

Agenda

Item #1



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

Minutes of the October 20, 2010, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
2nd Floor, Augusta, Maine

Present: Walter F. McKee, Esq., Chair; André G. Duchette, Esq.; Hon. Edward M. Youngblood; Margaret E. Matheson, Esq., Michael T. Healy, Esq. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:00 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Investigation of Cutler Files (partially discussed in executive session)

Mr. McKee provided Daniel I. Billings, Esq., counsel for the Cutler Files, and Richard Spencer, Esq., counsel for the Cutler campaign, an opportunity to respond to the new information and legal arguments that were raised after the last meeting.

Mr. Billings said that Mr. Spencer made two arguments in favor of continuing the investigation. The first argument was the website should have included a disclaimer identifying the responsible parties who created the site. The second argument was that the Commission should investigate whether more money was spent on the website than the amount claimed. Mr. Billings said that Mr. Spencer was, in effect, telling the Commission to make the Cutler Files prove that they did not spend more than \$100, whereas the standard for starting an investigation is that the complaining party has to provide sufficient evidence that a violation may have occurred. Mr. Billings stated that there has been no evidence provided to substantiate Mr. Spencer's claims that more money has been spent. He said the standard for whether an investigation is

warranted has not been supported. Mr. Billings said speculation and suspicion is not enough to support a further investigation.

Mr. Billings said the Cutler campaign's premise that the research for the website was done and paid for by an unsuccessful primary candidate was faulty. He said primary candidates do not spend large sums of money on staff or consultants to do opposition research on candidates they may possibly face in the general election. He talked with people who have been involved in primary campaigns and all have said that it is not practical to do so when the focus of the campaign is winning the primary election. Mr. Billings said that Mr. Spencer argued that, if the website is considered to be an independent expenditure, the cost of the research should be included in the overall cost of the communication. Mr. Billings said the Commission has never required other entities that made independent expenditures to report research costs. He also said that reporting the site research time as an independent expenditure has not been required by any other entity in the past. He said the Commission has not required filers to report time for any research that is done when making an expenditure.

Mr. Healy asked whether Mr. Billings' clients have waived the attorney/client privilege in order to provide factual information beyond what was submitted in the affidavit.

Mr. Billings said it would depend on the specific information that was requested. General questions have been addressed, he said.

Mr. Billings also stated that the Cutler campaign has indicated that it may file a civil suit. If the Commission does not go further with this investigation at this time, the Commission retains the right to take action in the future should any information provided to the Commission by the Cutler Files turn out to be untruthful or not factual as a result of fact finding in connection with a civil lawsuit.

Richard Spencer, Esq., counsel for the Cutler 2010 campaign, said he believes the affidavit submitted to the Commission is not accurate. He said the research was likely done in conjunction with a gubernatorial primary campaign or someone closely associated with one in preparation for running against Mr. Cutler in the general election. He said he believed the answer to Question 7 in the affidavit to be false. He also

expressed concern over the accuracy of Question 16 in the affidavit regarding the cost of the website and Question 9 regarding research time.

Mr. Spencer said until the Commission establishes for certain how much was spent on the website, one cannot conclude it is a de minimis violation of §1014. The Commission should continue the investigation to determine whether the representations in the affidavit are true.

At 9:30 a.m., Mr. McKee moved that the Commission go into Executive Session to consult with the Commission's counsel concerning pending or contemplated litigation and the legal rights and duties of the Commission. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

At 9:42 a.m., Mr. McKee moved to come out of Executive Session, seconded by Mr. Youngblood. Motion passed unanimously.

Mr. Healy moved that the Commission authorize the staff to continue the investigation of the Cutler Files for possible violations of 21-A M.R.S.A. § 1014 and § 1019(b) and continue the investigation in a confidential manner. Mr. Duchette seconded.

Motion passed unanimously (5-0).

Agenda Item #2. Request by Walter J. Eno concerning Columnist Bill Nemitz

Mr. Wayne explained that the Commission has received a request by Walter J. Eno of Scarborough to consider whether columnist Bill Nemitz has violated election laws because of his advocacy against Paul LePage. Mr. Wayne said the staff recommends taking no action on this matter, because of the exception in the campaign finance law for commentaries appearing in newspapers.

Mr. Duchette moved that the Commission take no action on the request for an investigation. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Agenda Item #3. Request by Maine Democratic Party concerning Paul LePage

Mr. Wayne explained that the Maine Democratic Party has filed a request for the Ethics Commission to investigate whether the 2010 gubernatorial campaign of Paul LePage received an in-kind contribution in the form of a company car which Marden's Surplus & Salvage has provided to the candidate, who is the General Manager of Marden's. In addition, the Maine Democratic Party requests that the Commission investigate whether the LePage campaign made material misrepresentations in its campaign finance reports due to the way travel reimbursements to Mr. LePage were reported.

