



Minutes of the March 31, 2021 Meeting of the
Commission on Governmental Ethics and Election Practices
45 Memorial Circle, Augusta, Maine

Present: William A. Lee III, Esq., Chair; David R. Hastings, Esq.; Meri N. Lowry; Dennis R. Marble; and William J. Schneider, Esq.

Staff: Jonathan Wayne, Executive Director; Jon Bolton, Assistant Attorney General; and Michael Dunn, Political Committee and Lobbyist Registrar

Commissioner Lee convened the meeting at 9:06 a.m. The meeting was livestreamed via YouTube.

The Commission considered the following items:

1. Ratification of the Minutes of the February 24 and March 8, 2021 Meetings

Mr. Lee made a motion to adopt the February 24 and March 8, 2021 minutes as presented. Mr. Schneider seconded the motion. Motion passed 5-0.

2. Complaint – Telephone Surveys Concerning State Senate Candidates

Mr. Wayne said this complaint was made by the Lincoln County Democratic Committee (the “Committee”) in September 2020 concerning telephone calls that were made during the last election in Senate District 13. The Committee alleged the calls were a push poll that should have stated who paid for them, and an independent expenditure report should have been filed. At the time the Commission authorized the investigation, the Commission staff did not know who was responsible for the calls. The Commission staff conducted a preliminary investigation and learned that the Senate Republican caucus was responsible for organizing the calls. The caucus stated the calls were made as part of a poll to test the strength of Republican candidates and potential campaign messages. The two PACs involved in this matter, the Maine Senate Republican Majority PAC and Maine Prosperity PAC, provided to the Commission staff the poll questions, results of the polls, expenditure information and some internal communications about the polls. Mr. Wayne said the Commission staff recommended no further action on this matter unless the Commissioners decided they wanted more information.

Joshua Tardy, Esq., Shawn Roderick, and Michael Hockenberry, Esq. appeared before the Commission on behalf of the Senate Republican caucus. Mr. Tardy acknowledged the investment of time by the Commission staff in this investigation and he said agreed with their recommendation.

Mr. Lee asked why the telephone survey did not include more demographic questions. Mr. Tardy said he had seen a lot of polls over the years and gathering demographic data was a tactical decision. The caucus was constrained by its budget. He said this was a small sampling spread throughout various State Senate districts. He said a 200-person sample was common for a poll in a legislative race. From a political standpoint, this poll would not have the same value as a more expensive poll. It simply provided a snapshot in time.

Mr. Lee asked what information they were seeking based on the language in some of the questions. He said it was understandable that someone would think the purpose was to influence the call recipient's vote based on the language used in some of the questions. Mr. Tardy said that it was typical in polling to test an issue to see if it resonates and to test the strength of and support for a candidate.

Mr. Lee asked why the caller had not used an identifiable name so the recipient could, if they wanted, check up on them. Mr. Tardy said that was a decision made by the vendor. Mr. Lee said that anonymity could lead a person to think the caller had something to hide.

Mr. Lee asked Mr. Tardy to explain why this was not a push poll in terms of the five criteria. Mr. Tardy said this was not a push poll because it did not meet the statutory criteria: it did not include an untrue statement; it was not a survey primarily for the purpose of suppressing or changing the voting position of the call recipients; it did make demographic inquiries; and it was based on a random sample. Mr. Lee asked how much was spent on this survey. Mr. Tardy said the combined expenditures of both PACs was approximately \$50,000. Mr. Lee asked how much was spent on the tabulation and analysis of the data versus the collection of the data. Mr. Tardy said he did not believe it was broken down that way; it was all part of the service.

Mr. Lee asked why this was not an independent expenditure and why there was no disclosure statement of who paid for the poll. Mr. Tardy said the poll followed generally accepted standards consistent with the Commission staff's legal analysis. He said this polling tactic had been used by many campaigns he had been involved with and by many of the opponents he had faced over the years.

Christopher Johnson, Chair of the Lincoln County Democratic Committee, appeared before the Commission. Mr. Johnson said there was an equally reasonable interpretation that the poll contained misinformation and untrue statements regarding a candidate. He said he did not believe the purpose of the poll was to gather information but was to disseminate a negative message

regarding a candidate. He said he did not believe Mr. Tardy had adequately answered the question of whether the information was used for future messaging or if the poll was the message itself.

