



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
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Minutes of the February 17, 2011, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
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 9:05 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the October 28 and December 20, 2010 Meetings

Ms. Matheson moved to accept the meeting minutes as drafted. Mr. Youngblood seconded.
Motion passed unanimously (5-0).

Agenda Item #2. Late Filing of Independent Expenditure Reports/Republican State Leadership Committee

Mr. Wayne explained that this independent expenditure (#142) was filed late with the Commission on Saturday, October 23. He said the Maine Democratic Party filed a complaint alleging that in addition to being filed late, the dates in the IE report were inaccurate. The Commission determined just prior to the election that the report was indeed late but that more information was needed to determine how late the filed report was. The request for information was sent back in November and received in January. He said the Commission staff sent out a notice of the preliminary penalties to Republican State Leadership Committee (RSLC's) counsel and just recently received a response back which outlined some reasonable arguments regarding how to apply the law in this case. As a result, the Commission staff has reduced the recommended penalty amount from \$41,000 to \$26,000.

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Mr. Wayne explained that the staff determined RSLC should have filed at least one IE report on Thursday, October 21 and it was received two days later on Saturday, October 23. He said also the Maine Democratic Party contends the RSLC may have been required to file a second report on Friday, October 22.

Mr. Wayne explained that RSLC hired a vendor, Crossroads Media, to do mailings, television ads and radio ads. He said the first order was for mailings and was placed on Tuesday, October 19. That expenditure should have been reported within 48 hours on Thursday, October 21. On Wednesday, October 20, RSLC directed Crossroads Media to start producing TV and radio ads. This expenditure should have been reported within 24 hours. On Thursday, October 21, Crossroads Media or a sub-vendor began purchasing TV and radio time. On that same day, Arena Communications informed RSLC about the cost of the postage for the mailings. The RSLC contends that, had it understood the reporting requirements, it would have reported all these expenditures (made on October 19, 20, and 21) in one report on Thursday, October 21. Mr. Wayne reviewed how other Maine-based PACs and party committees report independent expenditures for TV and radio ads. Most file a single report that contains the production costs and media buys. He said this was the reason why the staff re-assessed the penalty recommendation.

He said the Maine Democratic Party believes that the PAC report filed on October 22 was incomplete because it did not list any expenditures. The MDP contends that the report should have included the order for the production of the mailers placed on October 19. The RSLC concedes that point. However, it believes the recommended penalty is excessive because that expenditure was fully disclosed in the independent expenditure report filed on the day after the PAC report deadline, October 23. Mr. Wayne said that argument was not unreasonable but that the staff did not accept it for the purpose of its recommended penalties.

Mr. Wayne reviewed the proposed penalties for the Commission:

	Type of Violation	Recommended Penalty	Notes
A.	Late Filing of Independent Expenditure Report	\$5,000	<ul style="list-style-type: none">• presumes one IE report was late• staff recommends no waiver of the preliminary penalty
B.	Delay of Matching Funds for Late IE Report	\$10,000	<ul style="list-style-type: none">• presumes that one IE report was required• staff recommends maximum penalty

C.	Late Filing of 10/22/2010 PAC Report	\$10,000	
D.	Substantial Misreporting (date in IE report)	\$1,000	• Maximum penalty is \$5,000 for this violation
	Total	\$26,000	

Mr. Healy said it was his understanding that the disputed \$10,000 fine for the late filed PAC report was based upon the formula which multiplies the number of days the report was filed after the deadline. He asked Mr. Wayne what the penalty would be if the report was one day late.

Mr. Wayne confirmed that if the number of days late were to be calculated at only one day late instead of 53 days late, the amount of the fine would be \$756.

Mr. Wayne said the information about expenditures and obligations made during the reporting period which ended on October 19 should have been filed electronically into a PAC report that was due on October 22. The expenditure for the production of the mailers should have been reported in that report. Instead it was submitted in an independent expenditure report which was faxed to the Commission on October 23. If the PAC report had been filed correctly, the public would have had access to the information one day earlier, on October 22.

Mr. McKee stated that the problem was that if someone were following the RSLC's activities in the PAC reports, that person may not look at the independent expenditure reports and would have been unaware of the expenditure.

Daniel P. Riley, Jr., Esq., attorney for RSLC, said his client recognizes that they should have sought counsel prior to the election. He said his client is involved in elections in states across the country and is also familiar with the Federal Election Commission requirements. He said the RSLC was operating under the understanding that the trigger for reporting independent expenditures in Maine was similar to or the same as the federal requirements and in a number of other states where they have operated in the past. He said this election was the first time his client made an independent expenditure in a Maine election. He said consideration should be given to the fact that his client believed the reporting trigger was dissemination of communications, not placement of the order as is the law in Maine. He said they assumed that dissemination was when the mailings went to the post office to be mailed and when advertisements

went to the radio and TV stations. He said they believed they were in compliance with Maine law by filing the independent expenditure report on October 23. He said this assumption was incorrect and therefore the report was in fact late. Being more familiar with federal law and other states' requirements, RSLC attempted to follow that standard and did not understand Maine's unique reporting triggers. He said the RSLC is embarrassed by the quality of the advertisements and some of the ads' content. He said that after talking with his client about their unpleasant experience regarding these independent expenditures, he thought it was unlikely that the RSLC would attempt to make any independent expenditures again in Maine.

Mr. Riley said it is important to understand that on October 19, the 48-hour reporting requirement was in effect and on October 20, the 24-hour reporting requirement took effect. He said the mailers and TV and radio ads were ordered on those two days. The reporting deadline for the expenditures made on October 19 and those on October 20 fell on the same day – October 21. The reports were not filed until October 23, two days late. He said he does not argue otherwise on that matter. He said the RSLC only filed one independent expenditure report to cut down on the paperwork which is what they do at the national level as well. He said local PACs do the same. He accepted the \$5,000 fine for the late IE.

Mr. Healy asked if RSLC had any legal objection to the \$5,000 penalty or the calculation.

Mr. Riley said his client had no argument against that penalty and concede that it was two days late. He confirmed that his client had no objection to the penalty or the calculation used to determine the penalty.

