

**BEFORE THE SECRETARY OF STATE  
STATE OF COLORADO**

**CASE NO. OS 2005-0001**

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**AGENCY DECISION**

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**IN THE MATTER OF THE COMPLAINT FILED BY MANOLO GONZALES-ESTAY  
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY PUBLIC  
SERVICE COMPANY OF COLORADO D/B/A XCEL ENERGY**

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**Procedural History**

On January 5, 2005, Manolo Gonzales-Estay (“Complainant”) filed a complaint with the Secretary of State’s office alleging that Public Service Company of Colorado d/b/a Xcel Energy (“Xcel Energy” or “the Company”) violated the Colorado Constitution and the Fair Campaign Practices Act (“FCPA”) by failing to disclose the costs of its September 2004 and October 2004 customer newsletters urging the defeat of Amendment 37. Pursuant to Colo. Const. art. XXVIII, § 9(2)(a), on January 10, 2005, the complaint was referred to an Administrative Law Judge (“ALJ”) with the Division of Administrative Hearings. Hearing was originally scheduled on January 24, 2005. The parties requested several continuances, all of which were granted.

Hearing on the merits of the complaint was held on July 6, 2005, before ALJ Michelle A. Norcross on July 6, 2005, at the Office of Administrative Courts<sup>1</sup> in Denver, Colorado. Complainant was represented by Mark Bender, Esq. Xcel Energy was represented by William H. Caile, Esq. At hearing, the ALJ admitted Complainant’s exhibits 1 through 4 and Respondent’s exhibits A and B into evidence. The hearing was digitally recorded in Courtroom 2.

**Pre-hearing Motion**

On February 14, 2005, Xcel Energy filed a Motion to Dismiss the January 5, 2005 complaint on the basis that the issues raised in the complaint were previously adjudicated in a prior proceeding brought by Complainant against Citizens for Sensible Energy Choices and therefore the current complaint is barred by the doctrine of collateral estoppel. Complainant filed a response to the motion on February 28, 2005. The ALJ denied Xcel Energy’s motion ruling that the doctrine of collateral estoppel did not bar Complainant from pursuing his complaint against Xcel Energy because not all the issues in the present complaint are the same as those adjudicated in the prior proceeding and because Xcel Energy was not a party to the prior action.

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<sup>1</sup> On July 1, 2005, the Division of Administrative Hearings became the Office of Administrative Courts.

## Parties' Positions

Complainant: Complainant asserts that Xcel Energy violated Colorado campaign finance laws by failing to file reports disclosing the costs of advocacy ads urging the defeat of Amendment 37. More specifically, Complainant argues that Xcel Energy became an issue committee, as defined in Article XXVIII, § 2(10)(a) of the Colorado Constitution, when it prepared and sent its September 2004 and October 2004 Energy Update ("newsletters") to its customers with their monthly bills. Complainant contends that the newsletters were contributions and/or expenditures that should have been disclosed under § 1-45-108, C.R.S.

Xcel Energy: The Company denies that it violated Colorado's campaign laws for three reasons: (1) the newsletters are not contributions as that term is defined in the Colorado Constitution; (2) the newsletters are not reportable expenditures because they were prepared in the regular course and scope of the Company's business; and (3) Xcel Energy is not an issue committee as defined in the Colorado Constitution and therefore not subject to the disclosure requirements in § 1-45-108, C.R.S.

## FINDINGS OF FACT

Based on the evidence in the record, the ALJ makes the following Findings of Fact:

1. On June 17, 2004, the Colorado Supreme Court affirmed the certification by the Secretary of State of an initiated ballot measure entitled *2003-04 # 145* ("Initiative 145"). Initiative 145 later become known as "Amendment 37."
2. Amendment 37 was passed by the voters of Colorado on November 2, 2004. Amendment 37 requires Colorado utilities to increase their renewable energy production up to ten percent by 2015.
3. Xcel Energy produces and distributes power to over 1.2 million Colorado customers and has regulated energy operations in nine other states. Xcel Energy's primary business purpose is to provide economic, efficient, reliable, environmentally sound energy to its customers.
4. As a regulated energy provider in Colorado, Xcel Energy is subject to the requirements of Amendment 37. The requirements of Amendment 37 directly impact the structure of the Company's energy portfolio, and may also affect its customers' rates.
5. Xcel Energy supports renewable energy, but was opposed to Initiative 145 and its successor amendment, Amendment 37. In its efforts to defeat Amendment 37, Xcel Energy contributed more than \$500,000 to Citizens for Sensible Energy Choices ("Citizens"). Citizens was a registered issue committee opposing Amendment 37 in the last general election. Xcel Energy's monetary contributions to Citizens were disclosed in Citizens' contribution reports filed with the Secretary of State. Citizens' campaign reports do not disclose any non-monetary contributions from Xcel Energy.

6. As part of its regular business activities, Xcel Energy prepares and distributes a monthly newsletter to its customers with their bills. The newsletter is called "Energy Update." Energy Update is the company's primary method of communicating with its customers.