Daniel Walker, Esq., counsel for the Maine Democratic Party, explained the reasoning for the request. He said it was discovered that Mr. LePage had a vehicle with an expired registration around the time he began campaigning and he received a new company vehicle at about the same time. He said it appeared the vehicle could have been an in-kind contribution. He said the Party learned recently that Mr. LePage has had a company vehicle for over a decade and that the reimbursements were for fuel only.

Mr. John Morris, Chief of Staff for the LePage campaign, explained that Mr. LePage has had a company car provided by Marden's since 1999. He said the Chief Financial Officer wrote a letter confirming this. He also confirmed that Mr. LePage does purchase his own fuel for the vehicle. He summarized by saying there is nothing to this case.

Mr. McKee moved the Commission not investigate this matter any further since no probable cause exists. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Agenda Item #4. Request by Maine Democratic Party concerning Poll

Mr. Wayne said the Commission staff wishes to provide an update to the Commissioners of a staff investigation of a poll conducted by Target Point Consulting and Western Wats of Maine to residents concerning Democratic candidates for the State Senate. He said he contacted Target Point Consulting directly and confirmed that it was a real research poll testing negative themes for use by their clients in

communications to voters. He said the poll included demographic questions and the results were tabulated after the poll. Mr. Wayne said it was not a push poll as the Democratic Party had suspected.

Daniel Walker, Esq., counsel for the Maine Democratic Party, said he agreed that there is no longer an issue about whether these entities were engaged in push polling. He said the question now remains who did the poll and do they need to register as a political action committee if they spent more than the threshold. He also said that the Commission should determine whether the poll contained express advocacy which would require that an independent expenditure be filed.

Mr. Wayne said there are numerous organizations, such as the state party committees, that are using polls to test negative themes about candidates. He said none of those communications with voters has ever been reported to the Commission as express advocacy. He said further investigation would hold this organization to a standard that no other entity has.

Mr. Healy moved that the investigation requested by Mr. Walker on September 29, 2010 (on behalf of the Maine Democratic Party) be terminated in light of the report from Mr. Wayne. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Agenda Item #5. Request by Maine Republican Party concerning Elizabeth Mitchell Campaign

Mr. Wayne explained that the Maine Republican Party requests that the Commission consider whether a television ad run by gubernatorial candidate Elizabeth Mitchell featuring her family used Maine Clean Election Act funds improperly to assist the campaigns of two of her children and her husband, who are also candidates for office.

Daniel I. Billings, Esq., counsel for the Maine Republican Party, said the issue is the possible improper use of Maine Clean Election Act (MCEA) funds. He said that after the District Court struck down the rebuttable presumption in Maine election law, the Commission cannot do the kind of subjective analysis of the context of communications that was allowed in the rebuttable presumption provision as written. He said the Commission's guidelines state that MCEA funds cannot be used to assist another campaign in any way. He said this ad identifies and depicts Emily Mitchell, therefore it could be seen as promoting her

campaign in House District 58. He referred to a 2008 matter very similar to this issue regarding then Senate candidate Valerie Carr-Winocour. At that time, the Commission analyzed the communication and determined that it was as an independent expenditure.

[Mr. Billings' presentation was paused so that the Commission could look at the Mitchell ad at issue.]

Mr. Billings said if you apply the independent expenditure definition to this ad, all the requirements are there. The public policy behind the rebuttable presumption was to close a loophole for communications made close to the election that did not have the exact language of express advocacy but which did have an impact on the election. The impact on MCEA candidates was particularly hard because they were given a small amount of public funds to campaign with and could not adequately respond to last-minute ads that did not contain express advocacy. Mr. Billings did not agree with the staff's analysis that the independent expenditure statute does not apply because Emily Mitchell cooperated in making the ad, therefore the issue is whether the ad should be considered to be a contribution to Emily Mitchell. He said even many would presume that, for the independent expenditure statute to apply, the communication must be made independently of the candidate. However, the independent expenditure statute does not say that.

Mr. McKee said that we can all agree that the ad does identify and depict Emily Mitchell and that the ad was disseminated within the 35 days before the election, the question, however, is whether this expenditure was made to "design, produce or disseminate a communication..."

Mr. Billings said that there was money spent to design, produce, and air the ad. The analysis should be based on the simple objective standard of whether there is a communication that was disseminated in which a candidate is clearly identified and depicted.

Mr. Duchette asked if the ad were negative against Emily Mitchell whether that would change the decision.

Mr. Billings said in the Commission's Rules there is a provision that allows the Commission to determine for whom the communication was intended to benefit. He said the subjective analysis comes into play in the determination of which candidate would get the matching funds. He said the objective analysis is whether the communication is an independent expenditure.

