IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CONWAY FOR SENATE,	)	
	)	
Plaintiff,	)	
	)	Civ. No. 3:12-244-CRS-JDM
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	MOTION
	)	
Defendant.	)	
	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(c), defendant Federal Election Commission respectfully moves for summary judgment. The Commission is entitled to judgment as a matter of law because the administrative record in this case — the contents of which are not in dispute — amply demonstrates that the Commission reasonably imposed a $4,950 civil penalty against plaintiff Conway for Senate for failing to file a mandatory campaign-finance report. Specifically, the administrative record shows that the Commission weighed all of plaintiff's evidentiary submissions and arguments, conducted an investigation, and issued a reasoned determination finding that those arguments lacked factual support. Plaintiff cannot demonstrate any error — much less arbitrary and capricious error — in the Commission's determination. Plaintiff's new alternative claim that it used its "best efforts" to comply with its reporting obligations is foreclosed because plaintiff did not raise that argument before the Commission, and the argument is, in any event, devoid of legal merit.

In support of this motion, the Commission submits the attached Memorandum of Law and a Proposed Order. The Commission also relies upon the previously filed Administrative Record in this case (Doc. No. 13-1, 13-2).

WHEREFORE, the FEDERAL ELECTION COMMISSION respectfully requests that the Court enter judgment in favor of the Commission in this matter.

Respectfully submitted,

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February 15, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CONWAY FOR SENATE,	)	
	)	
Plaintiff,	)	
	)	Civ. No. 3:12-244-CRS-JDM
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM
	)	
Defendant.	)	
	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Conway for Senate ("Conway") challenges an administrative fine of $4,950 that defendant Federal Election Commission imposed as a penalty for plaintiff's failure to file a mandatory campaign-finance disclosure report in January 2011. Conway asserts that the Commission's imposition of this fine was arbitrary and capricious because one of Conway's staff members claims to have sent the required report by FedEx before the statutory deadline. The administrative record on which the Commission based its decision, however, shows that the report at issue was not included in the FedEx envelope — an envelope whose contents were extensively and contemporaneously documented upon receipt. Thus, because the only question before the Court is whether the Commission's action was supported by the administrative record, and that record amply supports the Commission's decision, the Commission is entitled to judgment as a matter of law.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. Reporting Requirements for Political Committees

The Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-457 ("FECA"), requires every "political committee" — which includes candidate campaigns, political parties, and other political organizations, *see* 2 U.S.C. § 431(4)-(6) — to designate a treasurer to maintain the committee's financial records. *See* 2 U.S.C. § 432(a)-(d). The treasurer must sign and file reports that detail, among other things, the committee's receipts and disbursements. 2 U.S.C. § 434(a)-(b). FECA establishes a periodic schedule for such reports. As relevant here, a candidate committee must file (i) a pre-election report 12 days before the relevant election; (ii) a post-election report 30 days after the relevant election; and (iii) quarterly reports 15 days after each calendar quarter ends, "except that the report for the quarter ending December 31 shall be

filed no later than January 31 of the following calendar year." 2 U.S.C. § 434(a)(2)(A)(i)-(iii).

Committees of candidates seeking election to the United States Senate (and certain political party committees that focus on Senate candidates) must file their reports by mailing them to "the Secretary of the Senate, who shall receive such … reports, as custodian for the Commission." 2 U.S.C. § 432(g)(1). The Secretary of the Senate forwards those reports to the Commission within two working days. 2 U.S.C. § 432(g)(2). All other committees file their reports directly with the Commission. 2 U.S.C. § 432(g)(3).

B. FECA's Enforcement Procedures

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. FECA establishes a detailed administrative process for the Commission to review alleged violations of the Act. *See* 2 U.S.C. § 437g(a); *see also* 11 C.F.R. §§ 111.3-111.24 (regulations governing Commission's enforcement process). Under FECA, if at least four of the FEC's six Commissioners vote to find "reason to believe" that a violation has occurred, the Commission's General Counsel can conduct an investigation that leads to a recommendation as to whether there is "probable cause to believe" a violation has occurred. 2 U.S.C. § 437g(a)(1)-(3). If at least four Commissioners then vote to find such probable cause, the Commission must attempt to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondent. 2 U.S.C. § 437g(a)(4)(A)(i). If the Commission is unable to resolve the matter through voluntary conciliation, the Commission may file a civil suit against the respondent in federal district court. 2 U.S.C. § 437g(a)(6).