Mr. Riley said he would like to approach the penalty for the delay in matching funds by looking at the five candidates individually and then examining the degree of harm each experienced as a result of the late filed report. He said that if the \$10,000 is the maximum penalty for a late filed report, then he would calculate the maximum penalty on a per candidate basis to be \$2,000, if the candidate suffered the maximum amount of harm. He explained that each candidate was harmed in different degrees; therefore the penalty should be assessed differently for each candidate. He said his method was to set \$2,000 as the maximum penalty for each candidate in this case and then decide an appropriate penalty based on the level of harm to the public interest and candidate. He said the amount per candidate needs to be adjusted to reflect the level of harm each one experienced.

Mr. Healy asked whether Mr. Riley thought the Commission was required to break the penalty down like that or if that was a matter of discretion. He said that he believed that there was, based on the record, a legitimate factual dispute about the degree to which the late filing of the report affected the candidate. However, he wanted to know whether Mr. Riley thought that it was within the Commission's authority to assess a \$10,000 penalty based on the record that was before the Commission.

Mr. Riley said the statute allows for the Commission to assess up to \$10,000. He said that he thought the penalty should be reduced because not all the candidates were affected to the same degree.

Mr. Riley said there were three classifications of candidates with regard to harm caused by the delay in authorizing matching funds due to the late filed report. He said Senators Perry and Simpson were in a distinct class. They were in highly contested races and had received all the matching funds for which they were eligible prior to any expenditure being made by the RSLC. Thus, once the staff gave them the authorization to spend matching funds, they would already have the funds in their campaign account. He said it is reasonable to assume that those candidates had time to make plans for how to use that money prior to being authorized to use it. He said the only delay to these candidates was the two-day delay in filing the independent expenditure report, so the harm was only two days that they had to wait. He said since these candidates already had the money in their accounts, they experienced less harm from the delay. Therefore, it is completely unreasonable to assess the maximum possible penalty for harm to those campaigns. He said a more appropriate level would be somewhere around \$500 - \$1,000.

Mr. Riley said the next class of candidates included Rep. Crockett and Rep. Trinward. They had not received any matching funds at that time and had to wait until the Commission authorized the payment to be made. They did not have access to the funds as quickly as Senators Perry and Simpson, so the delay had more of an impact on their campaigns. He said the penalty amount should be higher – somewhere in the \$1,000 - \$1,500 range. It was important to take into consideration that all the candidates received the money within six days before the election, including the weekend before the election. The maximum penalty amount of \$2,000 would be appropriate if a candidate did not receive the funds in time to use them to respond.

He said the third class of candidates was Rep. James Schatz, who was quoted in a news article that he did not intend to use any of the matching funds he received. It was Rep. Schatz's decision not to respond to the RSLC's ads. He said the public interest in this case and Rep. Schatz's campaign was not damaged at all, therefore no penalty should be assessed for this campaign.

In summary, Mr. Riley said the Commission cannot fine the maximum penalty amount since the amount of harm to the public and each campaign does not warrant it. He said a reasonable assessment of fines based on the late independent expenditure report and the delay in authorizing or paying matching funds should be somewhere in the range of \$8,000 - \$10,000 in his view.

Mr. Duchette asked whether the Commission would be prevented from assessing the maximum penalty of \$10,000 if it found that the maximum amount of harm was done to a candidate.

Mr. Riley said he did not believe so. He said in his view, the only way to determine that the maximum amount of damage was done to a publicly financed campaign and the public interest would be to determine that matching funds did not reach the candidate in time to use them effectively. He said the facts do not support that outcome in these five cases.

Mr. Healy asked, for clarification, Mr. Riley if the Commission would be committing any error of law by accepting the staff recommendation to assess a fine of \$10,000 based on the delay in paying matching funds due to the late filed independent expenditure report.

Mr. Riley said the Commission would be in error because the maximum fine is intended by statute to be utilized only when there has been a maximum amount of harm done to the public interest in ensuring that the publicly funded candidates are able to utilize their matching funds to respond effectively. He said that is not supported by the facts in this case.

Mr. Healy asked whether Mr. Riley was stating that for the Commission to legally conclude that the \$10,000 maximum should be imposed, there would have to be a factual record that established the degree of damage to public interest and the candidate by the late filing.

Mr. Riley said if the delay had prevented any of these five candidates from responding prior to the last weekend before the election, then the maximum penalty might be warranted, even if it happened in only one case.

Mr. McKee stated that there were multiple candidates affected in different ways by this late filed report. It was not just one candidate but five. That is a significant factor.

Mr. Riley said he agreed it did affect several candidates; however the harm to the public interest was not that great. The harm was the two day delay in receiving matching funds.

Mr. Healy said under Mr. Riley's theory if a candidate did not suffer any damage or harm, the fine should be zero. He said he could not accept that standard because, even if the candidate had received the matching funds, it was difficult to spend that money effectively with seven days left in the election and a two day delay could be very significant.

Mr. Riley said whether the candidates won or lost is not the issue, but rather how much the delay was and how much did the delay impact the public interest in a fair fight in that race.

Regarding the 11-day pre-general election PAC report, Mr. Riley said the purpose of reporting requirements is so that the public knows who is spending money and what they are spending money on. He said all that information was available to the public in a report faxed to the Commission. He conceded that it was filed with the Commission on the day after the deadline and on the wrong form, but thought the Commission should take into consideration the fact that the same information that should have been in the October 22 report (the 11-day pre-general election report) was included in the October 23 independent expenditure report.

Mr. McKee asked whether Mr. Riley's view was that because his client thought that dissemination triggered the reporting requirement, it was his client's belief that the October 22 report was in compliance.

Mr. Riley agreed. He said RSLC's view was that no reportable expenditures had been made during the reporting period covered by the 11-day pre-general election report. He said in his view, the Commission

could assess a penalty for reporting the information one day late which would make the penalty \$756. However, the information was not reported on the correct form, therefore, the Commission has more discretion to determine the penalty amount.

Mr. Healy asked what the statute allows the Commission to do when the wrong form is used to file the report. He asked Mr. Riley whether the Commission can penalize the filer for the time it takes to file the right form.

Mr. Riley said yes, the substantial conformity standard would apply. He said mistakes are made frequently with regard to using the wrong form.

Mr. McKee said it was true that the information was available on the Commission's website. However, because it was not reported in the appropriate PAC report, it was only the people who knew to look for independent expenditure reports that would find the information. He said that the Commission has discretion with regard to the penalty assessed.