Mr. Healy stated that although Emily Mitchell was identified, the ad did not state she was running for any office.

Mr. Billings said anyone living in her district would recognize her and know she was running for office. He said, also, that the intent of the statute was to capture communications that did not identify candidates.

Kate Knox, Esq., counsel for Mitchell campaign, said Mr. Billings' analysis was irrelevant to the question before the Commission. She said the definition of an independent expenditure says the expenditure is done independently of the candidate, without the candidate's knowledge or cooperation. She said Emily Mitchell knew about the ad and there was nothing independent about it. She said the independent expenditure analysis does not apply in this case. She suggested the Commission determine first, whether the expenditure was for a campaign-related purpose and whether it was a contribution to Emily Mitchell's campaign. She said that the ad was a valid campaign expenditure. It was one of a series of biographical ads about Libby Mitchell. It is extremely common to use family members in these kinds of ads. The theme of this particular ad was about education and children coming back to Maine to live. She said no other candidate was highlighted in the ad. She said the subject of the ad was entirely about Libby Mitchell running for Governor. Regarding whether the ad was a contribution to Emily and Will Mitchell, she said Emily and Will Mitchell appear for no more than three seconds in a 30 second ad. Jim Mitchell appears in the ad for even less time and is not identified by name. Because the connection between Emily, Will and Jim Mitchell and their candidacies is so attenuated, the ad has no value to their campaigns. She also said the campaign contacted the Commission office in July to review the rules and be sure all the family members could be part of the family-oriented ad. She said the way the ad was written is entirely within the statute guidelines.

Mr. Healy said having Emily Mitchell and Will Mitchell, who is running for a municipal seat, featured in an ad with their names printed very obviously and speaking is a benefit to both of their elections because they are getting the benefit of the ad running repeatedly in their districts.

Ms. Knox said the theme of the ad was having children come home to Maine to live and work. She said what made the message more powerful was having Libby Mitchell's children speaking with that message.

If they had not been identified as Libby Mitchell's children, they would have just been viewed as random people and the strength of the message would have been diluted. She said simply having someone appear in an ad does not necessarily mean that person receives a benefit from that ad.

Mr. Youngblood agreed the other candidates appeared for a short period of time and the benefit may have been limited. However, he asked what the standard the Commission should use to determine whether an ad becomes a contribution based on the amount of time the candidate appears in the ad.

Ms. Knox stated that the period of time may not be as important as the content of what is said in the ad. She said the question should be whether the indicia in the ad are enough for the viewer to make the connection between the content of the ad and the candidate.

Mr. McKee said the first step with regard to this ad is determining whether it was "done in cooperation, consultation, or concert with" Therefore, if the Commission decides it was not, the other issues may be interesting but are irrelevant. He asked if there was anything else for the Commission to look at if it made that determination.

Ms. Gardiner said that was a legitimate argument. The person filing an independent expenditure report must sign an affidavit affirming that the expenditure was made without any communication, cooperation or coordination with the candidate. She said this situation does not exactly fit the definition of an independent expenditure. The Commission has to look at the entire statutory scheme to see where it fits. That includes the prohibition against the use of MCEA funds to make a contribution. Mr. Billings may also have a legitimate point that not viewing this as an independent expenditure opens up a loophole; however, that is a matter for the Legislature to deal with.

Mr. Wayne said that Mr. Billings may have a reasonable policy question. If the Commission decides that the expenditure is not an independent expenditure, the Commission could still decide whether Maine Clean Election Act funds were used to assist another candidate. Mr. Wayne said that the independent expenditure statute should be administered as it was intended. That intention was that it would apply to certain expenditures that were made independently of the candidate and without the involvement of the candidate. The applicable standard under the rebuttable presumption provision of the statute for an expenditure made

independently of the candidate is whether the expenditure is campaign-related. For an expenditure made with candidate involvement, it is appropriate to use a purpose test. For legal and policy reasons, the Commission needs the ability to look subjectively at the ads on a case by case basis. Mr. Billings contends that the Commission has no option other than saying that this ad is directly related to the election of Emily Mitchell. Mr. Wayne said that there is room for argument on that point.

Mr. Healy asked whether Mr. Wayne agreed with Mr. Billings' point that the U.S. District Court eliminated the rebuttable presumption.

Mr. Wayne said that Judge Hornby did sever the provision that allowed the presumption to be rebutted from the independent expenditure statute. Mr. Billings argues that the presumption in 21-A M.R.S.A. § 1019 (1)(B) applies in this case because the ad mentions other candidates and was disseminated within 35 days before the general election. This presumption cannot be rebutted due to the Court's decision. However, Mr. Wayne said that section did not apply in this case because the expenditure was not made independently of the other candidates.

