

**BEFORE THE ALASKA PUBLIC OFFICES COMMISSION**

YES ON 2 FOR BETTER ELECTIONS, )  
 )  
 Complainant, )  
 )  
 v. ) **APOC Case No. 20-06-CD**  
 )  
 DEFEND ALASKA ELECTIONS – VOTE )  
 NO ON 2, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

**EMERGENCY ORDER**

Yes on 2 for Better Elections filed a complaint against Defend Alaska Elections – Vote No on 2 (DAE), alleging in part that DAE has not accurately identified its top three contributors on various advertisements. DAE is campaigning to defeat Ballot Measure 2, the Better Elections Initiative, in the statewide general election on November 3. The Commission granted expedited consideration of the top contributor issue at Yes on 2’s request.<sup>1</sup> After an expedited hearing, the Commission concludes that DAE’s radio ads identifying John Sturgeon, Mark Begich, and Sean Parnell as DAE’s top three contributors violate AS 15.13.090(a)(2)(C) because these individuals were no longer the top three contributors when the radio ads first aired. The Commission orders DAE to correct the top contributor disclosure on the ads as soon as possible and in no event later than three business days after the issuance of this order, so that the disclosures accurately

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<sup>1</sup> Order Granting Expedited Consideration (Oct. 6, 2020).

identify the top contributors as of DAE's September 17 independent expenditure report.<sup>2</sup> Alternatively, DAE may stop airing the ad with the inaccurate top contributor disclosure.

Alaska Statute 15.13.090(a)(2)(C) requires DAE to identify on its communications its "three largest contributors under AS 15.13.040(e)(5), if any, during the 12-month period before the date of the communication." A "communication" is statutorily defined, in relevant part, as "an announcement or advertisement *disseminated* through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass mailing."<sup>3</sup> To disseminate means "to spread (something, especially information) widely."<sup>4</sup>

The parties dispute when the "date of the communication" occurs for radio advertisements.<sup>5</sup> DAE argues that it must identify its top three contributors as disclosed in campaign reports before the date the radio ads were produced and placed, and that it does not need to change already produced ads if they continue to air after a contribution in a later filed report results in displacing one or more of the previous top three contributors.

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<sup>2</sup> Defend Alaska Elections – No on 2's Independent Expenditure Report, <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=4598&ViewType=IE> (filed Sept. 17, 2020). The Commission takes judicial notice of this report.

<sup>3</sup> AS 15.13.400(3) (emphasis added).

<sup>4</sup> Disseminate, Lexico.com, <https://www.lexico.com/en/definition/disseminate> (last visited Oct. 7, 2020). See AS 01.10.040 (construing statutory words "according to their common and approved usage," if they have not acquired a technical meaning through statutory definition or otherwise).

<sup>5</sup> For the purposes of this order, the Commission focuses solely on the testimony and evidence addressing radio advertisements because, as explained later, the Commission concludes that expedited consideration of the other types of ads at issue in this complaint is not warranted.

Yes on 2 views the phrase “date of communication” as requiring DAE to expeditiously change the top three contributor disclosure on radio ads still airing whenever a newly filed disclosure report shows that one or more of the top three contributors has changed.

The Commission held an expedited hearing on October 7 to consider this issue. Attorney Sam Gottstein represented Yes on 2, and attorneys Matt Singer and Lee Baxter represented DAE. Three witnesses—both groups’ campaign managers and a Commission staff member—testified. Yes on 2’s campaign manager, Shea Siegert, testified that he changes the top-three identifier in radio ads that are already airing if Yes on 2’s top contributors change. He explained that changing the identification on radio ads could easily happen overnight and be done cheaply: he could splice a new disclosure on a pre-existing radio ad using an application on his computer or phone and send the revised ad to radio stations in no more than thirty minutes.

DAE’s campaign manager, Brett Huber, testified that DAE had not adjusted the contributor disclosure on its radio ads because the disclosure was accurate based on the date the ads were produced and placed. He testified that DAE correctly disclosed in its radio ads that Sturgeon, Begich, and Parnell were its top three contributors consistent with its September 7 report (as amended).<sup>6</sup> Mr. Huber explained that, although the Alaska Republican Party, the Republican State Leadership Committee, and Americans For

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<sup>6</sup> Defend Alaska Elections – No on 2’s Independent Expenditure Report, <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=4663&ViewType=IE> (filed Sept. 7, 2020, as amended Oct. 3, 2020). The Commission takes judicial notice of this report.