In response to Mr. Healy's question whether the Commission had the authority to consider the report 53 days late in determining a penalty, Mr. Riley said that it would if one took a strict interpretation of the letter of the law. He said if the spirit of the law is considered, then the substantial conformity standard could apply and it would be important to consider the fact that all the information was available to the public the day after the filing deadline. He said that a \$10,000 penalty was draconian but that \$756 would probably not be sufficient. He said something in between those amounts would be fair.

Mr. McKee asked why there was such a delay to amend the report since the omission had been identified in October and the RSLC had been put on notice of the mistake then.

Mr. Riley agreed the report should have been amended. The PAC may have been delayed while it was looking for local counsel to retain and the PAC's involvement in information exchange due to the litigation initiated by Rep. James Schatz.

With regard to the penalty for substantial misreporting in the independent expenditure report, Mr. Riley conceded that the wrong dates for expenditures were used in the report and the fine was appropriate.

In summary, Mr. Riley said in his view a just penalty would be half of what the staff has recommended. He said this was the first time this organization had done business in Maine and this was a case of simple misunderstanding of the reporting requirements in Maine. He said ignorance of the law was not an excuse, but to apply maximum penalties in a situation where there was no intention to violate the law was not justice. He stressed that the Commission needed to do what was fair and reasonable under these circumstances and look at what the real harm was to the public's interest.

Andrew Cashman, Esq., representing the Maine Democratic Party, said there were two key issues. He reminded the Commission there were expenditures of nearly \$400,000 spent in five State Senate races towards the end of this past election cycle. He said all candidates affected by the advertisements lost their races. He admitted that definitively it was difficult to know whether the expenditure was the cause. He said the expenditure did definitely have a serious impact.

Mr. Healy questioned whether the candidates won or lost was a relevant statutory criterion for assessing a penalty.

Mr. Cashman said in his view, it was. He said the number of days that matching funds were delayed in getting to the candidate as well as the impact on the public interest were critical factors in assessing a penalty. He said the fact that the candidates could not respond strategically to the ads because they did not have the funds on hands and the very short time frame which they had to decide and plan their response are significant and relevant facts to consider at the penalty phase.

Mr. McKee said at the time the ads came out the public was concerned about the amount of money being spent in Maine by an outside interest. However, nothing could have been done about the ads being placed. He said the delay in getting matching funds to the candidates is really the issue and how that affected the candidates' ability to respond.

Mr. Cashman said the delay caused by the late-filed independent expenditure reports had other negative effects, such as increased cost for television and radio. He said the Commission should consider the harm to the public interest and the deterrence of future violations in assessing a penalty. He agreed with Mr. Riley that the expenditure made on October 19 was made during the 48-hour reporting period and should have been reported on October 21. However, he did not agree that all expenditures made on October 19 and 20 could have been reported in a single report on October 21. It may be true that common practice for reporting expenditures for radio or television ads is to include both production and distribution costs, but there is no support for the contention that the costs for production and distribution of the mailings would be reported in the same way. The RSLC has not provided any documentation that postage and airtime expenses had been determined and were known by the RSLC by October 21. He said all expenditures related to the mailings and advertisements were reported as being made on October 19 and 20 but there is no evidence before the Commission to support that.

Mr. McKee asked Mr. Cashman if he was saying that if the reporting had been done correctly, a single report should have been filed on October 21 disclosing the mailing, TV and radio ads.

Mr. Cashman said that there was no evidence to support the notion that all those costs were known to and paid by the RSLC so that they could be included in a single report. He said the production and distribution are two separate things and should have been paid for and reported separately. There was no evidence that they were paid for together.

Mr. Healy said the reporting obligation is triggered when an order for the production of the mailings is placed, not when the payment has been made.

Mr. Cashman said Mr. Healy was correct but it was difficult to be certain the sequence of events because the RSLC has not provided sufficient documentation to support their contention that they would have filed a single report had they been aware of Maine's reporting requirements. He said there are two separate events – the ordering of the production of the ads and the distributing of the ads. Each event required a separate report.

Mr. Duchette asked Mr. Cashman if it would have been acceptable for RSLC to file all expenditures under one report.

Mr. Cashman said one report could be filed if all reporting requirements are met in full. He explained that in this case those requirements were not fully met and therefore two reports were required. He cautioned the Commission not to rely on the representations that the RSLC would have complied if it had known the law but rather information and facts provided.

Mr. Cashman said he agreed with the staff's original recommendation to assess penalties for two late filed independent expenditure reports. With respect to the penalty for the delay in paying matching funds, he said Mr. Riley's argument relies on the assumption that the degree of harm to the candidates ranged from moderate to none at all, based on whether they had already received matching funds. Mr. Cashman said that assumption was flawed. Each of the candidates was harmed by the RSLC's delay in reporting the expenditures because the candidates could not effectively and strategically respond to the RSLC's ads until they knew what the ads were. Mr. Riley's contention that the candidates who had the money in their accounts could use it at a moment's notice was not true. The candidates were also adversely impacted because these ads and mailings were distributed in the very last stretch of the campaign, when every day counts. He said the impact on the public was very significant because the information was delayed getting to them. Mr. Cashman said that the Commission should assess a significant penalty in order to deter violations of this kind in the future.

Rep. Patsy Crockett, candidate for Senate District 24, said she was one of the five candidates affected by this infusion of money in to Maine. She said what bothers her most is what she hears from the public, that the Maine State Senate was bought by out of state money. She said the real impact on the election will never be known for sure. Every day in the last few weeks before election day is tremendously important. She explained that Clean Election Act candidates usually plan on \$5,000 or \$10,000 being spent above what normally is issued for funding. She said this is usually spent on radio ads. She said it makes a substantial difference if a candidate gets the notice of the matching funds on a weekday or on a weekend. She said if a candidate gets notice of matching funds during the week, plans and arrangements can be made to do TV or radio ads, but when the notice comes on a Saturday, this limits what a candidate can do in response because it is just more difficult to contact people on the weekend. She explained that you also

have to see what the ads are about in order to respond effectively. The closer one gets to the election, it is very difficult or impossible to purchase good, effective air time because it has already been bought up for the election. She said every single day makes a huge difference at this time during a campaign. She said the large amount of money spent that late in the election along with the uncertainty as to when those expenditures were made deserves the Commission's scrutiny.