7. Xcel Energy has been sending its monthly newsletter to its customers for many years. The manpower and costs associated with preparing and sending the newsletters are provided by and paid for exclusively by the Company.

8. Xcel Energy uses its monthly newsletter to communicate with its customers about current events affecting their utility rates, energy saving methods, and safety measures. The Company also uses its monthly newsletter to communicate its position on topics such as renewable energy and energy conservation.

9. In its September 2004 newsletter, Xcel Energy included an article about the Company's support of renewable energy and its position vis-a-vis Initiative 145. The last sentence of the article reads, "We want to greatly expand renewable energy in Colorado, but in a way that keeps the price of electricity reasonable for all of our customers. We don't think this initiative achieves that objective."

10. In its October 2004 newsletter, Xcel Energy included an article about Amendment 37. In the October newsletter, the Company made the following statement, "We will continue our efforts to add more renewable energy to our system, but believe that Amendment 37 is the wrong way to do it."

11. Xcel Energy included the articles about Initiative 145 and Amendment 37 in its September 2004 and October 2004 newsletters to let its customers know that the Company plans to continue adding renewable energy to its portfolio but in ways differing from the proposed law.

12. Xcel Energy believed it needed to explain to its customers how it could, on one hand, support renewable energy and, on the other hand, oppose Amendment 37. It did so by including articles about the proposed law in its September 2004 and October 2004 newsletters. Xcel Energy did not include the articles to urge its customers to vote against Amendment 37.

13. Xcel Energy did not collaborate or coordinate with Citizens or any other issue committee when it prepared and distributed its September 2004 or October 2004 newsletters. Xcel Energy's newsletters were prepared for the sole benefit of its customers; they were not prepared for the benefit of Citizens or any other issue committee or given to any issue committee as a gift or contribution.

14. Xcel Energy's September 2004 and October 2004 newsletters were prepared and distributed within the regular course and scope of the Company's business operations.

## DISCUSSION

In this case, Complainant contends that Xcel Energy became an issue committee when it prepared and sent its September 2004 and October 2004 newsletters to its customers and therefore was required to disclose the costs of its newsletters under § 1-45-108(1)(a)(I). Xcel Energy argues that it is not subject to the disclosure requirements of § 1-45-108 because it is not an issue committee. Its major purpose is not supporting or opposing ballot issues or questions. Moreover, its newsletters are not a contribution or expenditure as defined by Colorado election laws. To determine whether Xcel Energy is an issue committee and subject to campaign disclosure requirements, the ALJ must look to the definition of “issue committee,” giving the words and phrases of the statute and constitution their plain and ordinary meaning. *Colorado Common Cause v. Meyer*, 758 P.2d 153, 160 (Colo. 1988).

Under § 1-45-108 (1)(a)(I), C.R.S., all candidate committees, political committees, issue committees, small donor committees, and political parties must report to the appropriate officer their contributions received, expenditures made, and obligations entered into by the committee or party. The disclosure requirements in § 1-45-108 (1)(a)(I) apply only to those persons defined as candidate, political, issue or small donor committees or a political party. An “issue committee” is defined in § 2(10)(a), Article XXVIII of the Colorado Constitution as any person, other than a natural person, or any group of two or more persons, including natural persons: (1) that has a major purpose of supporting or opposing any ballot issue or ballot question; or (2) that has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question. In order to determine whether Xcel Energy is an issue committee, three questions must be answered:

Is Xcel Energy’s major purpose supporting or opposing ballot issues or ballot questions?

Xcel Energy’s major business purpose is providing economic, efficient, reliable, and environmentally sound energy to its customers in Colorado and nine other states, not supporting or opposing ballot issues or questions. The fact that Xcel Energy opposed Initiative 145 and Amendment 37 does not change the nature of its primary business purpose. Xcel Energy was formed and exists to provide energy to residents of the state. It did not evolve into an issue committee simply because it took a position regarding a proposed law directly impacting its business operations.

As discussed by the Colorado Supreme Court in *Common Sense Alliance v. Davidson*, 995 P.2d 748, 753 (Colo. 2000), the history of the development of the law in the area of defining an issue committee supports a narrow construction. “[I]f we were to hold that an organization may have multiple purposes, we would effectively create a legal fiction in which groups continually dissolve and reform each time the members decide to pursue a new task. Such an understanding is fraught with problems of identification, notice, and the absence of common understanding among the member of the organization.” *Id.* at 753-754. In this case, Xcel Energy does not meet the first definition of an issue committee.

### Were Xcel Energy's newsletters contributions?

Contribution is defined as (I) the payment, loan, pledge, gift, or advance of money, or guarantee of loan made to any candidate committee, issue committee, political committee, small donor committee, or political party; (II) any payment made to a third party for the benefit of any candidate committee, issue committee, political committee, small donor committee, or political party; (III) the fair market value of any gift or loan of property made to any candidate, issue, political, small donor committee or political party; or (IV) anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall or election. Colo. Const. art. XXVIII, § 2(5)(a) (I) – (IV).