In response to a question from Mr. Healy, Mr. Wayne explained that the Commission had promulgated a rule that states explicitly that any expenditure that is made with the cooperation or coordination of a candidate is not an independent expenditure. Mr. Wayne reiterated that the Commission needs to have the discretion to look at an expenditure and question what its purpose was.

Mr. Healy said there are potentially two issues – whether there was an illegal contribution to another campaign and whether Emily Mitchell's opponent should receive matching funds.

Mr. Wayne said that if the Commission decided that Emily Mitchell received an in-kind contribution, that would be taken into consideration in calculating matching funds for her opponent. However, Mr. Wayne recommended against finding that the Mitchell for Governor campaign was in violation because the law and guidance are unclear and the campaign sought advice from the staff early on regarding this ad.

Alison Smith, co-chair of Maine Citizen's for Clean Elections, said the first issue to decide was whether there was an independent expenditure made. She agreed with Ms. Gardiner's view that the Mitchell

campaign could not sign the required affidavit stating the expenditure was made without Emily Mitchell's coordination. She said the independent expenditure statute should not apply to this matter.

Ms. Smith said the ad was campaign related and the purpose was to promote the Libby Mitchell campaign. She said the answer to the question of whether the campaign spent MCEA funds to promote or assist another candidate is that it did not. Ms. Smith also noted that the Libby Mitchell campaign took the additional step of checking with the Commission before going ahead with the ad. She said the only lingering question is whether this ad assisted the other candidates even though that was not the ad's purpose. She suggested that if the Commission decides that Emily and Will Mitchell received some benefit from the ad, perhaps Emily and Will Mitchell should reimburse the Mitchell for Governor campaign for the prorated cost of the ad that could be attributed to them by calculating the time they appeared in the ad and the possible number of viewers in their districts. She said common sense should prohibit that scenario because the purpose was never to promote Emily or Will Mitchell's campaigns.

Mr. McKee said the question remains whether the expenditure made by the Libby Mitchell campaign constitute a contribution to Emily Mitchell's campaign.

Mr. Wayne said another issue raised by Mr. Billings is whether the Commission's guidelines for permissible uses of MCEA funds were violated as a result of MCEA funds being used to benefit Emily and Will Mitchell's campaigns. To find that the expenditure was a contribution, the Commission would have to determine that the Mitchell for Governor campaign's purpose in making the expenditure was to promote the other candidates.

Mr. Healy asked what the posture of this issue would be if the Commission were to factually conclude that the purpose of the expenditure was not to promote the campaign of Emily Mitchell, but that there was a benefit to her campaign.

Ms. Gardiner said the fact that the candidate is clearly identified is only relevant in the context of an independent expenditure but that is not the case here. Instead, the question becomes whether there was a violation of the Commission's guidelines on how MCEA funds can be spent. She said the clear purpose of the ad was to promote Libby Mitchell's campaign and not Emily's. However, the Commission could

decide whether its guideline that MCEA funds may not be used to assist another candidate means that an MCEA candidate cannot make an expenditure that confers an ancillary or collateral benefit to another candidate in the process of carrying out the primary purpose of the expenditure, which is to promote the MCEA candidate's campaign. Similarly, it is necessary to analyze the purpose of the expenditure to determine whether the expenditure should be considered an in-kind contribution to Emily and Will Mitchell.

Mr. McKee distinguished this ad from the 2008 ad in which Rep. Cornell du Houx appeared. That ad was a national ad and any collateral benefit was insignificant. In this case, it is clear that the independent expenditure statute does not apply. All factors surrounding the ad suggest that it is not a contribution. Mr. McKee also said that he did not see that the expenditure was made to assist the campaigns of the other two candidates.

Mr. Healy said he agreed that the primary purpose of the ad was to promote Libby Mitchell's campaign and not Emily Mitchell's campaign; however, he said there was an unquantifiable benefit to Emily Mitchell's campaign.

Mr. McKee stated that even though there may have been some small benefit to Emily Mitchell, the fact remains that it was not intended as a contribution or expenditure.

Mr. McKee moved that the Commission find there was no independent expenditure. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Mr. McKee moved that the Commission find there was no contribution or expenditure made as those terms are defined in § 1012. Ms. Matheson seconded.

Mr. Youngblood noted that the time that Emily was allotted was the same amount as the other children and therefore was not made to assist her campaign.

Motion passed unanimously (5-0).

Mr. Wayne said the only issue left for discussion was to consider whether this was a violation of the MCEA expenditure guidelines.

Mr. Healy asked whether the guidelines were adopted pursuant to the Maine Administrative Procedures Act and have the force of law.

