



Minutes of the October 30, 2020, Meeting of the
Commission on Governmental Ethics and Election Practices
45 Memorial Circle, Augusta, Maine

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

Staff: Jonathan Wayne, Executive Director, and Phyllis Gardiner, Assistant Attorney General

Commissioner Lee convened the meeting at 9:00 a.m. The meeting was conducted via Zoom videoconference and livestreamed via YouTube.

The Commission considered the following items:

1. Request for Waiver of Late-Filing Penalty – Jeffrey Pierce

Mr. Wayne said Jeffrey Pierce was a candidate running for House District 53. Mr. Pierce was required to file the 42-Day Pre-General Report on September 22nd. The report was filed on September 23rd, one day late. The preliminary penalty was \$40.37. Mr. Pierce requested a waiver of the penalty because he and his treasurer had some confusion about the reporting deadlines because three reports were due in close proximity to one another. He said Mr. Pierce was an experienced candidate, having previously served in the Maine House of Representatives. He said the Commission staff was not recommending any waiver due to the small amount of the penalty.

Mr. Marble made a motion to support the staff recommendation to not waive the penalty of \$40.37.

Mr. Schneider seconded the motion. Motion passed 5-0.

2. Request for Waiver of Late-Filing Penalty – Revive Hometown Maine PAC

Mr. Wayne said the Revive Hometown Maine PAC was required to file the October Quarterly Report on October 5th but did not file it until October 7th, two days late. The preliminary penalty is \$510. He said Rep. Joel Stetkis, Principal Officer for the PAC, had requested a waiver stating he was not able to file the report on the deadline because a power outage damaged his computer.

Rep. Joel Stetkis appeared before the Commission. Rep. Stetkis said he had lost power for just over 48 hours during one of the recent windstorms. He said he tried to start his computer on the day the report was due and discovered it had been damaged by the power outage. He said he immediately purchased another computer, but it took time to get it set up. He said he did think about contacting the Commission about the problem but decided not to.

Mr. Lee asked why he had not checked the computer as soon as he regained power. Rep. Stetkis said he only used that computer for financial activities and did not access it that often. Mr. Hastings asked why he did not use another computer to file the report. Rep. Stetkis said it did not occur to him and he was uncomfortable conducting financial activity on just any computer.

Mr. Lee said he was comfortable with the staff recommendation. Mr. Schneider and Mr. Hastings agreed.

Mr. Lee made a motion to accept the staff recommendation to reduce the statutorily calculated penalty of \$510 to \$250. Ms. Lowry seconded the motion. Motion passed 5-0.

3. Rebuttal of Independent Expenditure – Maine First Project

Mr. Wayne said the issue before the Commission was whether the communication by the Maine First Project was an independent expenditure. He said if they found it was an independent expenditure, Maine First would have to file an Independent Expenditure Report. He said Maine First Project was a non-profit founded by Rep. Lawrence Lockman. He said it had mailed a letter to voters in House Districts 128 and 130 urging them to contact the candidates in those districts about Maine First's concerns regarding local public education policies. He said Rep. Lockman filed a Statement to Rebut the Presumption of Independent Expenditure because the communication did not advocate for or against any candidate and was not an attempt to influence any election.

Rep. Lawrence Lockman appeared before the Commission. Rep. Lockman read his supplemental response into the record, explaining that the mailers were for the purpose of informing the recipients about education policy issues and not for the purpose of influencing any election.

Mr. Marble asked why the letters were mailed to these two House Districts. Rep. Lockman said the districts were chosen because the voters in those districts were affected by the education policy in the Bangor school system. Mr. Marble asked why Rep. Lockman had not mailed this to Democrat voters. Rep. Lockman said he did not believe Democrat voters would be receptive to the mailer and mailing to Republican voters only would keep costs down.