Prosperity became DAE's top contributors, their contributions were not reported until after the radio ads were both produced and placed.<sup>7</sup> Mr. Huber testified that he sent proposed radio copy and agreed to have Art Hackney of Hackney & Hackney produce the ads on September 14.<sup>8</sup> Three days later—on September 17—production of the ads was complete, according to Mr. Huber, and Mr. Hackney billed DAE \$3,228 that same day.<sup>9</sup> Mr. Huber testified that his agreement with a media buyer, Hellenthal and Associates, was final on September 17. An invoice reflects that DAE owed \$254,381 to Hellenthal and Associates for statewide radio ads that would run from September 23 to election day (November 3).<sup>10</sup> Mr. Huber testified that after September 17, the agreements had not been modified, he did nothing further, and he expected the media buyer to handle the ad placement. Mr. Huber testified that DAE's September 17 independent expenditure report (as amended) was accurate; the report stated that DAE paid Hackney & Hackney on September 17 and incurred the debt for Hellenthal and Associates that same day.<sup>11</sup>

Tom Lucas, the campaign disclosure coordinator for the Commission, testified that he discussed the contributor disclosure with Mr. Huber. He testified that the crucial event

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<sup>7</sup> Defend Alaska Elections – No on 2's Independent Expenditure Report, <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=4598&ViewType=IE> (filed Sept. 17, 2020).

<sup>8</sup> See also Exhibit 1 (emails).

<sup>9</sup> Exhibit 2 (emails).

<sup>10</sup> Exhibit 3 (invoice).

<sup>11</sup> Defend Alaska Elections – No on 2's Independent Expenditure Report, <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=4634&ViewType=IE> (filed Sept. 17, 2020, as amended Sept. 27, 2020). The Commission takes judicial notice of this report.

was dissemination in his view: at the time of creation and dissemination, the group should look back over twelve months to determine who the top contributors were. He also explained that in the context of bulk ad buys, he had advised that the dissemination occurs on the date the ads were placed as long as the ads are on a set schedule, and there are no later changes to the schedule or to the substantive components of the ad itself.

The Commission decides that the top three contributors are those who contributed the most as reported on campaign disclosure reports during the 12-month period before the radio ads first aired. Alaska Statute 15.13.090(a)(2)(C) requires identification of the three largest contributors “under AS 15.3.040(e)(5), if any, during the 12-month period before the date of communication.” Because AS 15.30.040(e)(5) specifies what a *report* must contain to fully identify the source of a contribution, the Commission decides that the date a contribution was timely reported, rather than the date the contribution was received, controls for the purposes of determining when the 12-month look-back period ends. The applicable report that ends the 12-month period for a particular communication is the report timely filed closest to the “date of communication.”<sup>12</sup> And the “date of the communication” for a radio ad is the date that the ad will first air because, by statutory definition, a communication occurs when “disseminated.”<sup>13</sup> The first date of airing a radio ad is when the information is first spread widely.<sup>14</sup>

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<sup>12</sup> AS 15.13.090(a)(2)(C).

<sup>13</sup> AS 15.13.400(3).

<sup>14</sup> Disseminate, Lexico.com, <https://www.lexico.com/en/definition/disseminate> (last visited Oct. 7, 2020). See AS 01.10.040 (construing statutory words “according to their

This interpretation best conforms to the statutory language while not overly burdening or restraining the communications of campaigns. A group does not need to update its top three contributor disclosure on an already running radio ad every time the group receives a contribution that displaces a top contributor, but the group must ensure the disclosure is accurate on the date the ad first airs by looking at the contributions reported on its most recent timely filed report and reports filed in the previous 12 months. If a radio ad has been recorded or produced, but not yet disseminated, and the identification of the top three contributors in the ad is no longer accurate, the group must update the ad accordingly.

This interpretation also provides more accurate information to voters than DAE's or Mr. Lucas's suggestion. A top three disclosure may become inaccurate over time if the same ads continue to run for a long time, but the Commission's interpretation at least prevents campaigns from spreading inaccurate information to voters by using a top three disclosure that is already inaccurate—perhaps wildly, as was the case here—by the time the voters first hear the radio ads.

