WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION

In re:	NO. 01-134
PROTECT OUR PETS AND WILDLIFE,	COMMISSION STAFF CLOSING BRIEF
Respondent.	

I. PROCEDURAL HISTORY

On October 20, 2000, the Public Disclosure Commission staff received a complaint concerning, in part, expenditures made by the Respondent, specifically related to purchases of time for running television ads. Specifically, the allegations and resulting Report of Investigation involved television ads placed by the Respondent in support of Initiative 713. Following the initial investigation, a brief enforcement hearing was held on October 18, 2001. The Presiding Officer continued the hearing for two weeks and instructed staff to further investigate the placement of ads and cancellation policies. Staff did further inquiries into the allegations.

A subsequent brief enforcement hearing was convened on November 1, 2001, but no testimony or evidence was taken. The matter was referred to the full Commission for a full enforcement hearing. That hearing was held on January 22, 2002. The staff presented

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evidence and testimony as to the sequence of actions taken by the Respondent and its agent, Fenn & King, regarding the television spots run in support of their position on Initiative 713. The Respondent presented no evidence at the hearing other than the cross-examination of the Investigator. At the conclusion of the hearing, the Commission requested briefing concerning the question of whether certain actions by the Respondent were reportable expenditures.

II. FACTUAL HISTORY

The Respondent, Protect our Pets and Wildlife (Protect our Pets), registered as a political committee in October of 1999 for the purpose of supporting Initiative 713, a statewide initiative to make it a gross misdemeanor to capture certain animals with certain body-gripping traps and poisons. The testimony at the hearing confirmed that Protect our Pets engaged the services of Fenn & King to handle political advertising in support of the Initiative. This obligation was not reported until October 26, 2000, at which time the C-4 report listed a $535,205 payment to Fenn & King for a TV Media Buy, without any elaboration.

Following a staff request on November 3, 2000, Protect our Pets filed an amended C-4 with a Schedule B listing the Fenn & King payment along with a station-by-station breakdown of expenditures for television ads. The investigation focused on the media buys and the exact dates certain transactions occurred. The main focus was on the dates in which the stations deemed orders had been placed by Fenn & King to run advertisements in support of Initiative 713.

In its amended C-4 and attachments, Protect our Pets states that the obligation to Fenn & King was incurred on August 31, 2000. Later, Fenn & King states that the obligations to

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the individual television stations were not incurred until ". . . the ad was approved by the media outlet and the cost was accepted." Statements from the individual television stations differed from that of Fenn & King about when "orders were placed." For example, actual invoices from KIRO television state that orders were placed on specific dates as early as September 12, 2000. See Exhibit 1A to Memo to Commission dated January 15, 2002.

For purposes of this case, the staff is not pursuing any claim that the dates of requests for proposals or any inquiries into the costs and times as a violation. To the contrary, only those situations in which a television station itself considered an "offer to purchase" the same as an order placed is subject to this hearing. The terminology used by the individual stations is what the staff relied upon in reaching its decision to proceed with an enforcement hearing. According to the testimony of Suemary Trobaugh, the following stations used the terms "orders placed" when it described the activity of Fenn & King and the running of ads: KOMO TV (September 1, 5, 14, 2000); KAPP TV (September 9, 2000); KIRO TV (September 12, 2000 as well as invoices); KHQ TV (September 29, 2000)[1]; KNDO TV (October 2, 2000); KIMA TV (October 15, 2000); KING TV (August 31, 2000)[2]; and KNDO TV (October 18, 2000). The following stations indicated that all activities constituted "offers to purchase": KXLY TV (September 9, 2000) and KREM TV (September 1, 2000).

All payments to the stations began on October 18, 2000 for spots scheduled to commence on October 20, 2000. This payment activity should have been reported on a C-4

[1] KHQ sent confirming emails acknowledging receipt of the orders.

[2] KING TV ultimately cancelled the order based on the content of the ads. Ads later resubmitted and run in November 2000.

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due October 31, 2000. It was not reported until Protect our Pets amended its October 26, 2000 C-4 filing on November 3, 2000 and only then at the request of PDC staff.

At the enforcement hearing before the full Commission, the staff argued that Protect our Pets violated the reporting statutes by not disclosing its obligation to Fenn & King and further failing to timely or properly report the orders placed to the various television stations when the orders were actually placed and not when the television stations were paid.

III. ISSUE PRESENTED

Whether an "offer to purchase" television spots is a debt, obligation or other liability requiring a report under RCW 42.17.090, WAC 390-16-041 and WAC 390-16-205.

IV. LEGAL ARGUMENT[3]

In reviewing the appropriate interpretation and application of the reporting requirements in this case, the Commission should rule in such a way as to give full effect to the intent of the statute itself. As stated in RCW 42.17.010,

> The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as to assure continuing public confidence of fairness of elections and governmental process, and so as to assure that the public interest will be fully protected.

[3] For purposes of this brief, the argument addresses the facts about the actual purchase of media time for the Respondent. There has been no dispute that the Respondent entered into an agreement for services with the Fenn & King group in 1999, received services beginning in July 2000 and failed to report this obligation at any time prior to paying Fenn & King $500,150 on August 31, 2000 as stated on their November 3, 2000 Amended c-4. See Exhibit 8 to Report of Investigation dated July 1, 2001. This failure constitutes a violation for which a penalty should issue.

