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Chair Nancy L. Isserlis
Washington State Public Disclosure Commission
P.O. Box 40908
Olympia, WA 98504-0908

Re: PDC Complaint – Case No. 137263

Dear Chair Isserlis:

The additional complaint filed by Tallman Trask (the "Trask Complaint") raises fundamentally the same issues as the previous complaint filed by Michael Christopherson (the "Christopherson Complaint"). Consequently, I refer you to my detailed response letter of June 9, 2023, on behalf of the Bob Ferguson for Governor Campaign (the "Campaign"). Additionally, I briefly address below the three specific arguments made in the Trask Complaint, each of which lacks merit.

1. **The "law itself has not changed nor has its meaning," it is "merely the Commission's nonbinding interpretation."**

The Trask Complaint's primary argument in favor of retroactively applying PDC Interpretation No. 23-01 is that the Commission's regulatory guidance should not matter to its enforcement decisions at all because the statute "itself has not changed."[1] This is a specious argument that ignores the equities, due process considerations, and case law regarding retroactive application of interpretative rules. As detailed in my June 9 letter, courts and administrative agencies have long recognized a presumption against retroactive application of statutes, regulations, and interpretive rules. This presumption against retroactivity is deeply rooted in state and federal law, consistent with basic due process norms and elementary considerations of fairness. The presumption against retroactivity is particularly strong in the administrative context, especially when regulated parties have relied on a prior inconsistent rule or interpretation from the agency.

Here, those reliance interests are especially strong because the Commission's prior guidance was directly contrary to the new interpretation, specifically allowing campaigns to transfer surplus contributions to a later campaign for a different office as lump sums. That guidance was in effect for nearly 28 years.

[1] Trask Compl. at 4.

Importantly, that guidance did not just represent the Commission staff's own view. It was specifically adopted by this Commission in a public meeting based on the analysis of Ro Marcus—then the Assistant Attorney General representing the Commission staff. The guidance was published on the Commission's website.[2]

Regulated parties relied on that longstanding guidance from the Commission at every step of the process. For the PDC to spend nearly three decades conveying to regulated parties that certain conduct is consistent with the law, and then punishing them for following its own guidance would constitute a textbook due process violation.

2. No slippery slope problem exists because "[t]here is no reason . . . that the Commission needs to reopen the books of years and decades old campaign to force adjustments," as the "money in those campaigns is gone," and "the campaigns are over."

This argument defies the Commission's enforcement principles and practices in at least two respects. First, to our knowledge, the Commission has never adopted the position that its jurisdiction ends when a campaign is over and the "money in those campaigns is gone."[3] That position would be untethered from the law. Second, because the Commission is primarily reactive to public complaints, when it receives a complaint about a past lump-sum transfer to a campaign for a different office, it will have the duty to investigate and adjudicate it consistent with its precedents. If the Commission intends to establish a precedent that lump-sum transfers before May 11, 2023 were inconsistent with RCW 42.17A.490—despite their express compliance with Commission guidance then in effect—it should expect to receive a large number of complaints going back at least five years, the applicable statute of limitations period.[4] In addition to expending the resources necessary to investigate and adjudicate those complaints administratively, the Commission should also reasonably expect to defend those enforcement actions in court, given the significant issues of statutory interpretation and constitutional rights they would implicate.

As explained in the June 9 response, there is no principled way for the Commission to apply the new guidance retroactively to some cases but not others. The Commission never withdrew its 1995 guidance before the May 11, 2023 public meeting. Regulated campaigns had no reason to believe that the Commission's May 11 decision to reverse itself after 28 years was a fait accompli. In fact, the published staff memo emphasized the reasonableness and appeal of the previous guidance. The Commission never hinted that it was considering applying new guidance retroactively to punish campaigns that had carefully followed its published guidance. Consequently, the Commission received no public comment at the May 11 meeting on the inequities of such a decision or the obvious and significant due process concerns it would raise.

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[2] *See* PDC Case No. 136626, Report of Investigation ¶¶ 1.2–1.4, Exs. 1–2 (June 12, 2023), https://pdc-case-tracking.s3.us-gov-west-1.amazonaws.com/5795/Combined%20ROI%20_%20Exhibits.pdf.

[3] Trask Compl. at 4.

[4] *See* RCW 42.17A.770.

3. **Unless the guidance is applied retroactively, it will be impossible "to determine if groups and individuals whose aggregate contributions to the surplus funds account exceed or likely exceed the current contribution limits."**

Finally, the Trask Complaint makes the circular argument assuming that contributions aggregated from multiple campaigns that were transferred *before* May 11, 2023, would violate the contribution limits for the current Campaign if they together exceed the statutory maximum. But under the Commission guidance in effect when those transfers were made, "the past contributions do *not* count against the contributor's limit for the new campaign."[5] Thus, the Trask Complaint's "issue" with purported "ongoing contribution limit violations" is no issue at all, provided the Commission applies its new guidance prospectively only.[6] In addition to the reasons already discussed above and in the June 9 letter, we also highlight the legal rationale behind the Commission's 1995 guidance, as articulated by then-AAG Ro Marcus: "Once the contribution is counted against the contributor's limit for that election, it should not be counted against a subsequent limit for a new election. *To do otherwise would be to double count one contribution.*"[7]

Retroactive application of the new guidance not only creates fundamental fairness problems, but also raises significant issues regarding protected speech. When individuals consented to surplus funds transfers prior to May 11, the Commission's operative guidance said that the transferred funds would not count towards the contribution limits for the office being sought at the time of the transfer. In addition to considering the equities of retroactive active application, the Commission should weigh the impact of its actions on protected speech.

In conclusion, we request that you consider my June 9 letter in its entirety as the Campaign's response to both the Trask and Christopherson Complaints. The Campaign will continue following the Commission's new guidance in PDC Interpretation No. 23-01. But I urge the Commission not to punish the Campaign or any other campaign for carefully following and relying upon the prior published guidance then in effect, which the Commission considered, adopted, and adhered to for nearly three decades.

Sincerely,

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[5] Internet Wayback Machine, Public Disclosure Comm'n, *Using Contributions for a Different Office* (May 17, 2022–Apr. 27, 2023), https://web.archive.org/web/20230427071146/https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/using-contributions-different-office (last visit July 13, 2023) (emphasis added).

[6] Trask Compl. at 4.

[7] *See* PDC Case No. 136626, Report of Investigation, Ex. 1 at 3 (emphasis added).