Mr. Hastings said he believed this was a policy advocacy mailing and not an election advocacy mailing. Mr. Schneider said he agreed. Mr. Lee said it was significant that the mailers mentioned both candidates, did not focus on either one, and the content was chiefly about the policy issues and not about the candidates.

Mr. Lee made a motion that Rep. Lockman had successfully rebutted the presumption and that the publications that were disseminated were not made as independent expenditures. Mr. Marble seconded the motion. Motion passed 5-0.

4. Request by Stop the Corridor to Vacate Investigative Subpoena for Records

Mr. Wayne said this matter related to an investigation the Commission authorized on March 10th based on a complaint filed by Clean Energy Matters about whether Stop the Corridor (STC) should have registered as a political action committee due to the expenditures it made to influence a ballot initiative regarding the CMP transmission corridor. The Commission expanded the investigation on May 22nd to include the question of whether STC should have registered as a ballot question committee (BQC). STC filed a Rule 80C appeal with the Superior Court stating the Commission's actions went beyond its jurisdiction. The Commission staff continued to request documents relevant to the investigation. When STC refused to provide the documents, Mr. Lee, as Chair of the Commission, authorized an investigative subpoena. STC requested that the Commission vacate the subpoena pending the decision by the Maine Superior Court.

Mr. Lee asked Ms. Gardiner about the status of the civil suit. Ms. Gardiner said both parties had filed their briefs and STC had an opportunity to file a reply brief. She said it would be up to the Superior Court whether it would schedule oral arguments. She said Clean Energy Matters had also filed a brief as a party of interest in the proceeding. She said there was no schedule for the Superior Court, set in statute or rule, regarding to how quickly the Superior Court would take up the matter and decide it. She said that, fortunately, in a Rule 80C appeal, the oral arguments can be, and generally were, done by Zoom. She said all of the litigation she had dealt with this year had been in cases where there were specific statutory deadlines and the courts did not have any discretion regarding those deadlines, but this matter did not get that kind of priority.

Ms. Lowry said she believed they should go into executive session prior to hearing from Mr. Monteleone. She said the Commission's procedure may benefit if they had a discussion about the confidential information the Commission has received prior to taking up this matter in the public meeting.

Mr. Lee said he thought it could be done either way. However, he thought they should briefly hear from Mr. Monteleone in order to hear an overview of his arguments. He said they should hear from Ms. Gardiner regarding the legal basis for going into executive session. Ms. Gardiner said their basis would be for the narrow purpose of considering material that was confidential and could not

be discussed in the public session. She believed the legal authority was in Title 1 § 405(6)(F). Mr. Lee said he believed that under this section, Mr. Monteleone would be allowed to participate in the executive session. Ms. Gardiner said that was correct, Mr. Monteleone could participate, but Mr. Augur could not.

Mr. Lee asked the other Commissioners how they would like to proceed. Mr. Marble said he would like to hear from Mr. Monteleone before they went into executive session. Mr. Schneider said he had no preference. Mr. Hastings agreed with Mr. Schneider but said he was willing to support Ms. Lowry's position of going into executive session before hearing from Mr. Monteleone. Ms. Lowry said, given that two Commissioners had expressed a desire to hear from Mr. Monteleone, she was comfortable waiting until after his presentation to go into executive session.

James Monteleone, Esq., appeared before the Commission on behalf of STC. Mr. Monteleone said at issue was the confidentiality of private corporate records that were unrelated to political activity. He said STC was an entity that was formed in 2018, before there was any ballot question campaign to influence. He said the subpoena was an effort to compel disclosure of those corporate records that were otherwise not part of the public record. He said STC was waiting for the Court to weigh in on the Commission's jurisdiction, which was a critical first step to determine whether those private corporate records were available to the Commission. He said he did not anticipate a long delay for the Court to make a decision. The evidence sought by the Commission was preserved and would still be available to the Commission after the Superior Court matter was resolved. Mr. Monteleone said since the ballot question regarding the CMP transmission corridor was no longer on the ballot, there was no need to rush to obtain the confidential records. He said STC was concerned because whether the records remain confidential was within the Commission's sole discretion and was determined by the Commission's decision that the confidential information was materially relevant to a memorandum or report by the Commission staff. Mr. Monteleone said the over-arching theme in the specific requests for records in the subpoena was far-reaching and overly broad and would mean forcing the disclosure of private corporate records unrelated to the ballot question campaign.