Ms. Crockett said if the expenditure had happened during a weekday it would have made a huge difference because it would have been easier to produce and place ads on TV and radio. She said getting people together during a weekend was very difficult which means that the two day delay had a significant negative impact on her ability to counter the RSLC's ads and get her message out to the public.

Mr. Healy asked how Ms. Crockett spent her matching funds and when she learned about her matching funds.

Ms. Crockett said she received an e-mail from the Commission on Saturday afternoon. She increased her radio time considerably and she paid for a television advertisement which she had no intention of doing originally. She said the night before this ad ran she and her campaign manager were trying to figure out how to come up with an extra \$200 to run an ad in a local paper and the next day she learned she had \$38,000 to spend. She said she spent \$20,000 on TV time that she never would have spent. She also spent about \$6,000 on newspaper ads. In all she spent all but \$800 of her matching funds.

Mr. Healy said he understood that if the reporting had been done on time, she would have learned about the expenditure on Thursday afternoon or Friday morning.

Ms. Crockett confirmed that if she had received the notice earlier it would have made a huge difference because it would have been a weekday. She would have been able to get her TV ad out sooner since there would have been people available to put the ad together and tape it during the week. She said her TV ad was not able to run until almost the end of the following week. Ms. Crockett also said she did not agree with Mr. Riley's assumption regarding how quickly candidates can secure TV time and said he was mistaken.

Rep. James Schatz, candidate for Senate District 28, stated that he was bothered by Mr. Riley's statement that he "chose" to not use the Clean Election matching funds. Mr. Schatz said he decided, as a matter of principle, that the timeframe in which he had to use the funds was simply too short to use that large amount of money in a useful way. In addition, the RSLC's ads against him accused him of stealing public funds when selectman for his town. He said that type of accusation could not be addressed in the time left before the election with any meaningful response. He said he lives in a large rural community that has multiple media markets but placing an ad in the two local weekly newspapers was not possible because there was not enough time to create an ad before the newspaper deadlines. He said looking at the timeline of events, it would seem to him that ordering the production of these types of materials would have to take place much earlier than the reported dates because the content of each ad implied some research had been done on each candidate. He said that kind of research takes time and the professional production must have started much earlier. He said there was a great deal of public harm due to the delay and if this entity is allowed to get away with this type of violation with only a slap on the wrist, then it will most likely do it again.

Senator Deborah Simpson, candidate for Senate District 15, said she was one of the two targeted races that Mr. Riley claimed suffered no harm in the delay of funds. She said the argument that because the RSLC is a national player and not familiar with Maine's law does not hold up and not bothering to check Maine campaign finance laws was not an excuse. She said she served the Legislature for ten years trying to do her best and treat people with dignity and respect. She said the mailers attacking her on the issue of illegal immigration had nothing to do with Maine politics. These attacks were done as a result of negative push polling done back in September and October. She said these negative ads were targeted for her district because of a large Somali refugee community in her district. She said this proves that research was done and the expense incurred much earlier than the date reported. She said she received a phone call from the Commission while she was out knocking on doors that Saturday afternoon. She explained that this was her sixth campaign running for the Maine legislature and she had never received the maximum matching funds prior to this election. She said in the last election cycle, she had one of the most expensive races in Maine and still did not receive the maximum amount. She had never seen the type and size of expenditures made by the RSLC before in Maine politics and she had no expectation that she would receive the entire amount of matching funds.

Ms. Simpson explained that she first needed to get over the initial shock of having \$95,000 spent against her and then she had to decide whether she could even respond effectively in such a short time frame. She said if she waited to see the RSLC ads, it would not have been possible to get anything out in a timely fashion. There was not enough time to produce and distribute a mailer. She decided to air television ads in her district even though she had seen the RSLC TV herself. She said that, while she was campaigning door to door, she noticed a definite and disturbing shift in the way some people responded to her after the RSLC ads had aired.

Mr. McKee asked how the delay factor impacted Ms. Simpson's response to the RSLC ads.

Ms. Simpson said she had to figure out how to respond and decided the TV ad was the best approach. She had never done any television ads in any of her past campaigning and had to figure out how to set that up, who to call, and how to get in touch with people who could help her do that. She said she called a consultant on Sunday but was not able to get anything set up until Tuesday. She said if she had waited to view the RSLC ad, it would have created more delay and she would not have been able to respond in time at all. If the report had been filed earlier, she would have had more time to make arrangements to have an ad produced and aired. As a result of the late report, she felt that she did not have the time needed to produce an ad that would have been an effective response to the RSLC ad and that would also have contained her message to voters rather than just responding to an attack ad.

Joseph Greenier, concerned citizen from Stockton Springs, Maine, read from a statement. He requested the Commission perform full audits of the candidates who benefited from these negative ads. He said the RSLC's actions gave the appearance that an election may be bought which goes against the intent of the Maine Clean Election Act.

Chuck Quintero, Senate Democratic Caucus Director, said that he has experience working on legislative campaigns in Maine. He stated, for the record, that he was not in this role during the past election cycle. He explained that Maine has a citizen legislature and candidates do not have the professional expertise in running campaigns and the resources to respond to expensive, professional campaign ads. A two day delay is critical under these conditions. He said most candidates do not use TV advertising in Maine because the ads are very expensive and are not an efficient use of their money. He said he finds it very difficult to find

the timeline laid out by the RSLC credible. In his experience, he has never been able to do mailers or produced TV ads within a three day period, as the RSLC claimed it did in these five candidates' races. He said mailings alone require two days for design and then finding a printer who is available to print them can be very difficult so close to the election. He said it requires calling around the country to find a print shop that will print mail during that late date. He said he finds it very difficult to believe that this mailer was done in one day because doing a four-color mailer requires a significant amount of drying time, and then it gets shipped to a mail house which does the actual mailing. Mr. Quintero said TV ads take time because you have to find a firm to take your business and produce the ad and these candidates did not have that time or experience. He also said TV and radio time is pre-purchased in advance and the cost doubles as the election approaches as well as the availability time when ads are aired. He said it matters significantly every day you wait, so a two-day delay is very significant. He said it was irresponsible to brush aside the 24-hour and 48-hour reporting requirement as the RSLC has. No organization regardless of political affiliation should be allowed to do that. He said that if the penalty is reduced, organizations that spend millions of dollars across the country will see a \$10,000 fine as a small cost of doing business in Maine.