Mr. Lee said the statute specified that for there to be express advocacy the communication could have no reasonable interpretation other than the election or defeat of a candidate. Mr. Johnson said it would be reasonable to reach another interpretation if the information purportedly gathered for research purposes was not actually used for research purposes. Mr. Lee said the Commissioners had received a large packet of confidential information, which included an analysis of the various questions in the poll that could be used to determine voter trends in the election.

Mr. Schneider said the answer to Mr. Johnson's question was in the response filed by the Maine Senate Republican Majority PAC dated January 22, 2021, which listed multiple uses of the survey results to modify their strategy and tactics in different races.

Canyon Woodward appeared before the Commission. Mr. Woodward noted there was a two-part test for the independent expenditure and disclosure statement exceptions. He said the first part was that the poll must meet generally accepted standards for polling research and while he understood the argument that it did, the fact that the poll was conducted using a false name and number was very telling. He said that if a false name had not been used, this matter would have been resolved very quickly and not wasted a large amount of the Commission staff's time.

Mr. Marble said when this matter was first presented to the Commission, he had believed this was a push poll. After reviewing the information gathered as part of the investigation and looking at the statute, he would support taking no further action on this matter. He said he believed the statute should be reviewed and strengthened.

Mr. Hastings agreed with Mr. Marble. He said the Commission staff did outstanding work in this matter. He said negative advocacy in politics had been around for a long time and was likely not going away. He said it was in the eye of the beholder whether a statement was negative advocacy or untrue. In this case, the purpose was research and it was done early in the campaign to get a better understanding of the races. He said he agreed there should have been better disclosure, but he believed the intent was research.

Mr. Schneider said he agreed with both Mr. Marble and Mr. Hastings. He said the push poll question was easily resolved because they had gathered and tabulated the survey results. He said he

believed this met the exception under the independent expenditure statute because it met the generally accepted standards for polling, even though it may have been somewhat imperfect.

Mr. Lee asked Mr. Bolton if the Commission could dispose of this matter by making a motion to not pursue further investigation of this matter or if they should expressly vote on whether this was a push poll. Mr. Bolton said it was appropriate to move that no further investigation be conducted.

Mr. Dunn said it would be helpful, for purposes of future guidance on this issue, if the motion, or there was language in their discussion, that contained the rationale for why the Commission made this determination.

Mr. Lee said the third requirement of the push poll statute was not met because they had received information that showed data was collected and the results tabulated. He said demographic data was also gathered and there was proof that the information was used for research purposes to gauge what further action should be engaged in for election purposes. He said even though some of the questions tried to push a voter in a certain direction, there was also a significant other purpose for the poll, which made this poll not primarily for the purpose of suppressing or changing the voters' position. He said he agreed with Mr. Woodward that it was a red flag to use a fake name in the poll. He said the express advocacy was a tough standard, but he believed this fit within the exception for both the independent expenditure and the disclosure statement requirements.

Mr. Lee made a motion that, for the reasons the Commissioners had stated, there be no further investigation of the complaint filed by the Lincoln County Democratic Committee. Mr. Hastings seconded the motion. Motion passed 5-0.

3. Request for Waiver of Late-Filing Penalty – Energy PAC for Maine

Mr. Wayne said on October 22, 2020, Energy PAC for Maine made seven expenditures totaling \$8,500 as contributions to other registered PACs. The PAC was required to file a 24-Hour Report on October 23, 2020 but did not file it until December 14. The preliminary penalty was \$8,840. The PAC requested a waiver because it had received incorrect advice from its former counsel, which resulted in the violation. The Commission staff recommended that the preliminary penalty be reduced to \$750 which would be consistent with previous penalty reductions of this kind.

Mr. Lee asked for clarification that, if all seven contributions had been under \$1,000, a 24-Hour Report would not have been required. Mr. Wayne said that was correct.