Mr. Wayne explained that the Maine Clean Election Act requires the Commission to publish guidelines outlining permissible MCEA expenditures. There was an opportunity for public comment before the Commission adopted the guidelines but they were not adopted under the APA and do not have the force of law. He explained that the statute says the Maine Clean Election Act funds can only be spent on campaign-related purposes and directs the Commission to determine what the purposes are.

Mr. McKee said the Commission needs to determine whether the Libby Mitchell ad was a campaign-related purpose. He explained helping out another candidate may not be considered a campaign-related purpose.

Mr. Healy asked what authority does the Commission have to take an action if it finds that there has been a violation of the guidelines.

Mr. Wayne explained that some candidates would feel a finding of a violation by the Commission to be significant in itself.

Ms. Gardiner said the guideline itself does not have the force of law. However, the statute states that the funds can only be spent for campaign-related purposes. She said if the expenditure for the ad was not for a campaign-related purpose, then it is a violation of the statute and could be a civil violation.

Mr. Wayne explained the Commission's authority to assess penalties only relates to violations of the MCEA or rules, not the guidelines.

Mr. Healy said it appears the guidelines were probably violated, but the Commission has no authority to do anything formally. He said the Commission should limit its authority to determining violations of the statute and the Rules.

Mr. Wayne said some Commissioner's may feel that this ad did not assist Emily Mitchell in any way and therefore the guidelines were not violated. He said when candidates act in good faith, they deserve credit for that.

Mr. McKee said the "assist in any way" language is a very low standard. However, he said the Commission has to follow the standard as set forth in the guidelines.

Mr. Duchette said that the Commission must conclude that there was some assistance simply due to the fact that Emily appeared in the ad.

Mr. McKee said that he finds it very difficult to find a violation but that he is appreciative of the Commission's obligation to make its finding on the facts and follow its own guidelines.

Mr. Healy said he did not feel the Commission should engage in finding violations of the guidelines since there are no procedures for assessing penalties.

Ms. Matheson said she believes that the statutory language, "campaign related purpose," leaves room for some subjectivity. She said the ad was clearly made for the purpose of benefitting Libby Mitchell's campaign.

No motion was made.

Other Business

Request for investigation by Wade McLaughlin of his opponent, Rep. Bernard Ayotte

Wade McLaughlin, the Democratic candidate for House District 3, requested an investigation of his opponent, Rep. Bernard Ayotte, regarding a flyer about the circuit breaker property tax refund program that has been distributed in the district. Rep. Ayotte is not aware that this is on the agenda.

Mr. McKee moved that the Commission take no action on this matter. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Ms. Matheson moved and Mr. Duchette seconded to adjourn. Meeting adjourned at 12:00 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

Minutes of the November 30, 2010, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
2nd Floor, Augusta, Maine

Present: Walter F. McKee, Esq., Chair; André G. Duchette, Esq.; Hon. Edward M. Youngblood; Margaret E. Matheson, Esq., Michael T. Healy, Esq. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 11:15 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the September 9 and 30, 2010 Meetings

Mr. Wayne explained that there was a small change to the September 30 minutes under agenda item #3 with regard to the audit findings for Senator Peter Mills' gubernatorial campaign to clarify that there was no finding of violation.

Ms. Matheson moved to accept the September 9 and September 30 minutes as amended. Mr. McKee seconded.

Motion passed unanimously (5-0).

Agenda Item #2. Request for Waiver of Late Filing Penalty/Campaign for Maine PAC

The Campaign for Maine political action committee (PAC) was required to file an independent expenditure report on Saturday, October 9, 2010. The PAC filed the report three days late on Tuesday, October 12, after the Columbus Day weekend. The preliminary penalty amount for the late filing is \$1,551.12. The PAC requested a waiver of the penalty in its letter dated November 1, 2010. Mr. Wayne explained that because of the four day weekend, even if the report had been received on time, it would not have been

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WEBSITE: WWW.MAINE.GOV/ETHICS

disclosed to the public until Tuesday, October 12. The public was not harmed by the late filing and there was no impact on the payment of matching funds to any candidate.

Mr. Healy recused himself from the consideration of this matter because the law firm with which he is affiliated is representing the PAC.

Jamie Kilbreth, Esq., counsel for the Campaign for Maine PAC, said there had been a discussion on Thursday, October 7, with Mr. Wayne regarding when the PAC should file its registration with the Commission because the PAC was beginning to raise and spend money. They were aware that the office would be closed due to Columbus Day and the shut down day on the preceding Friday and the PAC wanted to understand how that would affect filing a registration. The PAC wanted to be sure that if the registration were filed on Tuesday, it would be filed timely. The PAC was more focused on the registration requirement than on the independent expenditure report. He said when they reviewed the statute, it appeared that it is only after the registration is filed, that the obligation to file reports arises. He said the statute is confusing and unclear; however, they are willing to accept the staff recommendation.