The Commission finds that DAE's most recent timely filed report before the radio ads first aired is the September 17 report. The radio ads could not have aired before September 17. Mr. Huber testified that he did not finalize the agreement with the media

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common and approved usage," if they have not acquired a technical meaning through statutory definition or otherwise).

buyer to place the ads until September 17.<sup>15</sup> Mr. Huber indicated that it was advisable for campaigns to lock in radio ad buys and placements early in a campaign to get the best rates and placements for ads that will actually air closer to election day. But in this case, the invoice reflects that the intended first air date was not until September 23—six days after the disclosure report was filed, thus making the ad incorrect at the time of even its *initial* airing.<sup>16</sup>

The Commission finds that DAE’s radio ads violate AS 15.13.090(a)(2)(C) because they do not accurately identify the top three contributors on DAE’s September 17 report. The contributions disclosed in this report displaced Sturgeon, Begich, and Parnell as the top three contributors; the new top three contributors were the Alaska Republican Party, the Republican State Leadership Committee, and either Americans For Prosperity or Northern Holding, Inc.<sup>17</sup>

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<sup>15</sup> See also Defend Alaska Elections – No on 2’s Independent Expenditure Report, <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=4598&ViewType=IE> (Sept. 17, 2020) (reporting that debt to media buyer was incurred on Sept. 17).

<sup>16</sup> Exhibit 3.

<sup>17</sup> Compare Defend Alaska Elections – No on 2’s Independent Expenditure Report, <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=4663&ViewType=IE> (filed Sept. 7, 2020, as amended Oct. 3, 2020) with Defend Alaska Elections – No on 2’s Independent Expenditure Report, <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=4598&ViewType=IE> (Sept. 17, 2020). The Sept. 17 report discloses that Americans For Prosperity and Northern Holdings, Inc., both contributed \$45,000 and so were tied. DAE is not required to identify more than the top three contributors and could choose which of these two contributors to identify under AS 15.13.090(e).

The Commission concludes that this violation must be remedied before the election because the violation could materially affect the outcome of the election,<sup>18</sup> particularly because DAE intends to run the ads until election day, and absentee ballots have already been mailed. The Commission finds credible Mr. Siegert's estimate of how quickly and easily the top-contributor identifier on radio ads may be altered. In addition, Mr. Huber testified that the ads in their entirety took only three days to produce once he provided the radio copy to Mr. Hackney, and only the last few seconds of the ad must be replaced. Under AS 15.13.380(d), the Commission consequently orders DAE to correct the top three contributor disclosure on the radio ads as soon as possible and in no event later than three business days after the issuance of this order, so that the disclosure accurately identifies the top contributors as of DAE's September 17 report. Alternatively, DAE may stop airing the ads with the inaccurate top contributor disclosure.

Under AS 15.13.380(d), the Commission remands to staff to fully investigate and consider on a regular basis whether, and how much, of a penalty should be assessed for this violation. The Commission also remands to staff for a full investigation and consideration on a regular basis the issue of whether DAE's top three contributors were properly disclosed in DAE's communications on two political blogs, Facebook, and its website.<sup>19</sup> The Commission concludes that expedited consideration of these

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<sup>18</sup> See AS 15.13.380(c) (factors for granting expedited consideration).

<sup>19</sup> The Commission previously referred additional allegations in Yes on 2's complaint to staff for investigation and consideration on a regular basis in its Order Granting Expedited Consideration (Oct. 6, 2020).



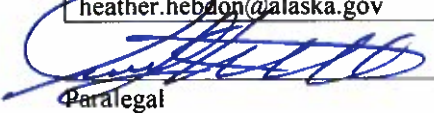
communications is not warranted because an inaccurate top-contributor disclosure on the non-radio ads, while a serious violation if it occurred, is less likely to materially affect the election than an inaccurate top-contributor disclosure announced in a radio ad.

This is a not a final Commission order for the purposes of an appeal to superior court because the Commission has not yet determined a penalty amount, if any, for the violation and has not decided all the issues raised in Yes on 2's complaint.

Dated: October 8, 2020.

BY ORDER OF THE ALASKA PUBLIC OFFICES COMMISSION<sup>20</sup>

<p><b>Certificate of Service:</b> I hereby certify that on this date, I served, by <b>certified mail and email</b> a true and correct copy of the foregoing in this proceeding on the following:</p>	
<p>Samuel Gottstein Holmes Weddle &amp; Barcott 701 W. 8<sup>th</sup> Avenue, Suite 700 Anchorage, AK 99501 sgottstein@hwb-law.com</p> <p>and by <b>email</b> to: Heather Hebdon Executive Director Public Offices Commission heather.hebdon@alaska.gov</p>	<p>Matthew Singer Lee Baxter Schwabe Williamson &amp; Wyatt, PC 420 L Street, Suite 400 Anchorage, AK 99501 msinger@schawbe.com lbaxter@schawbe.com</p>

 10-8-20  
Paralegal Date

<sup>20</sup> Commissioners Anne Helzer, Richard Stillie, Suzanne Hancock, Dan LaSota, and Van Lawrence participated in this decision. The decision was made on a 4-1 vote.