For more than twenty years, the Commission was required to employ these general

enforcement procedures for *all* violations of FECA — even the most straightforward violations in which committees simply failed to file their reports on time (or at all). In 1999, however, Congress amended FECA to create a streamlined enforcement system for violations of the periodic filing requirements. *See* Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, § 640, 113 Stat. 430, 476-477 (1999) (codified at 2 U.S.C. § 437g(a)(4)(C)). Specifically, Congress authorized the Commission to directly assess civil money penalties for violations of 2 U.S.C. § 434(a), which establishes, *inter alia*, the deadlines for political committees' disclosure reports. Pursuant to this authority, after the Commission finds reason to believe a committee and its treasurer have failed to file a report (or filed a report late), the Commission may

> require the person to pay a civil money penalty in an amount determined under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

2 U.S.C. § 437g(a)(4)(C)(i)(II). By eliminating the probable cause determination and conciliation period that applies to other FEC enforcement matters, this "administrative fines" program "create[d] a simplified procedure for the FEC to administratively handle reporting violations." H.R. Rep. No. 106-295, at 11 (1999). That procedure, "much like traffic tickets, . . . let[s] the agency deal with minor violations of the law in an expeditious manner." 65 Cong. Rec. H5622 (daily ed. July 15, 1999) (statement of Rep. Maloney).

A respondent who objects to the Commission's imposition of an administrative fine may seek judicial review of that fine in district court "by filing in such court . . . a written petition requesting that the determination be modified or set aside." 2 U.S.C. § 437g(a)(4)(C)(iii).

C. The Commission's Administrative-Fines Regulations

In 2000, the Commission promulgated regulations implementing FECA's administrative-

fines mechanism. *See* Administrative Fines, 65 Fed. Reg. 31,787 (May 19, 2000) (codified as amended at 11 C.F.R. §§ 111.30-111.46). These regulations establish the procedures that the Commission follows in cases that the Commission determines are appropriate for treatment under the administrative-fines process. 11 C.F.R. § 111.31.

The Commission's regulations define overdue reports as "late" up until a certain number of days after the due date; after that date, the report is defined as "not filed." 11 C.F.R. § 111.43(e)(2). Specifically, "election sensitive" reports — including pre-general-election reports and quarterly reports due in October of an election year, 11 C.F.R. § 111.43(d)(1) — are considered "late" if they are filed after their due dates but more than four days before the relevant election; after that, they are considered "not filed." 11 C.F.R. § 111.43(e)(2). Reports that are not election sensitive are "late" if filed within thirty days of their due date, and they are considered "not filed" after that point. 11 C.F.R. § 111.43(e)(1).

The Commission's regulations also establish the schedule of penalties authorized by 2 U.S.C. § 437g(a)(4)(C)(i)(II). *See* 11 C.F.R. § 111.43(a)-(c). This schedule takes into account whether the untimely (or not filed) report was election sensitive, how late it was filed, the dollar amount of the receipts and disbursements it detailed, and the number of prior violations by the respondent. *See id.*

When the Commission finds reason to believe that a political committee has violated 2 U.S.C. § 434(a), the Commission notifies the committee of that finding. 11 C.F.R. § 111.32. The notification includes the factual and legal basis for the finding, the amount of the proposed civil penalty, and an explanation of the respondent's right to challenge both the reason-to-believe finding and the amount of the penalty. *Id.* Upon receipt of this notification, the respondent can either pay the penalty or challenge the finding or the proposed penalty. 11 C.F.R. § 111.33.

If a respondent wishes to challenge the Commission's reason-to-believe finding or the proposed penalty, the respondent must file a written response that "detail[s] the factual basis supporting its challenge and include[s] supporting documentation" within 40 days of the Commission's finding. 11 C.F.R. § 111.35(a), (e). There are three possible grounds for such a challenge: (1) factual errors in the Commission's finding (such if the report was, in fact, timely filed); (2) inaccurate calculation of the penalty; or (3) a showing that

> The respondent used best efforts to file in a timely manner [but] was prevented from filing in a timely manner by reasonably unforeseen circumstances that were beyond the control of the respondent; and . . . [t]he respondent filed no later than 24 hours after the end of these circumstances.