In response, Mr. Riley said he was not defending the advertisements that were used by RSLC. He said they were not well done and were damaging personally and professionally to some of the candidates but that was not the issue before the Commission. He said the Commission needs to focus on the harm to the public interest by the two day delay. He said after listening to Mr. Schatz, he can see that Mr. Schatz may have been harmed to a greater degree than he originally thought and perhaps there should be some penalty to reflect that. He said the issues for the Commission was the timing of the notice to the candidates that they would be receiving matching funds, how long did they have to respond, and how they responded. He said despite what the candidates said today, they all new on Saturday, a week and a half before the election. Whether they were able to respond was a campaign management issue and he was not going to discuss one way or the other. He said the extent of the damage was what remains questionable. He said he did not believe the extent of the harm warrants the maximum penalty under the statute since all candidates received their money and were able to use it in some fashion. He said the second issue was simply a case of misunderstanding the trigger for reporting.

Mr. McKee expressed concern and skepticism about the timing and order of events as represented by the RSLC, noting that others who spoke have the same questions. However, the dates shown are all the Commission has to go on.

Mr. Wayne said the staff has had difficulty getting information from the RSLC but would be willing to do further investigation if the Commission wished. He said PACs are allowed to engage in research and planning without having to report an independent expenditure, so there could have been research done earlier that did not trigger an independent expenditure report.

Mr. Healy asked whether staff had any thoughts of changing the penalty amount after hearing from people today.

Mr. Wayne said he would not change the \$26,000 penalty recommendation because it sends the right message. He said the RSLC was a sophisticated organization. It is led by an attorney and has a compliance director. It should be able to figure out what every state's reporting requirements are. He said their lack of compliance had a very serious effect on these candidates.

Regarding the PAC filing, Mr. Wayne explained that RSLC filed their PAC report electronically on Friday, October 22, reporting no activity had taken place during the reporting period. The next day, it faxed an independent expenditure report listing almost \$400,000 expenditures.

Mr. McKee said that if someone were just looking at the RSLC's PAC reports on the Commission's website, they would not know the expenditures until December.

Mr. Duchette said the penalty was based on the late filing of the PAC report and asked if there could be a penalty assessed also for the substantial misreporting on the PAC report.

Mr. Wayne explained that the report is deemed to be late because it did not substantially conform to the reporting requirements. The staff thought that adding a penalty for misreporting to the late filing penalty would be penalizing the same violation twice.

Regarding the issue of when the RSLC should have known that the October PAC report may have been incomplete, Mr. Wayne said that on October 25 or 27, the Maine Democratic Party brought the fact that the RSLC's PAC reports stated that it had no activity to report, yet the RSLC filed an independent expenditure report with nearly \$400,000 in financial activity. At that point, the RSLC was on notice that there was a potential reporting issue that it would have to correct.

Mr. Youngblood said the RSLC was put on notice that the report may not be in compliance, but they chose not to correct the problem.

Mr. Healy moved that the Commission accept all staff recommendations and assess a penalty of \$26,000 against the RSLC. Mr. Youngblood seconded.

Mr. Youngblood stated that matching funds are a very critical part of the Clean Election program. In this case, \$160,000 in matching funds was not distributed when it should have been because of the late filed independent expenditure report. Though he did agree that the late filed PAC report was a significant violation and warranted a large penalty, he was concerned about assessing the maximum penalty for a late filed report because the Commission does not have the ability to impose a harsher penalty due to a more egregious violation, such as not filing a report at all.

Mr. Duchette said he did not feel it was necessary to leave room for a more egregious circumstance. This case is unusual compared to most matters that come before the Commission because of a late filed report. Here, the Commission is dealing with \$76,000 that was not reported in the report, whereas in most cases, the amount is much smaller. The statutory penalty formula would set the penalty at about \$40,000 in this case but the statute caps the penalty at \$10,000. Most penalties based on the formula do not exceed the \$10,000.

Mr. Healy said he was originally of the opinion that the penalty for the late filed PAC report should be reduced for the same reasons that Mr. Youngblood expressed. However, when he considered that the PAC report filed by the RSLC was totally incomplete and inaccurate even though expenditures had been made during the reporting period and since it was within the Commission's authority to impose the maximum penalty, he concluded that the \$10,000 was appropriate for that violation. The RSLC is a large national

organization with significant resources. It should have retained counsel to help them comply with Maine's reporting requirements. Though he does not believe that the RSLC intentionally filed inaccurate and incomplete reports, their mistake was not doing the necessary due diligence in ascertaining the reporting requirements in Maine. He thinks the total of \$26,000 for all the violations was reasonable.

Mr. McKee said he would support the motion. The RSLC's basic excuse for the late filed reports is ignorance of the law. The Commission has routinely held organizations and people who are significantly less sophisticated than this organization to the standards of compliance despite claiming ignorance of the law. The RSLC has advanced ignorance of the law to excuse its non-compliance but he did not see any reason to accept it. As for assessing the maximum penalty for the delay in paying matching funds, he said there were three factors that justify the maximum penalty: the large amount of the expenditure, the fact that five candidates experienced significant harm, and the timing of late filed report. He said these factors justify the maximum penalty amounts. The content of the ads themselves was not and should not be a factor to be considered in determining a penalty.

With regard to the PAC report, Mr. McKee said the RSLC was specifically put on notice the week after the incomplete report was filed. However, they chose to do nothing about it until December at the next regular filing deadline. He said that the \$1,000 penalty for substantial misreporting in the independent expenditure report was justified because the report indicated that the expenditures were made on the same day when in fact they had been made over several days. He said the total penalty amount is less than 7% of the total expenditure. Mr. McKee recognized that it was perhaps one of the larger penalties imposed by the Commission but the Commission has not had a matter like this before, where a large amount of money was spent in legislative races at the very end of the campaign which had such significant impact on five candidates.

Motion passed unanimously (5-0).