Complainant contends that Xcel Energy's September 2004 and October 2004 newsletters were a contribution to an issue committee, namely Citizens. There is no credible evidence in this record that Xcel Energy's newsletters were contributions to Citizens. The newsletters were prepared by the Company during the course and scope of its regular business activities and were distributed to its customers for their benefit. They were not prepared for the benefit of Citizens or any other issue committee nor were they a gift to any issue committee.

Alternatively, Complainant argues that if the newsletters were not a contribution to Citizens they must be considered a contribution to the Company. And by making a contribution to itself, Xcel Energy became an issue committee. The ALJ finds this argument circular and unpersuasive. Xcel Energy's newsletters were not contributions to itself; they are part of the Company's regular business operations. Furthermore, as per the plain language of the constitution, a payment, loan, gift, etc. does not become a contribution unless it is "made to" a candidate committee, issue committee, political committee, small donor committee or political party. There is no credible evidence that the newsletters were gifts or loans "made to" an issue committee. The ALJ concludes that the newsletters were not contributions to Citizens or any other issue committee.

### Are Xcel Energy's newsletters considered expenditures?

Expenditure is defined as any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or question. Colo. Const. art. XXVIII, § 8(a). However, expenditure does not include, among other things, spending by persons, other than political parties, political committees and small donor committees, in the regular course and scope of their business. Colo. Const. art. XXVIII, § 8(b)(III). Complainant asserts that the September 2004 and October 2004 newsletters, specifically, the articles regarding Initiative 145 and Amendment 37, cannot be excluded from the definition of an expenditure because the content of the articles makes them express advocacy, which is not part of the Company's regular business activities.

For many years, Xcel Energy has used its monthly newsletters to communicate with its customers about issues affecting its business and customer rates. Initiative 145 and Amendment 37 directly impact the structure of the Company's energy portfolio, and may also

affect its customers' rates. Accordingly, the Company included articles about Initiative 145 and Amendment 37 in its September 2004 and October 2004 newsletters. It wanted to explain its position on renewable energy and why the proposed law was not, in the Company's opinion, the way to achieve its goals. The articles in the newsletters discussing these proposals are directly related to the Company's business operations and were distributed as part of its regular business activities. Accordingly, they are excluded from the definition of expenditure.

The ALJ concludes that Xcel Energy has not become an issue committee within the meaning of the FCPA or the Colorado Constitution as a consequence of creating and sending its September 2004 or October 2004 newsletters because: (1) it does not have a major purpose of supporting or opposing ballot issues or ballot questions; and (2) its newsletters were not contributions or expenditures. Since Xcel Energy is not an issue committee it is also not subject to the provisions of § 1-45-108 (1)(a)(I), C.R.S.

### **CONCLUSIONS OF LAW**

Based on the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

1. Pursuant to Colo. Const. art. XXVIII, § 9(2)(a), the ALJ has jurisdiction to conduct a hearing in this matter and to impose appropriate sanctions.
2. Colo. Const. art. XXVIII, § 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA)<sup>2</sup>. Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Complainant is the proponent of an order seeking civil penalties against Xcel Energy for violations of the Colorado Constitution and the FCPA. Accordingly, Complainant has the burden of proof.
3. Complainant has not established by a preponderance of the evidence that Xcel Energy is an issue committee as defined in Colo. Const. art. XXVIII, § 2(10).
4. Complainant has not established by a preponderance of the evidence that Xcel Energy's September 2004 and October 2004 newsletters were a contribution as defined in Colo. Const. art. XXVIII, § 2(5)(a).
5. Complainant has not established by a preponderance of the evidence that the money spent or the costs incurred by Xcel Energy associated with its September 2004 and October 2004 newsletters constitutes an expenditure as defined in Colo. Const. art. XXVIII, § 8(a).
6. Complainant has not established by a preponderance of the evidence that Xcel Energy violated § 1-45-108, C.R.S.

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<sup>2</sup> Section 24-4-101, *et seq.*, C.R.S.

## AGENCY DECISION

It is the Agency Decision of the Administrative Law Judge that Xcel Energy did not violate the FCPA or Article XXVIII of the Colorado Constitution in any respect alleged in Complainant's January 2005 complaint. The complaint is dismissed.

This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

### **DONE AND SIGNED**

July 15, 2005

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MICHELLE A. NORCROSS  
Administrative Law Judge

## CERTIFICATE OF MAILING

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Mark Bender, Esq.  
1301 Pennsylvania Street, Suite 900  
Denver, CO 80203

William Caile, Esq.  
1775 Sherman Street, 21<sup>st</sup> Floor  
Denver, CO 80203

and

William Hobbs  
Secretary of State's Office  
1700 Broadway, Suite 250  
Denver, CO 80290

on this \_\_\_\_\_ day of July 2005

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