Charlie Summers, President and CEO for Maine Energy Marketers, and Principal Officer for the PAC, appeared before the Commission. He said he had started his position after Labor Day in 2020. Prior to that, the position had been vacant for one year. In the interim, Ms. Estes, the Business Manager for Maine Energy Marketers, had assumed many of the responsibilities for the association and the PAC. When the expenditures were made, Ms. Estes had sought advice from outside counsel and the Commission staff about the reporting requirements, which ultimately turned out to be faulty advice.

Mr. Hastings said it did not appear that the Commission staff had provided any advice about reporting the contributions. Mr. Summers said Mr. Dunn had provided information about the filing deadlines; it was their former counsel who had provided the erroneous reporting advice.

Ms. Lowry said it appeared the penalty notification letter may not have been received by the PAC. Mr. Wayne said the Commission staff had sent three penalty letters following the staff's normal procedures but had received communications from the parties that they had not received the letters.

Mr. Lee asked about the staff recommendation to reduce the penalty to \$750 and why it was not a higher amount when taken into consideration with similar matters. Mr. Wayne said most routine violations by PACs have resulted in penalty reductions starting at \$750. The Commission staff recommended \$750 penalty in this case for reasons of consistency. Mr. Wayne said there was a formula in the statute to determine the preliminary penalty, which in the context of a late-filed 24-Hour Report, can result in disproportionately large penalties. He said the PAC did try to make sure that it understood its reporting responsibilities. This was simply a misunderstanding. Mr. Lee said an additional mitigating factor in this matter was that the PAC made an overt attempt to comply and had sought advice. Mr. Wayne said that was correct, there was a definite intention to do the right thing. Mr. Dunn said this was a longstanding committee with a very good track record. He said Ms. Estes regularly contacted him to make sure the reports were filed correctly.

Mr. Schneider said he thought a \$750 penalty was adequate in this matter because the PAC had sought advice but received incorrect advice from its counsel.

Mr. Lee made a motion to adopt the Commission staff's recommendation that the penalty for this violation by Energy PAC for Maine be reduced to \$750. Mr. Schneider seconded the motion.

Motion passed 5-0.

4. Late Notice to Major Contributor by Clean Energy Matters PAC

Mr. Wayne said Clean Energy Matters PAC registered with the Commission in 2019 to support the New England Clean Energy Connect (NECEC) transmission project and oppose the first ballot initiative to reject NECEC, which was ultimately removed from the November 3, 2020 ballot. In September 2020, a new ballot initiative opposing NECEC was created and the PAC updated its registration on December 15, 2020 to reflect its opposition to the second ballot initiative. On November 18, 2020, the PAC received a contribution of \$813,000 from Avangrid. The PAC was required to provide Avangrid with notice of its major contributor reporting obligations by November 23. On January 26, 2021 Avangrid voluntarily filed a Major Contributor Report, but without waiving its argument that one was never required. The preliminary penalty was \$50,000. The PAC filed a waiver request because Avangrid had already filed a Major Contributor Report and it did not believe a second report was statutorily required.

Mr. Wayne said the Commission staff disagreed with the PAC's argument because some PACs exist for years and are involved in different initiatives over time. He said the Commission staff was concerned about precedent if the PAC's argument was accepted. If a donor made a \$100,000 contribution to a PAC to influence a citizen initiative, and a year or two later made another \$100,000 contribution to the same PAC for a different citizen initiative, that donor should file a Major Contributor Report after both contributions to provide the public with information about the donor and the citizen initiative. The Commission staff disagreed with the PAC's argument that it was required to provide only one notice to the major contributor and only one Major Contributor Report was required.

Mr. Lee asked if Mr. Wayne was relying on § 1060-A(1)(B). Mr. Wayne said he was. Based on the statutory language, an entity was a major contributor for a particular ballot question.

Mr. Lee asked whether the public was harmed by the lateness of the second Major Contributor Report filed by Avangrid. Mr. Wayne said he believe there was public harm. He said the major contributor was required to certify that it had not received contributions for the purpose of influencing a ballot question; the major contributor was acknowledging it was not acting like a PAC or BQC. He said there could be differences between Major Contributor Reports filed by the same contributor but at different times.