11 C.F.R. § 111.35(b)(1)-(3). The regulations provide that "reasonably unforeseen circumstances" beyond a filer's control that would satisfy this "best-efforts" defense include events such as natural disasters, 11 C.F.R. § 111.3(b), (c), but do not include causes such as negligence or staff inexperience. *See* 11 C.F.R. § 111.35(d).

Timely-filed challenges to the Commission's reason-to-believe finding are reviewed by the Commission's "Reviewing Officer," 11 C.F.R. § 111.36(a), a member of the Commission's staff who is not involved in the reason-to-believe finding. After considering the respondent's submission, along with the reason-to-believe determination and any supporting documentation, 11 C.F.R. § 111.36(b), the Reviewing Officer submits a written recommendation to the Commission, 11 C.F.R. § 111.36(e), that is also provided to the respondent, 11 C.F.R. § 111.36(f). The respondent may file a written response to the recommendation within ten days. *Id.* That response cannot raise any new arguments beyond those in the original written response, except in direct response to the Reviewing Officer's recommendation. *Id.*

After receiving the Reviewing Officer's recommendation and any timely additional response from the respondent, the Commission makes a final determination by an affirmative

vote of four Commissioners as to whether the respondent violated 2 U.S.C. § 434(a) and, if so, the amount of the civil penalty. 11 C.F.R. § 111.37(a)-(c). When the Commission makes a final determination under this procedure, the reasons provided by the Reviewing Officer for her recommendation serve as the reasons for the Commission's action, unless otherwise indicated by the Commission. 11 C.F.R. § 111.37(d).

II. THE ADMINISTRATIVE DETERMINATION CHALLENGED IN THIS CASE

Mr. Jack Conway was the Democratic Party's 2010 nominee for United States Senate in Kentucky. (*See* Compl. ¶ 6 (Doc. 1).) Plaintiff was Mr. Conway's "principal campaign committee." *See id*; 2 U.S.C. § 431(5).

In 2010, plaintiff timely filed its first three quarterly reports as required by 2 U.S.C. § 434(a)(4)(A). *See* http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do (search for "Conway for Senate" and click on "Filings"). In December 2010, the Commission sent notices to all registered political committees and treasurers, including Conway for Senate, reminding them of the January 2011 due dates for year-end reports. (*See* Administrative Record ("AR") 040-041 (Doc. 13-2).) Conway's year-end report was due on January 31, 2011. *See* 2 U.S.C. § 434(a)(4)(A)(i); AR041.

On February 17, 2011, having not received Conway's year-end report, the Commission sent a non-filer notice to Conway's treasurer. 2 U.S.C. § 437g(b); AR001. Conway then filed its year-end report on March 10, 2011 (AR004), but because that was more than thirty days after the due date, the report was deemed "not filed" under the Commission's regulations for non-election sensitive reports. *See id*.; *supra* p.4. On March 30, the Commission's staff recommended that the Commission (1) find reason to believe that Conway and its treasurer had "not filed" its year-end report; and (2) assess an administrative fine of $4,950. (AR002-007.) The Commission

unanimously approved this recommendation on April 1, 2011. (AR017.)[1]

The Commission notified Conway of its reason-to-believe finding and proposed fine by letter dated April 4, 2011. (AR024-027.) On May 4, Conway's treasurer R. Wayne Stratton submitted a written "protest" of the reason-to-believe determination. (AR028-033.) This protest asserted that the Committee "consistently filed on time reports and believe[d it] did so this time" (AR028), and attached an affidavit from a receptionist at Mr. Stratton's law firm averring that she had sent the year-end report and three other reports by FedEx on January 25 (AR029). The protest accordingly requested that the Committee "abate" the civil penalty. (AR028.)