Mr. Lee made motion to go into executive session pursuant to 1 M.R.S. § 405(6)(F) to have a discussion concerning information which was confidential by statute and could not be released to the general public but was in the possession of the Commission itself. Ms. Lowry seconded the motion. Motion passed 5-0. Mr. Lee clarified that the Commission was going into executive

session for the limited purpose of discussing information which was confidential and would not discuss anything that could be discussed in public session.

The Commission came out of executive session and resumed the public meeting. Mr. Lee said they could either have Mr. Monteleone provide more detailed information or the Commission could ask questions on the matter. Ms. Lowry said she preferred they ask questions.

Mr. Lee outlined the three arguments relevant to this matter: whether STC's major purpose changed from grassroots organizing to influencing an election, which would require it to register either as a PAC or BQC; whether the Commission had the authority to broaden the investigation after it received additional information; and whether, since the ballot initiative was no longer on the ballot, the Commission should wait for the Superior Court's decision regarding the Commission's jurisdiction before proceeding any further with the investigation. There was also STC's request to vacate the Commission's subpoena.

Mr. Marble asked Ms. Gardiner if she was aware of any oversight language, in statute or precedent, that would prevent the Commission from continuing with its investigation because a court action related to the investigation had been filed. Ms. Gardiner said STC did not obtain a stay of the Commission's proceedings in this matter. If it had, the Commission would have been stopped in their tracks until the Court resolved the issues.

Mr. Hastings asked Ms. Gardiner where the Commission would stand if STC was successful in its Rule 80C appeal regarding the mootness and jurisdictional issues. Ms. Gardiner said Mr. Monteleone may want to speak to this, but her understanding of STC's argument was that the Commission only had authority to investigate the possibility of STC qualifying as a PAC and, therefore, required to register and file reports as a PAC. She said if the Court was persuaded that the Commission could not expand the investigation to include whether STC constituted a BQC, the Commission could still proceed with the investigation of whether STC constituted a PAC. She said the Commission also had the authority to initiate an investigation on its own without a complaint being filed. The Commission could initiate its own investigation into whether STC qualified as a BQC, even if the Court ruled in STC's favor on the pending Rule 80C action.

Mr. Monteleone said STC had asserted that the investigation was moot because the Commission staff had represented to the general public that there was no ballot question campaign, so there was no need to report prior campaign activity. He said the Court's decision on the mootness issue would resolve this whole issue. Mr. Lee asked Mr. Monteleone if he was making the argument that

a comment by the Commission staff bound the Commissioners when they had not authorized it. Mr. Monteleone said the Commission staff's representations to the general public were guidance to other entities as to their reporting obligations and that guidance effectively said campaign activities did not have to be reported since the ballot question would no longer be on the ballot. He said it was an arbitrary and capricious abuse of discretion to investigate one entity and not the other; to investigate STC, but exempt another organization that engaged in similar activities.

Mr. Lee pointed out that there was a dispute as to what the staff's representation actually was. Mr. Lee again asked how, as a matter of law, the Commission staff's public comment in a newspaper article could legally bind the Commission itself. Mr. Monteleone said that question involved a legal issue was before the Court. STC was asking the Commission the procedural question of whether it was appropriate to compel the disclosure of private corporate documents before the Court had the opportunity to answer this threshold legal argument regarding mootness. Mr. Monteleone said the staff's public statement binds the Commission by announcing to the public what actions the Commission intended to take. As a result of that public statement, an organization that had previously acknowledged its obligation to report its campaign activities reversed course and indicated it was not reporting anything.