Ms. Lowry said the practical impact of this was that if someone were looking for contributions related to the new NECEC citizen initiative, they would not find that information because the only

Major Contributor Report available was related to the original NECEC citizen initiative. Ms. Lowry referred to Mr. Wayne's testimony in support of the major contributor legislation and said it highlighted that this was a chance to see what was behind these large contributions and why these disclosures were necessary.

Mr. Hastings asked if he went on the Commission's website to look at the ballot questions, were the two NECEC initiatives listed separately so he would not be able to see the filings for the initial NECEC initiative by looking at the second NECEC initiative. Mr. Dunn said that was correct. He said if a person clicked on the second initiative, they would see a list of the committees involved in the initiative, but they would not see the filings related to the first NECEC initiative unless they clicked on one of the committees.

Newell Augur, Esq., appeared before the Commission on behalf of Clean Energy Matters PAC. He said the language in § 1060-A did not require a committee to send a second major contributor notice if they had sent an initial notice. He said the way to correct this would be to amend the definition of "major contributor." That would have clarified that, in this instance, Clean Energy Matters had an obligation to send a second notice to Avangrid when it received a contribution in support of a second direct initiative. Mr. Augur said the issue was whether there was a legal requirement for the PAC to send a second major contributor notice if that major contributor had already filed a Major Contributor Report; he did not believe the statute required this.

Mr. Hastings said that, after looking at § 1060-A(2), he could understand some of the confusion, but subsection (1)(B) answered the question by defining what a major contributor was: a person, other than an individual, that makes one or more contributions aggregating in excess of \$100,000 to a ballot question committee or political action committee for the purpose of initiating or influencing any one people's veto referendum campaign or any one direct initiative campaign. He asked if Mr. Augur was suggesting that the Commissioners should read this to mean that once someone became a major contributor for one campaign, they were a major contributor for life and would never have to file another report. He believed it referred to each initiative campaign and each people's veto referendum.

Mr. Schneider said he did not see a conflict between subsection (1)(B) and subsection (2). An organization became a major contributor when it donated more than \$100,000 to influence one ballot question. It became a major donor again when it donated more than \$100,000 to influence a different ballot question.

Ms. Lowry said the introductory language leading into the definitions made the intent of the statute clear. She believed it turned the requirements inside out to suggest that the disclosure requirement was satisfied with a one-time filing for all campaigns.

Mr. Schneider asked if an organization donated \$100,000 to three different committees related to one initiative, all three committees would be required to provide notice to the major contributor. Mr. Wayne said that was correct.

Mr. Bolton said it was the Commission's job to interpret the statute and decide its meaning. He said he believed the court would give deference to that interpretation. He said he agreed with Mr. Schneider's interpretation that each time there was a contribution to a new ballot initiative, the entity became a major contributor again and a new report was needed. He said he believed the Commission staff's interpretation was reasonable.

Mr. Lee made a motion to find a violation of Title 21-A, § 1060-A(2) when Clean Energy Matters failed to give notice within five days of receiving the \$813,000 contribution from Avangrid, which occurred on November 18, 2020. Mr. Hastings seconded the motion. Motion passed 5-0.

Mr. Lee said the statute stated the Commission could consider "other things" when determining a penalty and asked Mr. Bolton what were the "other things." Mr. Bolton said he would interpret that as a broad authorization to consider factors that are germane to the matter under consideration.

Mr. Lee said he believed there was limited harm to the public and he would be willing to consider a lower penalty than the \$5,000 recommended by the Commission staff. Mr. Schneider said he agreed with the Chair, this was a unique situation and suggested a penalty of \$2,500. Ms. Lowry said she would not agree to a penalty lower than \$2,500 but she believed the penalty should be higher.

Mr. Lee made a motion to reduce the statutorily calculated penalty of \$50,000 to \$2,500. Mr. Schneider seconded the motion. Motion passed 5-0.

Adjournment

Ms. Lowry made a motion, seconded by Mr. Schneider, to adjourn. The motion passed. The meeting adjourned at 12:10 p.m.

Respectfully submitted,
/s/ Jonathan Wayne
Jonathan Wayne, Executive Director