Agenda Item #3. Ballot Question Committee Reporting/Request by Thomas Valleau

Mr. Wayne explained that on January 3, 2011, Thomas Valleau requested that the Ethics Commission investigate whether the Portland Press Herald newspaper was required to register and file campaign finance reports as a ballot question committee with the Portland City Clerk in late 2010. At issue was a series of

full page ads that ran in the Portland Press Herald in support of a municipal referendum to make the office of mayor of Portland an elected position. An individual, on behalf of the Portland Regional Chamber of Commerce, asked Richard Connor, the editor and publisher of the Press Herald, if the Regional Chamber could receive free advertising for ads to support the referendum. During the week leading up to the November 2, 2010 election, the Press Herald allowed the Portland Regional Chamber of Commerce to run a number of full-page advertisements in support of the referendum. The Regional Chamber worked cooperatively with the Elect Our Mayor PAC to come up with the content of the ads. As far as the staff can determine, the Press Herald did not have any involvement in creating the content of the ads. It is clear that Mr. Connor knew that the ads would be used to support the referendum. The Press Herald responded that it is exempt from Maine's campaign finance disclosure laws and its purpose in providing the ad space was not to influence the election. Mr. Valleau's concern was that the public did not know the Press Herald had donated this large ad space in support of the referendum to the Chamber. Mr. Wayne also said Mr. Valleau was inquiring as to whether the Press Herald would qualify as a ballot question committee (BQC) and if so, they should have filed a report disclosing the donation. Mr. Wayne explained that a BQC was similar to a political action committee (PAC) except the major purpose of a BQC is not influencing elections. It is an organization that has another business purpose that receives or spends over \$5,000 to influence a particular election.

Mr. Duchette asked whether the Chamber of Commerce filed a BQC report and Mr. Wayne said it did not. He said arguably the Chamber probably should have; however, that was not part of Mr. Valleau's complaint. Mr. Wayne believes the Chamber acted in good faith. He said he has used this case as an educational opportunity and explained to the Chamber's Executive Director that the Chamber needs to be more careful in the future when it is involved in elections.

Mr. Healy asked who organized the Elect Our Mayor PAC. Mr. Wayne said he spoke to the campaign manager who said that the PAC was separate from the Chamber and was a coalition of individuals who were supportive of having an elected mayor in Portland. He said the newspaper gave space to the Chamber knowing it would be used to influence the election but the space was not given to the PAC directly. The Chamber gave the ad space to the PAC.

Mr. Wayne said that the staff's recommendation was not to find a violation because the newspaper's purpose was not clear and there was a pre-existing policy between the newspaper and the Chamber to provide free ad space. He said, also, the staff views the newspaper as a contributor rather than a BQC. There are many organizations that contribute money or services to a PAC and the law does not require them to register simply because of that contribution.

Tom Valteau from Portland explained that there was an event held in Portland last October where a board member of the Chamber spoke to Richard Connor from the Portland Press Herald and asked if free advertising could be provided to support the yes vote on the mayoral referendum. He explained that Mr. Connor said he would arrange it. Two days later, a full page color ad ran in the Press Herald every day in the final week before the election. Mr. Valteau explained that Mr. Connor's company owns the Portland Press Herald, Maine Sunday Telegram, Waterville Sentinel, and the Kennebec Journal and was also the publisher and editor of the Press Herald. He said the Chamber of Commerce made this referendum its pet project and devoted all its attention and resources to the project. He said the Press Herald also supported the project from its beginning and wrote editorials in support for nearly two years coming up to the election. Mr. Valteau said the newspaper bank rolled one of the two sides in this election and the public did not know it. He said only an inner circle of individuals knew about this large contribution and it was not until after the election that it was discovered in a footnote on a report filed by a PAC. He said the statute states that the Press Herald should have registered as a ballot question committee which was a simple thing to do and not an attack on free speech. He said the reason for doing so was very simple; so the public will know who is trying to influence their vote. Mr. Valteau said this was within the newspaper's prerogative to do so (give free ads) but they would have to file a report with the City Clerk. He said this was the most expensive municipal campaign in the city of Portland's history and the majority of funding was donated by the Press Herald. He said the free ads were donated for the purpose of promoting this referendum and he hoped the Commission would not dismiss this issue. He said in order for the Commission to dismiss this, they would have to believe in their hearts that these ads were not donated to influence the ballot. He expressed concern over the future elections and how this newspaper will influence those votes as well. He said this was a teachable moment and hoped that the lesson the Commission sends will be that even newspapers have to play by the rules. He said he did not expect the Commission to levy any fines on the Press Herald, just make a simple finding of violation that the Press Herald should have

registered as a ballot question committee and file campaign finance reports. He said this finding will honor the Commission.

Mr. Valleau, in response to Mr. Healy's question, said he was not present during the conversation between Mr. Connor and the chamber board member who asked for the free ad space. He said he got that information from the staff's investigation.

Mr. Duchette asked why Mr. Valleau's complaint did not include the Chamber if that organization was the main supporter for the referendum. He said the Chamber had the major purpose of promoting the referendum question.

Mr. Valleau said because the Chamber was not the entity that made the donation. The Press Herald was the contributor. He said he understood the statute to read that if a large contribution is made to influence an election, registration as a ballot question committee is required.

Mr. McKee stated that he understood that the Press Herald did not just give the Chamber free space for six full page ads on any issue. The Press Herald knew that the ads would be used to support the referendum.

In response to Mr. Healy, Mr. Valleau said he was not sure if Mr. Connor knew the ads would be run under the name of the PAC.

Mr. Healy asked how the disclaimer was written on the bottom of the ad.

Mr. Valleau said Maine law does not require a disclaimer statement on ads to support or oppose a ballot question. He did not think how it was written was relevant in this matter. The disclaimer on some ads indicated that the PAC had paid for the ad. The disclaimer on other ads indicated the Chamber did. In fact, neither paid for the ads.

In response to Mr. Healy's question, Mr. Valleau said that he did not know whether the Chamber was responsible for organizing the PAC.

Ms. Matheson asked, hypothetically, if there was no attribution at all on the ad, how would someone know who paid for the ad.

Mr. Valleau said this was a weakness in this statute. He said the ballot initiative ads need to have a disclosure statement required.