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The courts have recognized that the Commission has certain powers within the confines of its statute to define what the reporting requirements are for committees. *See State ex rel. Public Disclosure Com. v. Rains*, 87 Wn. 2d 626, 632, 555 P.2d 1368 (1976).

In giving meaning to its rules, the Commission is authorized to give the words in the statute "their ordinary and common meaning absent a contrary statutory definition." *John H. Sellen Constr. Co. v. Dep't of Revenue*, 87 Wn.2d 878, 882, 558 P.2d 1342 (1976). "Courts may resort 'to dictionaries to ascertain the common meaning of statutory language.'" *Id.* at 883. Additionally, even when statutory language is ambiguous, the Commission is generally given deference to interpret its intent, if the statute or rule being interpreted is within the Commission's expertise. *Budget Rent-a-Car v. Dept. of Licensing*, 144 Wn.2d 889, 31 P.2d 1174 (2001)(citing *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994)). The only restriction on that deference is where the interpretation conflicts directly with the language of the statute. *Id.* at 901.

In defense of the propriety and timeliness of its reports to the Commission, Protect our Pets has asserted that an "offer to purchase" is not a reportable event. In reaching this conclusion, it has claimed that an "offer to purchase" is somehow different than an order placed and thus does not carry the same reporting requirements. This argument must fail because in the world of media buys, an offer to purchase has the same characteristics as an order.

RCW 42.17.090(1) requires political committees to report

> (h) The name and address of any person and the amount owed for any **debt, obligation, note, unpaid loan, or other liability** in the amount

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> of more than two hundred fifty dollars or in the amount of more than fifty dollars that has been outstanding for over thirty days; . . . (Emphasis added).

The statute does not define the terms debt, obligation or liability but does provide guidance on the definition of "expenditure." In pertinent part, the term includes " . . . agreements to make expenditures, contracts, and promises to pay may be reported as estimated obligations until actual payment is made."

In codifying this statute in its rules, the Public Disclosure Commission has required committees to report, under Schedule B (3) of the C-4 report, "Orders Placed, Debts, Obligations." The question now is whether as applied in the normal course of media purchasing, the term "offer to purchase" constitutes an "order placed." The answer to that question is yes where the media entity deems it so.

From the outset, the Commission staff has **not** tried to argue that any requests for information or proposals as to specific prices or flight times for ads were reportable events.[4] The issue has simply been one of actual orders placed or offers to purchase submitted by the agent of Protect our Pets to a variety of television stations. The Respondent cannot dispute that for each instance in which a station has stated that an order was placed, then that event would have been reportable under WAC 390-16-041, Schedule B.

With respect to those television stations that provided evidence[5] that "offers to purchase" were made, an analysis of an "offer to purchase" must not only be in the context of

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[4] See argument in Respondent's brief as it concerns references to "requests for proposals" or "RFPs."

[5] The specific stations that stated that "offers to purchase" were made was presented to the Commission at the January hearing and included KCPQ, KXLY, and KREM.

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the ordinary wording but also in the context in which a television station interprets it. Ms. Trobaugh testified at hearing about each date she discovered activity relating to ads. She made clear distinctions between the actual terms used by the stations. No testimony was offered to refute her testimony or the interpretation by the individual stations. Ms. Trobaugh did distinguish between those events that were still preliminary in nature and those in which the parties had understood the costs and times of the ads and were simply waiting for payment and the ad. The Respondent did not refute this testimony in any manner so it must stand as fact.

Even in examining the meaning of the words, the proper determination is that offers to purchase time were the same as placing orders. In defining an "order", the American Heritage Dictionary says an order is "to give an order for; request to be supplied with; or to give a command or instruction for." *See* American Heritage Dictionary of the English Language – 4th Ed. An offer has been defined as "to present for acceptance or rejection; proffer; to put forward for consideration" (*see* American Heritage Dictionary of the English Language – 4th Ed.) or "to present for acceptance or rejection" (*see* Merriam Webster Dictionary). Essential to an offer is the proposal to enter into an agreement with another entity. An offer must express the intent of the person making the offer to form a contract, must contain some essential terms--including the price and subject matter of the contract--and must be communicated by the person making the offer. Additionally, RCW 42.17.020 (19) defines expenditure to include agreements to make expenditures, whether or not legally enforceable.

According to testimony at the hearing, the television stations deemed offers to purchase flight times as orders. With an offer to purchase, only conditions that would impede the ad

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from running would be the stations' rejection of the ad's content or the failure to pay for the ad. In this context, an offer was no different from order since the same two events would result in the same two outcomes.

Contrary to the Respondent's assertions, there is nothing difficult, unmanageable or absurd about requiring the disclosure of "offers to purchase" at the time they are made as estimated expenditures. The information that supports those offers were clearly in the hands of the Respondent's agent, Fenn & King, as well as the individual stations.

V. CONCLUSION

Given that the Commission has the authority to determine that media "offers to purchase" are distinguishable from simple requests of information about the running of ads, the Commission staff has met its burden of proving that for those stations that classified the arrangement concerning ads as "offers to purchase", a report must be made at the time the "offer" is submitted. Additionally, since the Commission staff has presented evidence that "orders" were placed for several stations, including KIRO and KHQ, without the proper accounting by the Respondent, and the Respondent's failure to report its obligation to Fenn & King, the Commission staff respectfully request that the Commission find that Protect our Pets committed multiple violations and assess a penalty of $2,500.00.

DATED this 13 day of February, 2002.

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