BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaint Against Montana Conservation Voters	)))	**SUMMARY OF FACTS AND STATEMENT OF FINDINGS**

W. A. (Bill) Gallagher filed a complaint with the Commissioner of Political Practices alleging Montana Conservation Voters violated the Montana Clean Campaign Act.

SUMMARY OF FACTS

1. W. A. (Bill) Gallagher (Gallagher) was a candidate for the office of Public Service Commissioner, District 5, in the fall of 2010. His opponent was Ken Toole of Helena, Montana. Gallagher prevailed in the election, held on November 2, 2010.
2. Montana Conservation Voters (MCV) is a registered Political Action Committee in Montana.
3. On or before October 4, 2010, MCV paid for and mailed a piece of literature to voters of District 5.
4. In the 10/04/10 piece of literature contained eight paragraphs referring to Gallagher:

> Bill Gallagher is running for the Montana Public Service Commission, the same commission that regulates his Helena-based water company, Aquaflow.
>
> When questioned under oath at a PSC hearing, Gallagher refused to reveal the other owners of Aqua Sierra, the company that owns Aquaflow, based in Nevada, which has no income tax.
>
> Why? What is he trying to hide?
>
> Why has Bill Gallagher set up a complicated dual-company, multi-state outfit in Nevada to run his utility here in Montana?

We don't need a Public Service Commissioner making decisions about our energy bills and public utility monopolies who won't let voters know who owns the utility he runs.

We don't need a Public Service Commissioner who can't stand up for consumers on key water utility decisions because of his conflict of interest.

We don't need the fox guarding the hen house when it comes to Montanans' energy bills and utility rates.

We can't afford Bill Gallagher on the PSC.

5. This mail literature had the disclaimer "Paid for by Montana Conservation Voters Political Action Committee, P.O. Box 63, Billings, MT 59103, Dave Tyler, Treasurer, mtvoters.org"

6. West Ridge Creative is a Montana communications firm listing MCV as a client.

7. On October 25, 2010, West Ridge Creative, through Jim Parker, entered into an Agreement for Political Broadcasts with KSEN/KZIN of Shelby, Montana on behalf of (MCV). The parties agreed to $554.40 for 112 radio spots from October 26 to November 1, 2010.

8. On October 26, 2010, West Ridge Creative, through Jim Parker, entered into an Agreement for Non-Candidate/Issue Advertisements with Bee Broadcasting – all stations, on behalf of (MCV). The parties agreed to $2,005.50 for radio spots on at least 6 different stations from October 27 to November 1, 2010.

9. The script for the radio spots is as follows:

> In tough times, we need to re-elect our consumer champion, Ken Toole, to the Public Service Commission.
>
> When Qwest grossly overcharged customers, Ken Toole got a 16 million dollar a year reduction.
>
> Ken Toole stood up against energy deregulation – a disaster!
>
> **Opponent Bill Gallagher owns a water utility regulated by the PSC. His conflict of interest means he won't be able to protect ratepayers on some key PSC decisions.**
>
> Vote for Ken Toole, Public Service Commission – a consumer champion!
>
> Paid for by Montana Conservation Voters PAC, Box 63, Billings, MT 59103, Dave Tyler Treasurer. (Emphasis added).

10. On October 29, 2010, MCV provided Gallagher a copy of the script and radio ad via e-mail, in response to Gallagher's complaint.

11. In a written response to the complaint MCV contends its October 4, 2010 campaign mailer (Fact 4) contains an assertion regarding Gallagher that is identical to the statement contained in the October 26, 2010 radio ads – the claim that Gallagher will have a conflict of interest based on his ownership of water utility company. MCV contends the October 4, 2010 campaign mailer contains "identical material . . . already published or broadcast," thereby exempting the October 26, 2010 radio ads from the provisions of the Clean Campaign Act.

STATEMENT OF FINDINGS

ALLEGED VIOLATION OF THE MONTANA CLEAN CAMPAIGN ACT, MCA 13-35-402

§13-35-402, MCA, which is part of the Clean Campaign Act, provides:

> **Fair notice period before election – definition.** (1) A candidate, a political committee that has filed a certification under 13-37-201, and an independent political committee shall at the time specified in subsection (3) of this section provide to candidates listed in subsection (2) of this section any final copy of campaign advertising in print media, in printed material, or by broadcast media that is intended for public distribution in the 10 days prior to an election unless:
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> (a) identical material was already published or broadcast; or
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> (b) the material does not identify or mention the opposing candidate.
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> (2) The material must be provided to all other candidates who have filed for the same office and who are individually identified or mentioned in the advertising, except candidates mentioned in the context of endorsements.
>
> (3) Final copies of material described in subsection (1) must be provided to the candidates listed in subsection (2) at the following times:
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> (a) at the time the material is published or broadcast or disseminated to the public;
>
> (b) if the material is disseminated by direct mail, on the date of the postmark; or
>
> (c) if the material is prepared and disseminated by hand, on the day the material is first being made available to the general public.
>
> (4) The copy of the material that must be provided to the candidates listed in subsection (2) must be provided by electronic mail, facsimile transmission, or hand delivery, with a copy provided by direct mail if the recipient does not have available either electronic mail or facsimile transmission. If the material is for broadcast media, the copy provided must be a written transcript of the broadcast.
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> (5) For the purposes of this section, an "independent political committee" is a committee that is not specifically organized on behalf of a particular candidate or that is not controlled either directly or indirectly by a candidate or a candidate's committee in conjunction with the making of expenditures or accepting contributions.