Robert Hains, a resident of Portland, said the Commission is a quasi-judicial body and the determination in this matter will set a precedent for future elections. He said he has already heard about how political entities will circumvent the reporting requirements if the Commission decides that the Press Herald is not required to report. He said the plan would be to form a PAC, have a straw man who will channel the money from a third source who will be hidden from the public. He said if the Commission follows the staff recommendation, there will be organizations that will not bother to report at all. He said the top people from the Chamber, Mr. Wood, and from the Press Herald, Mr. Connor, made this deal. He said Mr. Connor claims that editorials are the same as advertisements which is not true. He said editorials are opinions and the public knows that someone has expressed their opinion when reading it. He said an advertisement is an attempt to sell something and carries a different connotation to the public. He said when the source of the ad is not reported, the law is circumvented. Both the Chamber and the newspaper should have filed and reported according to the statute definition. He said the original arrangement between the Chamber and Press Herald was that the Chamber would waive the \$25,000 member fee in exchange for a weekly, quarter page ad in the newspaper throughout the year. The Press Herald then gave the Chamber six full page ads over a ten day period for no consideration. This arrangement was far beyond the original deal between the Chamber and the Press Herald. He said the advertising done by a newspaper is a business deal and has nothing to do with freedom of speech. He said assessing a fine is not important, but setting a precedent that it is not allowed to circumvent the law in this fashion is.

Mr. Healy asked Mr. Hains whether he would have viewed the ads differently if there had been a disclosure that the Portland Press Herald had paid for them.

Mr. Hains stated that these ads did not require any disclaimer but that does not negate the statutory requirement to report the expenditure. He said the issue in this case was the enforcement of reporting requirements.

Daniel Walker, Esq., representing the Portland Press Herald, said this case was being scrutinized by newspapers around the country because it gets to the heart of what newspapers provide to the public which is a forum for discussion. He said that the Press Herald's actions that are the subject of Mr. Valteau's complaint do not and should not fall under Maine's campaign finance law. He stated that the Press Herald does not waive its assertion that, under the First Amendment, the Commission lacks jurisdiction to impose Maine's campaign finance law upon the press. Nonetheless, his client was in full compliance with campaign finance law. He said these contributions of the ad space were fully disclosed in a campaign finance report filed by the Elect Our Mayor PAC. Mr. Walker explained that the Press Herald provides a forum for all viewpoints. It also has a general ad hoc donation policy to provide free advertising for public interest groups or civic organizations such as Spurwink, United Way and the Red Cross to run any type of ad they wish. He said it averages to about \$750,000 per year of donated ad space. Michelle Lester, vice president of advertising for the paper, and the other executives have full authority over the donated ads. Mr. Walker said non-profits often ask for extra ad space which was the case with the Chamber.

Mr. Healy asked if there was a written policy with regard to the non-profit free ad space.

Michelle Lester, vice president of advertising for the Press Herald, said there was no written policy. The matters were dealt with on a case-by-case basis. She said that the Chamber may have had 20 to 30 pages of free ad space in 2010.

Mr. Walker explained that the board member from the Chamber approached Mr. Connor about receiving extra ad space to state the Chamber's position on the mayoral campaign. The ads were provided by the PAC to the Chamber and the Chamber provided them to the Press Herald which is consistent with the ad hoc policy that was in effect. The Press Herald only gives free ad space to civic organizations, not to PACs.

Mr. McKee asked whether the free ad policy would apply if the Red Cross wanted to run a counter opinion ad that did not support the mayoral referendum.

Ms. Lester said it probably would have.

Mr. Healy asked if Mr. Connor's expectation was that the Chamber was running the ad or the PAC was running the ad. He wanted to know whether Mr. Connor understood that the ad was going to be turned over to the PAC. He said that it may be difficult to do without Mr. Connor present but he wanted to know what Mr. Connor's state of mind and intention was in giving the ad space to the Chamber and what the agreement between the paper and the Chamber was.

Mr. Walker said that the purpose of giving the ads to the Chamber was to get the Chamber's message out.

Ms. Lester said all the ads came directly from the Chamber, not the PAC. She did not expect the Chamber to transfer the ad space to the PAC. She stated that her expectation was the Chamber would be running the ad. The paper did not review every detail of the ad before publishing it.

Mr. Healy said this case raises very serious issues. If an entity gives out \$44,000 in free advertising in a small local campaign, there is a good likelihood that could significantly influence the election, particularly in a close election such as this referendum.

Mr. Walker said the purpose of the free ad space was to provide a public forum for one of the newspaper's business partners. He said the paper was not making a cash donation. It was not providing staff to a PAC. It was providing space for a political forum. He said if the paper had given a contribution straight to the PAC, there would have been no issue.

Mr. Duchette asked Mr. Walker whether there was any prohibition for an individual to make a contribution to the Chamber and then have the Chamber pass it on to the PAC and asked how would that reporting requirement be met.

Mr. Walker said that was a classic "straw man" scenario which is prohibited. The purpose was not to influence the campaign but to provide support to the paper's non-profit business partner, the Chamber, in expressing its public view. This is consistent with the Press Herald's ad hoc policy as well as to provide a public forum. The Chamber may have intended to influence the election but that intention cannot be imputed to the Press Herald.

Mr. Walker explained that the value of the donated ad space did not reach \$5,000. It was not the \$40,000 mentioned previously and reported in the PAC report as an in-kind contribution. That amount was what a for-profit entity may have to pay for ad space. But since this was free donated space, the value was zero.

Ms. Lester, in response to Mr. Healy, said that there are more than one hundred ways to calculate the rate for an ad.

Mr. McKee said generally speaking if someone were to place a full page ad in six issues, most likely the cost would exceed \$5,000.

Ms. Lester said the newspaper's cost may not exceed that amount but the price charged to the customer would probably exceed \$5,000.

Mr. McKee said the question is whether to use a cost analysis or market value analysis.

Mr. Walker said this expenditure was reported by the PAC. He said newspapers across the country are not in the business of filing election law reports, they provide a forum for debate only. He said this could be a trap for the unwary and possibly chill the use of newspapers as a medium of political expression.

In response to Mr. Healy's hypothetical case, Mr. Walker said giving away free ad space to a candidate or political action committee is different than giving ad space to a non-profit or civic organization. He would not be able to answer the question of whether campaign finance law would apply to a newspaper.

