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Citizens Clean Elections Commission

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June 20, 2017

Nicole Ong Colyer
Chairwoman
Governor's Regulatory Review Council
100 N. 15th Ave #305
Phoenix, AZ 85007

Re: Clean Elections Commission Rules/June 6, 2017 Meeting

Dear Chairwoman Ong Colyer:

This letter addresses issues relating to GRRC's June 6, 2017 meeting.

Resubmittal of 5-Year Report. Please find with this letter a resubmittal of the Arizona Citizens Clean Elections Commission's 5-year report addressing R2-20-109, 110, and 111. Attachment A. The Council voted to return the Commission's report concerning these rules at its June 6, 2017 meeting. At that meeting, individual Council members identified two concerns about in the report, and those issues have been addressed in the report that is submitted with this letter. We note that although two individual council members mentioned two concerns with the report (neither of which raised a substantive concern about the rules themselves), the Council itself did not "inform the agency of the manner in which its report is inadequate" as the statutes require it to do. A.R.S. § 41-1056(C).

The Commission believes its 5-year Review Report, and the previous versions of the report, that it submitted to the Council satisfy the requirements set forth in A.R.S. § 41-1056(C). Nevertheless, when Council has voted to return the Commission's report, the Commission has always modified the report and resubmitted it for Council review. Accordingly, we are modifying the report and submitting it to the Council for consideration.

Expiration Notice. On June 8, Council staff provided me a copy of a notice advising the Secretary of State's office that Commission rules R2-20-109 and R2-20-111 "expired" as of June 7, 2017. The Council did not discuss this notice during its June 6 meeting at which it returned the Commission's report addressing those rules. After the meeting, Council staff mentioned to me that such a notice would be issued, but the Council itself never referenced such a notice during its deliberations concerning our report at the June 6 meeting.

For the record, the Commission objects to the notice submitted to the Secretary of State's Office and asserts that the notice has no legal effect on any Commission rule. First, the

purported expiration order that the Council issued in February 2, 2016 has itself expired. *See* A.R.S. § 41-1056(F)(1)-(2) (permitting extension for one year). No statutory authority provides for extensions beyond a year. Aside from being beyond the one-year period provided in statute, GRRC'S flawed February 2, 2016 order to "repeal R2-20-109(F)(2) – (F)(12) and (G)" has been mooted by subsequent amendments to Commission rules. That February 2, 2016 order cannot, without additional Council action, morph into the June 2017 notice of expiration of R2-20-109 and R2-20-111.

The Council twice advised the Commission that, contrary to the notice, only R2-20-109(F)(2)-(12) and 109(G) would expire. *See* March 8, 2016 Ltr. of C. Klemminich to T. Collins (Attachment B); March 17, 2016 Ltr. of C. Klemminich to M. O'Grady (Attachment C). No accounting for the incredible expansion of the notice, including affecting subsections never questioned by the Council, has ever been made. However, the very notice that the Council provides only confirms that there has never been any public determination of what the Council finds materially flawed respecting the Commission's current rules, let alone how they fail to comply with the Council's procedurally invalid February 2016 "decision" to require the Commission to repeal R2-20-109F(2) – (F)(12) and (G).

Indeed, Mr. Klemminich's comments June 12 Commission testimony confirmed the Council's views are inconsistent. Mr. Klemminich testified at the Commission meeting that because R2-20-109 and 111, in his view, had not been amended, those rules expired. Attachment D, Transcript of testimony of C. Klemminich to Citizens Clean Elections Commission, June 12, 2017, Tr. 13:17-25 to 14:1-19. When Mr. Klemminich testified, along with Council Members Sundt and Ames, at the Commission on February 23, 2017, he commented that although the initial concern was R2-20-109(F)(2)-12 and (G), he believed that in light of the rule changes since the process started, the only rules that remained a concern were 109(B)(2) and (4) and 111(A). Attachment E, Testimony of C. Klemminich to the Clean Elections Commission, February 23, 2017, Tr. 67:5-9 ("What is left of that, at least in our view, is 109(B)(2), (B)(4) and 111(A). So we're only speaking to those, *not the Commission's rules at large*. The expiration date for those provisions was then extended again to March 4, 2017; in other words, two weeks from now.") (emphasis added).

Nor has Mr. Klemminich, or the Council, or any Council Member explained how the Council's purported decisions address a subsection of a rule or an entire rule. While on June 12, Mr. Klemminich expressed the view that the entire rule expires, GRRC's initial order and was directed at subsections of rule R2-20-109. How the Commission is to determine compliance, let alone substantial compliance, when the Council itself cannot, demonstrates the Council process is not grounded in law.

The purported expiration notice itself falsely claims that "Provisions in R2-20-109(F) which were required to be repealed by the Council have been renumbered to R2-20-109(B), but have not been repealed as the Council required." GRRC's authority to provide notice that rules have expired only arises when "the agency does not amend or repeal the rule by the date specified by the council" A.R.S. 41-1056(G). The record amply demonstrates that R2-20-109(F) was repealed and that current R2-20-109(B) is substantially different than R2-20-109(F). And there was never any direction from GRRC to repeal R2-20-109 in its entirety or R2-20-111. The agency has made no determination that these rules are materially flawed, nor has any date ever been set for these new rules' expiration.