Mr. McKee said the staff recommendation is substantially less than the preliminary penalty amount due to the lack of harm to the public.

Mr. Duchette requested the staff's opinion with respect to Mr. Kilbreth's claim that the statute is vague.

Mr. Wayne explained that the independent expenditure reporting requirement is separate from PAC reporting law. The requirement to file an independent expenditure report applies to anyone who spends money on a communication to voters that advocates for or against a candidate. Whether an entity is a registered PAC has no bearing on the obligation to file an independent expenditure report.

Ms. Matheson moved that the Commission accept the staff recommendation and assess a penalty of \$250. Mr. Youngblood seconded.

Motion passed unanimously (4-0).

Agenda Item #3. Consideration of Proposed Civil Penalties against Consultant Michael Dennehy

On June 7, 2010, about 7,000 Maine households received an automated telephone message asking whether candidate Paul LePage could be trusted on issues of moral values. The calls did not include a “disclaimer” statement disclosing the sponsor of the calls or whether the calls were authorized by a candidate. On June 11, 2010, the Commission received a request from Robert D. Stone of Lewiston to investigate who made the calls. In July 2010, as a result of a news article, a political consultant based in New Hampshire, Michael Dennehy, came forward and took responsibility for the calls. Mr. Wayne submitted some questions to Michael Mahoney, counsel for Mr. Dennehy, and received back a sworn affidavit. Mr. Wayne said Mr. Dennehy was employed by Les Otten’s campaign for Governor as a consultant and was paid \$33,000 for those services. He said the campaign also paid \$30,000 to Contact Services LLC in Grand Rapids, Michigan, which is the same company that made the robocalls in question. Mr. Wayne explained that Mr. Dennehy claimed in his affidavit that he arranged and initiated the calls on his own in response to a mailing that was sent out by the LePage campaign attacking Les Otten. Mr. Wayne said there seems to be no proof of such mailing from the LePage campaign. Mr. Dennehy said he received no authorization from the Otten campaign and acted on his own.

Mr. Wayne said the staff investigated further to be sure this was done independently of the Otten campaign. He said staff interviewed Mr. Dennehy and Edith Smith who was the Otten campaign manager and decided that the Otten campaign did not authorize this expenditure. Mr. Wayne said Ms. Smith was completely credible and was very convincing that the campaign knew nothing about these calls. Mr. Wayne stated that the penalty is too small relative to the violation, but the Commission is limited to the enforcement procedures and penalties in the statute.

Michael Mahoney, Esq., counsel for Michael Dennehy and the Dennehy Group, expressed his client’s regret over the event that happened on the eve of the primary in June. Mr. Mahoney stated that his client did come forward almost immediately upon learning about the Commission’s investigation and cooperated fully with the investigation. He said Mr. Dennehy agrees with and accepts the staff recommendation. However, Mr. Dennehy does not agree with the staff’s finding that there may not have been a negative attack mailer by Paul LePage’s campaign. He said Mr. Dennehy does recall a negative mailer and takes exception to the staff finding. Mr. Mahoney said Mr. Dennehy disagrees with the staff finding with regard

to his knowledge and disregard of the disclaimer requirement and indicated in his affidavit that he was not aware of the disclaimer requirement.

Mr. Healy pointed out Mr. Dennehy's affidavit states that he "caught wind" of a mailer and asked whether he actually saw the mailer.

Mr. Mahoney said he could not confirm the circumstances under which his client learned about the mailer.

Mr. Healy asked what Mr. Dennehy's role was for the Otten campaign and whether he was an agent for the campaign.

Mr. Mahoney said Mr. Dennehy was a senior member of the Otten campaign team and worked on campaign communications and for general campaign strategy.

Mr. Healy said Mr. Dennehy appeared to be a high level advisor of the campaign and one could conclude that he was an agent of the campaign.

Mr. Mahoney said with respect to this incident, Mr. Dennehy acted on his own.

Mr. Healy stated that, if Mr. Dennehy was an agent of the campaign, even though he did not clear the project or get pre-approval from the candidate, it should not mean the campaign is off the hook for these actions. The facts, however, are not sufficiently developed in this case to delve into questions of whether Mr. Dennehy acted beyond the scope of his agency.

Mr. Healy asked if Mr. Dennehy owned the company solely or if there were other owners.

Mr. Mahoney said he believed Mr. Dennehy owned the company alone.

Mr. Youngblood stated that it was difficult to believe an experienced company did not notice that the disclaimer was missing on these calls since they most likely provided other calls that did have it. He

expressed concern that the maximum fine is only \$200. He said it would be very easy for an entity to do this again, knowing that the fine will only be \$200 and assessed well after the election.

Joseph Greenier, concerned citizen from Stockton Springs, agreed with Mr. Youngblood. He expressed concern over this large sum of money being spent without any accountability. He said the law and fine associated with the violation of this statute needs to be strengthened.