Ms. Lester explained that there were approximately six or seven people that sat down and talked through how the Chamber would promote itself and drive membership. She said a rough draft was adopted as to when the ads would run but it was always a very loose transaction. She said it was agreed that there would be advocacy ads and editorial columns but no contract was signed. There is a written description about the plan to use the ad space but she does not consider it to be a contract. She said the purpose of the agreement was to help the Chamber.

Mr. Healy asked what the newspaper received from the Chamber and what its value was.

Ms. Lester said the value received by the Press Herald was about \$15,000. It would receive free logo placement during events sponsored by the Chamber and other communications from the Chamber. She said there was never a straight up trade.

Ms. Matheson said she understood that there was a re-negotiation of the initial agreement between the Chamber and the newspaper to include the six ads.

Ms. Lester said she would not consider it a re-negotiation. She instructed the Chamber to send over the additional ads. In response to Ms. Matheson's question whether she knew what the ads were for, Ms. Lester said she had no idea what the content was. She said Mr. Connor knew but it did not matter to her because all she cared about was helping the Chamber under the agreement. She said Mr. Connor told her the ads would be coming but she did not know what they contained.

Mr. McKee said if the Commission wished, arrangements could be made to have Mr. Connor speak before the Commission in order to get additional information from him before making a decision.

Mr. Healy asked Ms. Lester whether any discussion had occurred after the ads had run as to why the Chamber did not run the ads instead of the political action committee. In addition, he asked whether the paper would, in the future, advise these non-profit organizations to run the ads themselves and not turn them over to a PAC.

Ms. Lester said no discussion had taken place but the Press Herald understood that was how the ads would be run. She said in the future it will influence how the newspaper handles donated ad space for non-profits.

Ms. Matheson asked Ms. Lester if the Chamber had wanted a full page ad for a store in Portland, would the paper have honored that request.

Ms. Lester said no. She said something else would have been worked out.

The Commissioners discussed whether Mr. Connor should be invited to come before the Commission to provide more information.

Mr. Healy expressed his concern that if there had been a simple disclosure on the ads at the beginning, this matter would not be before the Commission now. He said even though the PAC disclosed the donation in a footnote, they did not actually pay for the ad.

Mr. Duchette asked what the requirements of the newspaper would have been if the purpose of the ads was to influence.

Mr. Wayne said if the newspaper's expenditure was greater than \$5,000, the newspaper would have had to register within seven days, file a 24 Hour report for expenditures that exceeded \$500, and file a post election report that contained all campaign activity.

Mr. Duchette stated that the only report that came out was by the PAC which was filed in December.

Mr. McKee asked whether the Commissioners wanted to rely on the evidence before them today or ask Mr. Connor to come in and swear to the intent to provide the ad space.

Ms. Gardiner asked Ms. Lester whether the Press Herald's ad hoc policy included or addressed the use of space for political campaigning.

Ms. Lester said that the policy did not but typically the purpose behind the ad is very apparent, for example blood bank needs or fund raising for a non-profit. She said in the Chamber's case the possibility of advocacy ads was discussed.

Ms. Lester confirmed that the newspaper viewed these advocacy ads no differently from other non-profit ads. The purpose of the policy was to support the Chamber.

Mr. Duchette said he did not believe any testimony directly from Mr. Connor would change his view on this matter because there is enough evidence to make a decision. The first step was to determine whether the Press Herald's purpose was to influence a referendum.

Mr. Healy agreed and said a decision should be made today.

Mr. Duchette moved, based on the evidence provided, that the Commission accept the staff recommendation; find that the purpose of the Portland Press Herald was not to influence the referendum; and that the Press Herald did not have to register as a ballot question committee.

Mr. Youngblood seconded.

Motion passed (4-1) with Ms. Matheson opposing.

Agenda Item #4. Letter to Joint Standing Committee on Veterans and Legal Affairs

A draft letter by the Commission staff was provided for the Commissioners' review concerning the issue of leadership political action committees.

Mr. McKee said he would sign the letter as drafted.

No further action required.

Agenda Item #5. Report from Commission Auditor

The Commission's auditor completed the audit of Pamela Trinward's 2010 campaign for state representative, which she terminated after deciding to replace a withdrawing candidate for the State Senate. No exceptions (violations) were found.

No further action required.

Agenda Item #6. Adjustment to \$350 and \$750 Contribution Limits

Mr. McKee said in a 2009 law, the Maine Legislature required the Commission to adjust the contribution limits every two years based on the rate of inflation. After review of the findings by the Commission's auditor, it was agreed that no adjustment to the contribution limits should be made at this time, based on the low rate of inflation. The current limits of \$350 and \$750 will continue to be in effect for elections in 2011 and 2012. The Commission will next consider whether any adjustment is necessary in December 2012.

Other Business

Arizona Litigation Regarding Public Financing and Matching Funds

Mr. Wayne explained that the United States Supreme Court will be considering the constitutionality of the matching funds component of Arizona's clean election program. Under Maine's clean election program, matching funds are handled in a fashion very similar to Arizona's program. Several other states are joining together to file an amicus brief with the Supreme Court. Maine has been invited to join with the other states. He explained that the decision to join is up to the Attorney General.

Mr. McKee stated in his view this is a very important part of the law and he supports joining with other states.

Ms. Ann Luther, co-chair of Maine Citizens for Clean Elections, said the MCCE is currently working on a brief. She said it was very important for Maine to join with other states in support of this law since Maine was the first state in the nation with the most success with the Clean Election process. She strongly urged the Commission to encourage the Attorney General to join with the other states on the amicus brief.

Mr. Youngblood moved that the Commission request the Attorney General join the amicus brief. Ms. Matheson seconded.

Motion passed (3-0-2). Mr. Duchette and Mr. Healy abstained.

Request for Investigation of Senate Candidate Roger Katz by Joseph and Michele Greenier

Mr. Wayne explained that the Commission has standards for what a complaint must include in a request for an investigation. He said this request for an investigation by Joseph and Michele Greenier does not state specifically what the violation was. He has notified the Greeniers' that their request was incomplete and if the request were re-submitted with the required information, the regular actions will be performed.

Mr. McKee stated that he cannot take part in any discussion or action with regard to this matter due to conflict of interest. However, it was not necessary for the Commission take any action at this time.

Mr. Duchette moved to adjourn and Mr. Healy seconded the motion.

Meeting adjourned at 1:25 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director