BEFORE THE WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION

In re: Protect Our Pets

PDC Case #01-134

Protect Our Pet's
Brief on Statutory Argument

RECEIVED
FEB 12 2002
Public Disclosure Commission

I. Introduction

At the conclusion of the third scheduled hearing on this case (held on January 22), the parties were directed to brief the "statutory argument" raised by Protect Our Pets in response to allegations that the campaign failed to file timely reports concerning certain media buys. At the brief enforcement hearing stage, staff argued that the media buys became reportable debts two weeks before the ads ran based on an alleged general two week freeze period. [See Report of Investigation (July 1, 2001), pg. 7]. Staff dropped that argument before the entire PDC because there was no proof we knew of any such policy. [See Memorandum to Commissioners (January 15, 2002) at pg. 6]. Staff now argues that an "offer" to purchase time or Requests for Proposals (RFPs) is the same as an "order" and should have been reported at that time the offer or RFP was issued. However, the term "offers" or "Requests for Proposal" is not used in the PDC statute, regulations or forms. Any interpretation that would require reporting of offers or RFPs would be contrary to general rules of statutory construction, unmanageable and absurd.

II. Offers and RFPs are not Orders

During the staff's lengthy Power Point presentation at the January 22 hearing, the terms "offer to purchase" and "orders placed" were misleadingly interchanged. For example, at page 7 of the Memorandum to Commissioners from Phil Stutzman (dated January 15, 2002), he states:

> *Orders were placed* with KCPQ totaling $61,200 on approximately September 5, 2000.

[Ex. A]

However, the December 13, 2001, Memorandum from Suemary Trobaugh, to File of *Protect Our Pets*, identifies as the "Date of *offer to purchase* media time" as September 5, 2001. [Ex. B]. Thus, you have Mr. Stutzman stating "orders were placed" on September 5 and Ms. Trobaugh stating they were merely "offers to purchase."

Shawn Timothy Newman
Attorney at Law [WSBA 14193]
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: 360/866-2322
FAX: 360/866-2304

Furthermore, even Ms. Trobaugh's statement that "offers to purchase" were made on September 5, is misleading given her own research as set forth in the footnote in Exhibit B:

> Chris Schuler [KCPQ sales manager] described the September 5, 2001, date as the date Fenn and King, through the national sales agency HRP, *made a Request for Proposal (RFP)*. The RFP was for availability of flight times and rates. Fenn and King did not accept the RFP until October 21, 2001.

Thus, what Mr. Stutzman calls "orders", Ms. Trobaugh calls "offers to purchase," the station calls a "Request for Proposal (RFP)." This is not merely an exercise in semantics for the three terms have separate and distinct meanings. Unless the PDC wants to establish the precedent that an "order" is the same as an "offer" is the same as a "Request for Proposals," this case should be dismissed.

III. General rules of statutory construction

Staff alleges that ProPets failed to timely file an *"Order Placed"* report (PDC form Schedule B) disclosing the cost of broadcast political advertising supporting I-713 during the 2000 election. RCW 42.17.090 sets forth the contents of reports and states, in part, that:

> (1) Each report required under RCW 42.17.080 (1) and (2) shall disclose the following:
>
> ....
>
> (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 of more than two hundred fifty dollars or in the amount of more than fifty dollars that has been outstanding for over thirty days;

To claim that the statute should be read to include "offer" or "Requests for Proposals" violates substantive due process and basic rules of statutory construction. The statute clearly and specifically lists: *"debt, obligation, note, unpaid loan or other liability."* Nothing about offers or RFPs. It is a well established rule of statutory construction that the express inclusion of certain matters in a statute precludes the inclusion of other matters by implication. Washington Natural Gas Co. v. PUD 1, 77 Wn. 2d 94, 98, 459 P.2d 633 (1969). Furthermore, an unambiguous word used, but not defined, in a statute should be given their ordinary meaning which may be determined by the resort to dictionaries. Fred J. Moore, Inc v. Schinmann, 40 Wn. App. 705, 711, 700 P.2d 754 (1985) [citing Garrison v. State Nursing Bd., 87 Wn.2d 195, 550 P.2d 7 (1976)].

An "order" is defined as "a written direction to pay money or deliver goods." An offer is

Shawn Timothy Newman
Attorney at Law [WSBA 14193]
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: 360/866-2322
FAX: 360/866-2304

a "manifestation of willingness to enter into a bargain." Restatement, Contracts (2d) sec. 24. Furthermore, an Request for Proposal is a communication addressed to numerous persons which will not generally be an offer but will rather be considered an invitation for offers (which may then become contracts through acceptance). Certainly, the simple fact that a party makes an offer or issues a RFP does not obligate the party to order anything until there is acceptance.

Schedule B to the PDC's C4, at item 3, states: "Orders Placed, Debts, Obligations" and asks to "List each debt, obligation or estimated expenditure that is more than $250.00" Leaving aside the fact that the form uses the term "orders placed" which is not in the statute, there is still no mention of "offers" or "Requests for Proposals." Certainly, expressing an interest in buying media time and asking a station for a proposal does not constitute placing an order. Expressing an intention to buy media time does not create a "order, debt or obligation," when the material terms are uncertain and indefinite (i.e. time, price and content). In fact, KING and KREM cancelled ads. As stated in Peter Fenn's sworn declaration which is attached to the Brief Enforcement Hearing Memorandum and marked as Exhibit 4, page 2:

> So, even though an offer to buy media time was made in August, no agreement or obligation was incurred until the ad was approved by the media outlet and the cost was accepted, which depends on when the ad would run.