The Commission's Reviewing Officer, Ms. Dayna C. Brown, acknowledged receipt of Conway's protest by letter dated May 9, 2011. (AR034.) On June 20, in the course of preparing her recommendation, Ms. Brown sent a letter to the Superintendent of the Office of the Secretary of the Senate, Ms. Dana McCallum. (AR050.) That letter asked Ms. McCallum to review the Secretary of the Senate's records to ascertain if Conway's year-end report had been received in January 2011. (*Id.*) On June 22, 2011, Ms. McCallum responded with a letter stating that on January 28, 2011, her office had received from Conway a FedEx envelope containing five different reports. (AR051.) Ms. McCallum identified each of those five reports, none of which was Conway's 2010 year-end report. (*Id.*)[2] Ms. McCallum also confirmed that the Senate did not receive the year-end report until March 16, 2011. (AR051.)

Ms. Brown issued her preliminary recommendation on June 29, 2011. (AR059-109.) She rejected Conway's factual assertion that it had timely submitted its year-end report, noting

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[1] The Commission's procedures for voting on reason-to-believe findings in administrative fines matters are available at http://www.fec.gov/directives/directive_52.pdf (Sept. 10, 2008).

[2] The reports in the envelope were "an October 15 Quarterly Report Amendment, three (3) separate and distinct 12-Day Pre-General Report Amendments, and a 30-Day Post-General Report Amendment." (AR051.)

that Conway's staff had made inconsistent statements regarding that submission during the Commission's investigation, including multiple statements contradicting the claim that the year-end report had been sent in the same FedEx envelope as the other reports. (AR061-062.) Ms. Brown also credited Ms. McCallum's written confirmation that the Senate had not received Conway's year-end report until March 2011. (*See id.*) Ms. Brown accordingly recommended that the Commission make a final determination that Conway had violated 2 U.S.C. § 434(a) and impose a civil penalty of $4,950.

Ms. Brown mailed her recommendation to Mr. Stratton (AR058), who submitted a written response on July 8, 2011 (AR112-121). This response included additional affidavits and documentation regarding the preparation and mailing of Conway's year-end report. (AR113-121.) Ms. Brown reviewed this material, determined that it did not change her recommendation (*see* AR124), and formally submitted that recommendation to the Commission on March 28, 2012. (AR 122-134.)

On April 5, 2012, the Commission voted unanimously (with one Commissioner not participating) to adopt the Reviewing Officer's recommendations and determine that Conway and its treasurer had violated 2 U.S.C. § 434(a). (AR135.) The Commission assessed the same civil penalty calculated at the reason-to-believe stage, $4,950. (*Id.*) The Commission notified Conway of its final determination on April 10, 2012 (AR136-138), and plaintiff filed its petition for review with this Court thirty days later, on May 10.

ARGUMENT

I. STANDARDS OF REVIEW

A. Summary Judgment Standard

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986). The Court must view the evidence and the inferences that may reasonably be drawn from the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must provide evidence of specific facts showing that there is a genuine issue for trial. *Celotex,* 477 U.S. at 324; *Liberty Lobby,* 477 U.S. at 248; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

B. Review of Agency Adjudications

Pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, a reviewing court can set aside final agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). This standard applies to challenges to the Commission's imposition of administrative fines under 2 U.S.C. § 437g(a)(4)(C)(iii). *Cooksey v. FEC,* No. Civ. 04-1152, 2005 WL 1630102, at *2 (W.D. La. June 9, 2005) (citing *Miles for Senate Comm. v. FEC,* Civ. No. 01-83, 2002 WL 47008 (D. Minn. Jan. 9, 2002)). "An agency decision is arbitrary and capricious if the agency fails to examine relevant evidence or articulate a satisfactory explanation for the decision." *Bangura v. Hansen,* 434 F.3d 487, 502 (6th Cir. 2006) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 42-43 (1983)). The arbitrary and capricious standard of review is "highly deferential" and "presumes the validity of agency action." *Nat'l Ass'n of Clean Air Agencies v. EPA,* 489 F.3d 1221, 1228 (D.C. Cir. 2007). Indeed, "the arbitrary and capricious standard is the least demanding form of judicial review of administrative action. When it is possible to offer a reasoned explanation, based on evidence, for a particular outcome, that

outcome is not arbitrary or capricious." *Schwalm v. Guardian Life Ins. Co.,* 626 F.3d 299, 308 (6th Cir. 2010) (internal quotation marks omitted). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc).