Mr. McKee stated that Mr. Dennehy was lucky that the Commission does not have the authority to assess a larger penalty. He agreed that a change in statute may be in order for this type of violation.

Mr. Healy stated the resolution should be that campaigns are held responsible for the acts of their agents, regardless of whether there was authorization by the candidate.

Mr. Duchette asked if the Commission had the ability to apply the portion of 21-A M.R.S.A. § 1014(4) which referred to misrepresentation.

Mr. Wayne explained that after consulting with Commission's counsel, it was decided that this matter was not a case of misrepresentation, but an absence of representation.

Mr. Healy moved that the Commission accept the staff recommendation to assess a penalty of \$200 for the missing disclaimer which is the maximum permitted by statute and a \$74 penalty for late independent expenditure reporting. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Agenda Item #4. Request for Waiver of Late Filing Penalty/Stop Handgun Violence Action Fund
Stop Handgun Violence Action Fund is a PAC registered with the Commission. It was required to file an independent expenditure report on Saturday, October 23, to disclose a payment for a newspaper ad opposing Senate candidate Gerald Davis. The PAC filed a 24-Hour PAC Report on October 22 by mistake and should have filed an independent expenditure report. The independent expenditure was filed on Monday, October 25. The preliminary penalty amount for the late filing is \$11.34. The staff has no doubt

that Mr. Harwood acted completely in good faith and did intend to file the correct report. Mr. Harwood pointed out in his letter that the PAC has never made an independent expenditure before. The staff does not recommend a waiver or reduction of the penalty because the late report did delay matching funds to Sen. Davis.

Mr. McKee stated that he could see how this mistake could happen and acknowledged the PAC's good faith attempt to file. He said the other factor to consider was the delay in matching funds to a candidate.

Mr. Duchette asked if the staff was considering a change in the guidelines to make report filings clearer because that could affect the Commission's action on these issues.

Mr. Wayne said there were actions the staff could take to make the reporting obligations clearer, including the publication of the PAC Guidebook. He said also language could be added to the e-filing system to clarify whether an independent expenditure report should be filed instead of a 24-hour report.

Mr. Healy raised a concern about the cost effectiveness of an enforcement process for very minor penalty amounts such as in this case.

Mr. Youngblood stated there are many PACs who do it correctly and the bottom line is the report was late. He said if penalties are waived, the incentive to file is diminished. He said the fact that the late filed report resulted in a delayed matching funds payment to a candidate was not as important as the late filing itself.

Ms. Matheson agreed with Mr. Youngblood's point that a delayed matching funds payment should not outweigh the importance that reports are filed on time. She asked how many PACs incorrectly file and do not request waivers.

Mr. Wayne said 27 PACs and 5 party committees filed the independent expenditure report correctly and were able to distinguish between the 24-hour and independent expenditure reports. He said the three today were asking for a waiver because they filed the wrong form and there were several that filed late and just paid the penalty without requesting a waiver.

Mr. Youngblood moved that the Commission accept the staff recommendation and assess a penalty of \$11.34. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Agenda Item #5. Request for Waiver of Late Filing Penalty/Sagadahoc County Dem. Committee

The Sagadahoc County Democratic Committee was required to file an independent expenditure report on October 23, 2010 and mistakenly filed a party committee 24-Hour Report. They filed the independent expenditure report eight days late which delayed matching fund payments to a candidate. The preliminary penalty amount for the late filing is \$142.80. Stephen Masters, the treasurer of the Sagadahoc County Democratic Committee, seeks a waiver of the late filing penalty because it made a good faith effort to file the correct report and the e-filing system does not provide instructions about independent expenditure report filing procedures.

Mr. McKee noted that the filing occurred only two days before the election.

Mr. Healy moved that the Commission accept the staff recommendation and assess a penalty of \$142.80. Mr. Duchette seconded.

Motion passed unanimously (5-0).

Agenda Item #6. Request for Waiver of Late Filing Penalty/Robust Economy Maine PAC

The Robust Economy Maine PAC was required to file an independent expenditure report on October 17, 2010, because it purchased a direct mailing for \$3,100 in support of House candidate Paul Tessier and mistakenly filed a PAC 24-Hour Report. After the mistake was brought to the PAC's attention, it filed an independent expenditure report on October 30, 2010. The late report did not delay the payment of matching funds to Mr. Tessier's opponents, because their campaign receipts were significantly higher than his as of October 17. The preliminary penalty for the late report is \$403. The PAC requests a waiver because it made a bona fide effort to file the report on time.

Mr. Duchette said he was less concerned with the matching fund issue but more with the lateness. He said this was a significant expenditure that was made and felt a \$400 penalty was not out of line.