IV. Conclusion:

The burden to prove a violation of PDC rules and regulations is on the PDC staff. Restrictions on first amendment rights must be supported by a compelling governmental interest and are narrowly construed. This is not a question of failing to file. ProPets cooperated with PDC staff, amended reports when directed, but were allegedly late in reporting media buys. ProPets did not incur any "debt, obligation .... or other liability" under the law by issuing a Request for Proposals or offering to buy media time. To define "orders" to include "offers" and "Requests for Proposal" (when the latter two terms are not in the statute) would be unconstitutional, unmanageable and absurd.

Date: February 11, 2002

Shawn Newman

Attachments:

Ex. A: Memorandum to Commissioners from Phil Stutzman (1/15/02) - pages. 1&7
Ex. B: Memorandum from Suemary Trobaugh, to File of Protect Our Pets (12/12/01)

Shawn Timothy Newman
Attorney at Law [WSBA 14193]
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: 360/866-2322
FAX: 360/866-2304

STATE OF WASHINGTON
PUBLIC DISCLOSURE COMMISSION
711 Capitol Way Rm 206, PO Box 40908 • Olympia, Washington 98504-0908 • (360) 753-1111 • FAX (360) 753-1112
Toll Free 1-877-601-2828 • E-mail: pdc@pdc.wa.gov • Website: www.pdc.wa.gov

MEMORANDUM

TO: Commissioners

FROM: Phil Stutzman, Director of Compliance

DATE: January 15, 2002

SUBJECT: Protect our Pets and Wildlife – PDC Case #01-134

BACKGROUND

Protect our Pets and Wildlife (Protect our Pets) registered as a political committee on October 6, 1999 to support Initiative 713, a statewide initiative-to-the-people making it a gross misdemeanor to capture most animals with certain body-gripping traps and poisons. The committee raised $935,995 in contributions and spent $927,455 in its efforts to support the initiative. Voters passed I-713 on November 7, 2000. Lisa Wathne was the Campaign Manager for Protect our Pets. She was a salaried employee of the U.S. Humane Society while she served as Campaign Manager for Protect our Pets. Lynne Marachario was the Campaign Treasurer.

Prior to August 31, 2000, Protect Our Pets hired Fenn & King Communications (Fenn & King), a political consulting firm from Washington D.C., to act as its agent and arrange for its political advertising expenditures in the I-713 campaign. Protect our Pets paid Fenn & King $565,205 for the cost of production and to purchase air time for its "T.V. Media Buys." Fenn & King has an on-going relationship with the U.S. Humane Society for consulting on similar issues in other states. It is through its relationship with the U.S. Humane Society that Fenn & King established a relationship with Protect our Pets. No written contract existed between Fenn & King and Protect our Pets although both parties acknowledged that an oral contract existed between the parties. Fenn & King worked with various national media buying firms to place orders and

Ex. A-1

On November 3, 2000, Protect Our Pets submitted an amended C-4 report covering the period of October 13 - 26, 2000. This report included liabilities of $500,150 and included an attached Schedule B listing an August 31, 2000 "Order Placed or Obligation" to Fenn Communications for $500,150 described as "Media Buy." An attached memo provided a station-by-station breakdown, which included TV stations, dates, and cost of the advertisements. The memo failed to include information concerning advertisements placed with KCPQ, the Fox affiliate in Seattle. Orders were placed with KCPQ totaling $61,200 on approximately September 5, 2000. The ads ran between October 23 and November 6, 2000.

Ex. A-2

MEMORANDUM

To: File of *Protect Our Pets*

From: Suemary Trobaugh, Sr. Political Finance Specialist

Date: December 13, 2001

Subject: Staff addendum to report of investigation

On December 3, 2001 and December 13, 2001, staff contacted television stations KCPQ in Seattle, KREM, and KXLY in Spokane; to verify the date to offer to purchase media time was made with station.

KCPQ **Estimated cost:** $61,200 Paid on 10/18/00	**Date of offer to purchase media time:** • September 5, 2001 Per Chris Schuler, sales manager[1]	**Flight dates:** 10/23/00 – 11/06/00
KXLY **Estimated cost:** $19,665 Paid on 10/18/00	**Date of offer to purchase media time:** • September 9, 2000 • September 9, 2000 • September 9, 2000 Per Kirby of the sales staff.	**Flight dates:** 10/20/00 – 10/23/00 10/24/00 – 10/30/00 10/31/00 – 11/06/00
KREM **Estimated cost:** $11,450 Paid on 10/18/00	**Date of offer to purchase media time:** • September 1, 2001 • September 1, 2001 • September 1, 2001 Per Amy Warren, sales manager	**Flight dates:** 10/20/00 – 10/23/00 10/24/00 – 10/30/00 10/31/00 – 11/06/00 (air time cancelled 10/24/00)

Respectfully submitted this 13th day of December, 2001

Suemary Trobaugh

Suemary Trobaugh
Senior Political Finance Specialist

[1] Chris Schuler described the September 5, 2001 date as the date Fenn and King, through the national sales agency HRP, made a Request for Proposal (RFP). The RFP was for availability of flight times and rates. Fenn and King did not accept the RFP until October 21, 2001.

Ex. B