"As a general matter, courts [in APA cases] confine their review to the administrative record, which includes all materials compiled by the agency that were before the agency at the time the decision was made." *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997) (internal quotation marks omitted); *see Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Accordingly, plaintiffs are precluded from raising before a reviewing court any arguments not presented to the agency in the administrative proceeding. *Wilson Air Center, LLC v. FAA,* 372 F.3d 807, 813 (6th Cir. 2004) ("It is inappropriate for courts reviewing agency decisions to consider arguments not raised before the administrative agency involved"); *LeBlanc v. EPA,* 310 Fed. App'x 770, 776 (6th Cir. 2009) ("A reviewing court may not consider arguments that were not previously raised before an administrative agency . . . ."). Thus, the question presented to the court on motions for summary judgment in APA challenges is whether, "on the basis of the administrative record, . . . an agency reasonably could have found the facts as it did." *Cunningham v. FEC,* Civ. No. IP-01-0897-C-B/S, 2002 WL 31431557, at *3 (S.D. Ind. Oct. 28, 2002) (citations omitted).

II. THE COMMISSION IS ENTITLED TO SUMMARY JUDGMENT

A. The Administrative Record Establishes that the Commission Reasonably Found that Conway Failed to File Its 2010 Year-End Report

The Commission's finding that Conway failed to timely file its 2010 year-end report was a reasonable determination based on the administrative record. The Reviewing Officer's recommendations, which the Commission adopted, described the underlying facts accurately,

correctly analyzed the violation, and applied the Commission's administrative-fines regulations appropriately.

The two primary pieces of evidence on which the Reviewing Officer relied establish that the Commission's determination was reasonable. First, the Reviewing Officer took affirmative steps to investigate whether Conway's year-end report had been received by the Secretary of the Senate in January 2011. That office responded with detailed information regarding the exact contents of the FedEx envelope in question: Five specific documents, each with a copy of a FedEx label showing the same tracking number; each with a cover letter signed by Conway's treasurer; each with a handwritten and initialed intake sheet showing a FedEx shipping date of January 25 and receipt date of January 28; and each time-stamped "Secretary of the Senate 11 Jan 28" between 2:39 p.m. and 2:41 p.m. (AR086-103.) In light of this extensive evidence showing that the Secretary of the Senate had exhaustively catalogued these five documents as coming from the same FedEx envelope — and the absence of any allegation, much less evidence, that it contained *six* documents — it was eminently reasonable for the Commission to credit the Secretary's statement that the envelope did not, in fact, contain any documents beyond those catalogued by the Secretary's office.[3]

Second, the administrative record shows that Conway's personnel gave shifting and inconsistent explanations about the mailing of the year-end report. Initially, Ms. Paula Pasley called the Commission on March 10, 2011, and claimed to have "a *certified-mail* receipt

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[3] A Conway employee, Ms. Paula Pasley, submitted an affidavit stating that she had "printed" and "reviewed" *four* reports, including the year-end report, which "were then turned over" to another employee for mailing. (AR115.) Similarly, the affidavit of Ms. Lynn-Marie Johnson, the receptionist charged with mailing the documents, states that she was given four documents to mail. (AR64.) On its face, these statement are inconsistent with the undisputed evidence from the office of the Secretary of the Senate that it had received *five* reports — an inconsistency that casts doubt on the accuracy of Conway's evidence and recordkeeping.

confirming delivery" of the year-end report. (AR081 (emphasis added).) Then, on April 20, Conway's treasurer told the Commission that the year-end report had been "sent separately" by FedEx from the other reports the Senate had received on the same day. (AR081.) Finally, on May 5, a receptionist submitted an affidavit stating that the year-end report and four other documents "were packaged" — she does not claim to have personally packaged them — "in a Federal Express envelope" for shipping. (AR064.) Although plaintiff emphasizes only this last statement (*see* Pl.'s Sum. J. Mem.("Conway Mem.") at 7 (Docket 15-1)), it was reasonable for — and indeed, incumbent upon — the Commission to take the *entire* record into account.[4] Thus, the Reviewing Officer committed no error in finding that the inconsistency in Conway's statements cast doubt upon their accuracy. (*See* AR061-062.) While Conway "may offer a different explanation for these facts, an alternative explanation does not negate the reasonableness of the [agency's] finding." *Bangura*, 434 F.3d at 503.