Mr. Youngblood wondered why there was such a long lapse in time before the Commission staff contacted the PAC.

Mr. Wayne explained that the last few weeks before the election this type of error was overlooked. He said when the filed 24 Hour reports were reviewed by staff, these few were picked up.

Mr. Healy asked why the two reports could not be combined into one. He said these organizations believed they were complying with the law.

Mr. Wayne said that independent expenditure reports have to be filed on paper; however, this could be reviewed in the future.

Mr. Duchette moved that the Commission find the Robust Economy Maine PAC in violation for failing to file an independent expenditure report on time and assess a penalty of \$200. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Agenda Item #7. Request for Waiver of Late Filing Penalty/Seacoast Democrats

The Seacoasts Democrats is a party committee that was required to file an 11-day pre-general report on October 22, 2010. The report was filed seven days late on October 29, after the committee received a communication from the Commission staff that the report was late. The preliminary penalty is \$408.52. The treasurer admits that she forgot about the filing deadline because the committee was very involved in the regional get out the vote effort.

In response to a question from Ms. Matheson, Cindy Sullivan, the Commission's PAC Registrar, said that the committee has been around for years but that the treasurer is new this year.

Mr. McKee said the amount was high for a small committee; however, the reason for not filing was a poor excuse.

Mr. Youngblood said over the years there has been a number of late committee reports that did not receive such a lenient reduction.

Mr. Wayne said in this instance the inexperience of the treasurer was a factor in the staff recommendation. It is not uncommon for small town committees to have new treasurers who are unfamiliar with the process.

Mr. Healy moved that the Commission find the committee in violation and assess a penalty of \$200. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Agenda Item #8. Request for Waiver of Late Filing Penalty/Senator Lawrence Bliss

Senator Lawrence Bliss was required to file an 11-day pre-general report on Friday, October 22, 2010. The report was filed one day late, after Senator Bliss received a call from the Commission staff. The preliminary penalty amount is \$228.88. Senator Bliss requested a waiver of the penalty because a data entry error by the Commission staff contributed to the late filing.

Mr. McKee noted that the error was not discussed during the first call when the staff called to remind Senator Bliss about the report but only came up during the second call on that Saturday.

Mr. Wayne explained that the staff recommended a reduction of the penalty because the amount is high for a candidate to pay and Senator Bliss responded to the reminder call very quickly.

Mr. Duchette moved that the Commission accept the staff recommendation and assess a penalty of \$114.44. Mr. Healy seconded.

Motion passed unanimously (5-0).

Agenda Item #9. Request for Waiver of Late Filing Penalty/Eric Lusk

Eric Lusk was a candidate for State House of Representatives. He was required to file an 11-day pre-election report on Friday, October 22, 2010. He filed it one day late, after receiving a call from the Commission staff. The preliminary penalty amount is \$28.21. Mr. Lusk claims that he had completed the report but it did not get filed when he hit the "File Report" command in the e-filing system. Mr. Wayne explained that when the report is filed, an e-mail is generated to the candidate so they should know that the report has been filed correctly.

Mr. McKee stated that since this was not Mr. Lusk's first filing, he should know the process by now and realize the report did not get filed correctly at the time.

Mr. McKee moved that the Commission accept the staff recommendation and assess a penalty of \$28.21. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Agenda Item #10. Audit Report of Primary Election Candidate

The Commission's auditor randomly selected Maine Clean Election Act candidates for the Legislature who lost their primary elections for an audit. In October 2010, the auditor completed his audit of the last remaining audit of a primary legislative candidate, Daniel L. Smiley. The auditor did not find any exceptions regarding Mr. Smiley's audit.

Other Business

Republican State Leadership Committee Update

Mr. Wayne said he sent a detailed questionnaire to Greg Engle, national counsel to the Republican State Leadership Committee to whom the Commission spoke by phone at the October 28 meeting. He said the questionnaire was designed to help the staff determine the dates on which various actions occurred in order to calculate how late the PAC was in filing its reports. He said Daniel Riley, Esq., from Bernstein Shur, had been obtained as local counsel for RSLC and he has not heard back from Mr. Riley as of November 23.

Cutler Files Update

Mr. Wayne said two interviews have been conducted with people who have some knowledge as to whom is responsible for the research on the website. The staff has requested an opportunity to interview Dan Billings' two clients, who are responsible for the website. One interview has been scheduled. The staff is still working on setting up the interview with the second person. He said there may be a need for a subpoena. He said the investigation has proceeded in a manner that gives the Commission the opportunity to keep the individuals involved anonymous if the Commission decides that is the right course of action. He said the subpoena process may be challenged by Mr. Billings in court.

Ms. Matheson moved to adjourn and Mr. Youngblood seconded.

Meeting adjourned at 12:45 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director