The Commission's objections to GRRC's assertion of authority to repeal Commission rules and the Council's process leading to the June 8 notice have been documented in previous communications. As the Council knows, the Commission has long objected to the Council's violations of Title 41. *See, e.g.*, Attachment F, Ltr. from Mary O'Grady to Chris Klemmich, March 22, 2016 ("Council cannot, as you propose, "affirm" the August 2 date at a future meeting. It must first make the determination that the rules are materially flawed and then set a deadline for the Commission to propose an amendment or repeal of the rules that is at least six months from the date of that determination."); Attachment G Transcript of testimony of J. Roth to Governor's Regulatory Review Council, May 5, 2016, Tr. 12:21-25 to 13:1-6 ("I don't understand what the purpose of a revised report would be if it was going to go on a parallel track with a repeal. It -- it seems to me that there is no productive end result to that process if a conclusion with respect to repeals happened. And, additionally, I would just clarify that the Commission does not think that there has been a finding that any portion of the rule is materially flawed and that is one of the objections we had to the legal effect of the action taken on February 2nd."); Testimony of T. Collins, Governor's Regulatory Review Council, March 28, 2017, *available at* <https://archive.org/details/032817GRRCstudysession>, 1:02:10 to 1:03:08 ("The changes in organization, the substantive changes and the changes in the underlying law are changes that alter the posture of this report and alter the posture of the order of expiration that you've postponed in such a way that, I think we've articulated in the letter, but just to rearticulate a new process would be advisable.").

As the Commission's objections have previously explained, the Commission's repeated resubmissions of five-year reports triggered a new analysis of agency's analysis under A.R.S. 16-1056(E). The Council never identified how the amendments to R2-20-109 or R2-20-111 failed to satisfy the plain terms of 1056(G), which permits a notice of expiration only if "the agency does not amend or repeal the rule [determined to be materially flawed under 1056(E)] by the date specified by the Council when it made the determination that the rule was materially flawed or the date of the extension, which cannot exceed one year from the original designation.

Open Meeting Concerns. I have two concerns about open meeting law issues relating to GRRC's executive session on June 6. First, when the Council's public meeting began, it was announced that the Assistant Attorney General who advises GRRC was recused from the Clean Elections agenda item because of a conflict of interest. This recusal was appropriate given the Attorney General's representation of both the Council and the Commission on other matters. Despite the announced recusal, however, the Assistant Attorney General actually attended the Council's executive session on the specific agenda item for which she was recused.

According to the Attorney General's Agency Handbook, the open meeting law limits who can attend an executive session for legal advice:

the only persons allowed to attend this executive session are the members of the public body, the public body's attorney, and those employees and agents of both whose presence is necessary to obtain the legal advice. The mere presence of an attorney of the public body in the meeting room is not sufficient to justify the use of this executive session provision. This provision can only be used for the purpose of obtaining "legal advice," which involves the exchange of communications between lawyer and client.

Here, because the assistant attorney general was not the Council's attorney for this matter, her presence in the Executive Session was not "necessary to obtain legal advice." She maintains that she was in the Council's executive session to provide procedural advice. But since she is recused from the matter because of a conflict, she has no proper role in an Executive Session on the Clean Elections issue, even if her legal advice is intended to be "procedural." Additionally, although Chris Kleminich's title is "staff attorney," I am not aware of any legal authority for him to serve as the Council's actual attorney. See A.R.S. § 41-192. I do not question that his presence may be permitted in the Executive Session, but it is not clear that he has the lawful authority serve as the public body's attorney.

Second, there was no mention during the public meeting of any the repeal or expiration of the rules that were the subject of the report yet Mr. Kleminich indicated immediately after the GRRC meeting that a repeal order concerning two of the three rules in the report that was under review would be issued. Again, according to the AG's manual,

the public body may not take a vote or make a final decision in the executive session, but rather must reconvene in a public meeting for purposes of taking the binding vote or making final decisions. For example, '[a] decision to appeal transcends 'discussion or consultation' and entails a 'commitment' of public funds. Therefore, once [a] Board [has] finished privately discussing the merits of appealing, the open meeting statutes require[] that board members meet in public for the final decision to appeal.' . . . Taking a straw poll or informal or preliminary vote in executive session is unlawful under the Open Meeting Law.

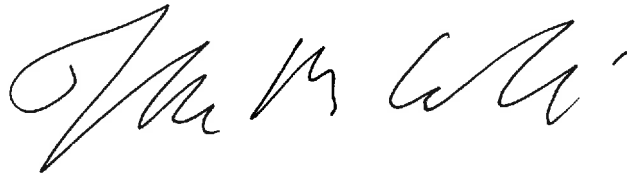
Id. (citations omitted).

The lack of discussion of any repeal at the public meeting leaves me questioning whether the Council exceeded the parameters for the executive session. And two days later, GRRC's chair signed a notice of the purported expiration of two of R2-20-109 and -111 as of June 7, 2017.

Status of the Rules and the Returned Report. Based on my conversation with Council staff after the June 6 meeting, my understanding is that GRRC may return at its next meeting to accept the Commission's report as to R2-20-110 and declare the Report moot as to R2-20-109 and -111 based on the GRRC expiration notice. We believe that the resubmitted report that addresses all three rules at issue satisfies the relevant statutes and should be accepted. As the Commission has long made clear to the Council, there are also significant substantive and procedural reasons GRRC's notice of expiration of Commission rules has no legal effect. We provided a notice to the Secretary of State's office alerting them of these concerns. In the Commission's view, all of its rules that are addressed in the resubmitted report remain in effect. We can lay out our legal concerns in more detail if it is helpful, but I believe those issues were addressed in our previous communications.

On behalf of the Commission, I request that the Council address the changes made in the resubmitted report, approve the report, and rescind the substantively and procedurally faulty notice issued June 8, 2017. In addition, I request that the Department of Administration preserve all materials related to the Clean Elections Commission in the event of litigation concerning these issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas M. Collins', written in a cursive style.

Thomas M. Collins
Executive Director

Attachments