Mr. Lee asked Mr. Monteleone to state the legal basis for his argument that the Commission did not have the legal authority to broaden the scope of an investigation. Mr. Monteleone said their arguments on the extent of the Commission's jurisdiction had been presented to the Court for the Court to decide. He said the question presented to the Commission was not on the merits of the legal arguments but on the procedure of moving forward prior to the Court's decision. He said STC's concern was that once documents were made public, which could happen on the recommendation of the Commission staff to the Commission, the documents will be in the public sphere no matter what the Court decides. Mr. Lee asked if his position was that STC would be irreparably harmed if this information were provided to the Commission. Mr. Monteleone said STC would be irreparably harmed if the information regarding private corporate activities occurring more than a year before the beginning of the ballot question campaign were made public.

Ms. Gardiner pointed out that 21-A M.R.S. § 1003-A provided Mr. Monteleone's client an opportunity to review a report or memorandum by the Commission staff to identify material that was confidential and should not be publicly disclosed. She said the Commission also had a track record of never having disclosed any confidential information in numerous investigations that have

involved confidential material. Ms. Gardiner asked Mr. Monteleone whether he thought the statute and the Commission's track record provided his client adequate protection against any irreparable harm.

Mr. Monteleone said the statute did not impose a requirement on the Commission to accept STC's requests. Even if STC designated some information to be privileged or confidential and requested that it not be made public in a Commission staff report or memorandum, that designation would not be a bar to the inclusion of the information if the staff deemed it to be materially relevant to the Commission's determination. Ms. Gardiner said STC would have an opportunity to seek relief from the Commission, or the Superior Court, if STC and the staff disagreed about making certain information public. She said the Commission's track record has been to honor requests for confidentiality and to work it out with the parties. She said in the National Organization for Marriage (NOM) case, the Commission voluntarily stayed the effect of its order that the organization file a BQC report until NOM had the opportunity to seek a stay from the Superior Court. Mr. Monteleone said that procedure was not binding and the statute was flexible enough to give the staff the discretion to disclose confidential information as being materially relevant despite STC's objection.

In response to a question from Mr. Lee, Ms. Gardiner said STC had the right to seek court relief if they objected to the disclosure of information in a memo or report. STC could also to argue to the Commission that certain information should be kept confidential. She said the Commission has never needed to get to that point before because objections to the disclosure of information were worked out at the staff level in cases where there was great deal of contention about confidential information.

Ms. Gardiner said she believed STC's primary argument was to vacate the entire subpoena or withdraw it while the Rule 80C appeal was pending in Superior Court. She said STC had not requested any particular modifications to any parts of the subpoena.

Mr. Hastings asked Mr. Monteleone if he had any suggestions to narrow the scope of the subpoena. Mr. Monteleone said, assuming the Commission had jurisdiction to request documents from STC, their concern was about records that predate the start of the campaign in August 2019 or any records of STC's operations other than those related to the referendum campaign.

Mr. Lee asked if STC was objecting to providing any information until the Rule 80C appeal was resolved. Mr. Monteleone said that was correct.

Mr. Schneider said he believed there was sufficient protection for any confidential information disclosed to the Commission and the importance of continuing the investigation was unaffected by any ongoing litigation. He said his position was that they should not vacate the subpoena or suspend the investigation. Mr. Hastings said he agreed with Mr. Schneider. He said they had heard arguments from STC that the subpoena was overly broad but no suggestions for modification. He said he was opposed to vacating or suspending the subpoena at this point. Mr. Marble and Ms. Lowry agreed.

Mr. Schneider made a motion to deny the request to vacate the subpoena. Ms. Lowry seconded the motion. Motion passed 5-0.

Adjournment

Mr. Lee made a motion, seconded by Mr. Schneider, to adjourn. The motion passed. The meeting adjourned at 12:07 p.m.

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