The MCV radio ads qualify as campaign advertising subject to the requirements of §13-35-402, MCA. MCV's previously published[1] mailer (Fact 4) and the radio ads contained the same conflict of interest allegation against candidate Gallagher, although the scripts for the two campaign pieces are different. The provisions of the Clean Campaign Act do not apply if "identical material was already published or broadcast." § 13-35-402(1)(a), MCA. My decision in this matter hinges on the meaning of the word "identical" in §13-35-402, MCA.

The rules of statutory construction require that the language of a statute be construed according to its plain meaning, if possible. If the language is clear and unambiguous, no further interpretation is necessary. Rausch v. State Comp. Ins. Fund, 2002 MT 203, ¶ 33, 311 Mont. 210, ¶ 33, 54 P.3d 25, ¶ 33. When construing a statute the intent of the Legislature should be pursued by reasonably and logically interpreting the statute as a whole, giving words their usual and ordinary meaning, without omitting or inserting anything, and without focusing on only part of the statute. Gaub v. Milbank Ins. Co., 220 Mont. 424, 427-28, 715 P.2d 443, 444-45 (1986). Statutory construction should not lead to absurd results if a reasonable interpretation will avoid it. State ex rel. Ronish v. School Dist. No. 1, 156 Mont. 453, 460, 348 P.2d 797, 801 (1960). If the plain words of a statute are ambiguous, the next step is to determine legislative intent by examining the legislative history of the statute. Infinity Ins. Co. v. Dodson, 2000 MT 287, ¶ 46, 302 Mont. 209, ¶ 46, 14 P.3d 487, ¶ 46.

The word "identical" is undefined in §13-35-402, MCA, or any other provision of the Montana Code Annotated. Therefore, it is appropriate to look to accepted dictionary definitions. See Ravalli County v. Erickson, 2004 MT 35, ¶ 13, 320 Mont. 31, ¶ 13, 85 P.3d 772, ¶ 13. According to Merriam-Webster's Collegiate Dictionary, Eleventh Edition (2008), "identical" is defined as: 1. being the same; 2. having such close resemblance as to be essentially the same; 3. having the same cause or origins. Depending on which of the first two commonly accepted definitions is applied, the statutory exception in subsection (1)(a) would apply if 1) the previously published campaign material is exactly the same as the later published material, or 2) if the previously published material is essentially the same.

General principles of statutory construction set forth above dictate that a statute derives its meaning from the entire body of words taken together, not the definition of one word; thus it is not appropriate to focus on the word "identical" in isolation, regardless of which dictionary definition seems to be most applicable. Because ambiguity exists when taking the definition of

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[1] While "published" is not defined in §13-35-402, MCA, "publish" is defined in §45-6-307, MCA as "...to communicate information to any one or more persons, either orally, in person; by computer, telephone, radio, or television; or in a writing of any kind, including but not limited to a letter, memorandum, circular, handbill, newspaper or magazine article, or book." §1-2-107, MCA states that "[w]henever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears." Thus, the definition in § 45-6-307, MCA shall also be applied to the term "published" as it is used in § 13-35-402, MCA.

the word "identical" in context of the entire statute, it is appropriate to consider the legislative history of §13-35-402, MCA.

The sponsor of the Montana Clean Campaign Act in 2007, Senator Joe Balyeat of Bozeman, was asked what the term "identical material" in §13-35-402, MCA, meant in a hearing before the Senate State Administration Committee during the 2007 Legislature. In his response (and also in his closing before the House State Administration Committee), Senator Balyeat stated that "identical material" meant something that didn't raise new issues, and that had been raised earlier in the campaign. Senator Balyeat stated that the intent of the clean campaign legislation was to eliminate the element of surprise.

In radio ads that aired during the ten-day period prior to the election, MCV raised the issue of Mr. Gallagher's ownership of a water-utility company, and alleged that he could not protect his constituency due to his conflict of interest. MCV first raised the conflict of interest issue more than three weeks earlier, in its October 4, 2010 mailer. Although the exact language in the two campaign messages did not match word for word, the two representations were similar enough to be essentially the same, thereby meeting one of the commonly accepted definitions of the term "identical." The legislative history of the Act indicates an intent to remove the element of surprise during the last ten days of a campaign by requiring that candidates be given notice of campaign materials distributed by opposing parties that raised "new issues." The campaign message broadcast in the October 26, 2010 ads did not raise a new issue. The assertion regarding Gallagher and his water utility company was essentially the same as in the previously published campaign materials, thus the exception to the Clean Campaign Act provided in § 13-35-402(1)(a) applies and there was no violation of the Act.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings, MCV did not violate §13-35-402, MCA.

DATED this 7th day of FEB, 2011.

Jennifer L. Hensley
Commissioner of Political Practices