will fight for them. It's what I've done all my life, and it's what I'll do in Congress."

[11] The total time attributed to Horsford would be 14 seconds out of a total of 29 seconds, compared to the Democratic Party's 15 seconds, yielding an allocation of slightly less than 50% to the Horsford Committee (14/29) and slightly more than 50% to the DCCC (15/29).

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1 Thus, all but one allocation approach results in 50% or less of the ad being attributed to
2 Horsford.

3 The Respondents' equal allocation of the costs of the "Fight" ad between the two parties
4 may not be the only possible attribution method, but it reflects a reasonable interpretation of the
5 available authorities. Accordingly, we recommend that the Commission dismiss the allegations
6 that DCCC violated 2 U.S.C. §§ 441a(a) and (d), and that the Horsford Committee violated
7 2 U.S.C. § 441a(f) by improperly allocating the costs of the "Fight" ad.

8 Further, as the Complaint notes, the Democratic National Committee ("DNC") logo
9 appears in the advertisement. Compl. at 7; Table 1 *supra* at 4. There is no information,
10 however, that the DNC had any involvement in the "Fight" ad or that the use of the logo affects
11 the allocation of the costs of the ad. The DNC asserts that it was unaware of the use of its logo
12 and "it did not take part in the production of the advertisement, nor did it pay for any costs
13 associated with its distribution." DNC Resp. at 2 (Dec. 28, 2012). The DNC explains that this
14 use is consistent with the DNC's policy to allow its national party committees to use its logo. *Id.*
15 Accordingly, we recommend that the Commission find no reason to believe that the DNC
16 violated 2 U.S.C. §§ 441a(a)(2)(A) and 441a(d).

17 B. <u>Alleged Corporate Contribution Via Broadcast Charges</u>

18 The Complaint also alleges that Respondents received a reduced "lowest unit charge" rate
19 on air time for the "Fight" ad due to the Horsford Committee's funding of the ad — a rate to
20 which the DCCC was not entitled. Compl. at 2, 11. Accordingly, Complainant concludes that
21 this discounted air time constitutes a prohibited corporate contribution from the television
22 stations to the DCCC. *Id.* Respondents contend that they were permitted to pay the lowest unit
23 charge for the "Fight" ad's air time. *Id.* at 5-6.

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1 Corporations may not make contributions directly to candidates. 2 U.S.C. § 441b. The
2 Communications Act of 1934 provides that a legally qualified candidate for public office making
3 use of a broadcasting station in connection with his campaign is entitled to the lowest unit charge
4 of the station during the 60 days prior to the general election in which he is a candidate.
5 47 U.S.C. § 315(b)(1). The Commission, however, has no jurisdiction to make a formal
6 determination as to whether Respondents were entitled to the lowest unit charge under the
7 Communications Act; rather, this is within the jurisdiction of the FCC. *See* Factual & Legal
8 Analysis at 5-6, MUR 5834 (Darcy Burner for Congress). Although an alleged violation of
9 2 U.S.C. § 441b is certainly within the Commission's jurisdiction, a determination of whether
10 section 441b was violated turns on whether Respondents were entitled to the lowest unit charge
11 to broadcast their hybrid communication.[12] Accordingly, we recommend that the Commission
12 dismiss the allegation that the DCCC and the Horsford Committee violated 2 U.S.C. § 441b.
13 Finally, as discussed above, it appears the DNC was not involved in the "Fight" ad so we
14 recommend that the Commission find no reason to believe that the Democratic National
15 Committee and Andrew Tobias in his official capacity as treasurer violated 2 U.S.C. § 441(b).

[12] Although the Commission has no jurisdiction to make a formal determination as to whether Respondents were entitled to the lowest unit charge under the Communications Act, the statute does not appear to exclude communications funded jointly by the candidate and a party committee. *See generally* 47 U.S.C. § 315; *see also* Dissent of Comm'rs. Toner & Smith at 2, Advisory Op. 2004-43 (Missouri Broadcasters) ("the statutory language [regarding the lowest unit rate] is permissive, making clear that broadcasters have the discretion to provide" the rate to candidates even if they are not fully compliant). Instead, the FCC's regulations define "use" for the purpose of this statute as any candidate appearance that does not constitute a bona fide newscast, a bona fide interview, a bona fide news documentary, or on-the-spot coverage of bona fide news events. 47 C.F.R. § 76.205(b). In general, it appears Commissioners have been reluctant to conclude that a broadcaster's potential misapplication of the "lowest unit rate" rule results in a corporate contribution by the broadcaster. *See* AO 2004-43 (concluding that a candidate's receipt of the lowest unit charge despite a potentially non-compliant disclaimer did not result in an in-kind contribution); *see also* Statement of Comm'rs. Toner, von Spakovksy, & Mason, Advisory Op. 2006-31 (Casey) and Statement of Comm'rs. Lenhard, Walther, & Weintraub, AO 2006-31 (both concluding that a candidate could receive the lowest unit rate, even if not entitled under the statute, if the rate was offered in the ordinary course of the television station's business).

IV. RECOMMENDATIONS

1. Dismiss the allegations that Horsford for Congress and Michael Kern in his official capacity as treasurer violated 2 U.S.C. § 441a(f) and the Democratic Congressional Campaign Committee and Kelly Ward in her official capacity as treasurer violated 2 U.S.C. §§ 441a(a) and (d).

2. Dismiss the allegation that Horsford for Congress and Michael Kern in his official capacity as treasurer and the Democratic Congressional Campaign Committee and Kelly Ward in her official capacity as treasurer violated 2 U.S.C. § 441b.

3. Find no reason to believe that the Democratic National Committee and Andrew Tobias in his official capacity as treasurer violated 2 U.S.C. §§ 441a(a), 441a(d) and 441(b).

4. Approve the attached Factual and Legal Analysis.

5. Approve the appropriate letters.

6. Close the file.

Daniel A. Petalas
Associate General Counsel

6-27-14
Date

BY: Kathleen Guith
Kathleen Guith
Deputy Associate General Counsel

Peter Blumberg
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