Conway relies on *Greenwood for Congress, Inc. v. FEC*, Civ. No. 03-207, 2003 WL 22096125 (E.D. Pa. Aug. 15, 2003), in which the district court found that the Commission had erred in assessing an administrative fine. In *Greenwood*, however, the reporting committee had provided concrete evidence that, based on the registered weight of the package it sent to the Commission, that package must have contained more material than the Commission

[4] Conway mischaracterizes its own evidence by asserting that its treasurer "insisted *he sent* the report in the envelope" and "the secretary and the office manager produced affidavits confirming that *they had printed out and mailed* the year-end report in the envelope." (Conway Mem. at 7; (emphasis added).) In reality, Conway's treasurer admitted that he had no personal knowledge of the mailing. (*See* AR113 (stating "I am not sure what happened" but explaining what he knew "according to the receptionist").) The office manager similarly admitted that she had not sent the report herself. (*See* AR115 (stating that "reports were then turned over to Marie Johnson, receptionist . . . for mailing")). Yet, as noted above, the receptionist's affidavit does not state that she *personally* placed the report in an envelope. (AR064.) Accordingly, Conway's reference to "tracking documents from Federal Express showing that the envelope arrived timely at the FEC" (Conway Mem. at 7) is irrelevant, as there is no evidence that the report in question was in that envelope.

acknowledged receiving. *See id*. at *2. Because the Commission had not explained its basis for rejecting this evidence, the district court held that the Commission had simply "disregarded" it. *Id*. at *3. Here, however, Conway presented no such evidence to the Commission. (*See* AR061 (noting treasurer's statement that he was unable to confirm precise weight of shipment).) Instead, as noted previously, Conway merely submitted affidavits that were inconsistent with the committee's prior statements. The Reviewing Officer then conducted a thorough search, communicated with relevant staff at the Senate, and received conclusive documentary evidence of which reports had in fact been delivered. She weighed all of this evidence and found the committee's claims lacking in factual support, and the Commission adopted her analysis. Thus, far from "disregarding" any evidence or acting capriciously, the Commission considered the entire record, and its conclusion was reasonably based on that record. *See Bangura,* 434 F.3d at 503 (holding that agency action is "not arbitrary and capricious" when agency provides "reasoned explanation" that is "supported by substantial evidence"). "Since the record is clear that the relevant factors were considered and the applicable regulations were strictly applied to Plaintiff['s] violations," the Court should conclude that the Commission's final determination and assessment of civil penalties is "supported by a rational basis and does not indicate a clear error of judgment. In light of that conclusion, further analysis is neither required, nor permitted." *Cox for U.S. Senate Comm., Inc. v. FEC,* Civ. No. 03C3715, 2004 WL 783435, at *5 (N.D. Ill. Jan. 22, 2004).

B. Plaintiff's Newly Raised Challenges to the Commission's Action Are Waived, and in Any Event Meritless

Conway raises in its summary judgment brief for the first time the claim that the Commission "fail[ed] to give plaintiff the benefit of the doubt under the best efforts defense, a safe harbor provision." (Conway Mem. at 2; *see also id*. at 7-9.) But APA plaintiffs are

precluded from raising before a reviewing court any arguments not presented to the agency during the administrative proceedings under review. *See Wilson,* 372 F.3d at 813; *LeBlanc,* 310 Fed. App'x at 775. "'Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection *made at the time* appropriate under its practice.'" *Cunningham,* 2002 WL 31431557, at *4 (emphasis added) (quoting *United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37 (1952)). "Thus, any objections not made before the administrative agency are subsequently waived before the courts." *Id.* (citation and footnote omitted). Indeed, the Commission's regulations specifically put all administrative-fines respondents on notice that "failure to raise an argument in a timely fashion during the administrative process" constitutes "a waiver of the respondent's right to present such argument in a petition to the district court." 11 C.F.R. § 111.38. Thus, because Conway never raised its "best-efforts" defense before the Commission, that claim is waived.

Even if the Court were to consider Conway's new argument, it lacks merit and should be rejected. The Commission's regulations provide that an administrative-fines respondent may challenge a reason-to-believe finding on the grounds that the respondent "used best efforts to file in a timely manner" but was prevented from doing so "by reasonably unforeseen circumstances" beyond the respondent's control. 11 C.F.R. § 111.35(b)(3); *see also* 2 U.S.C. § 432(i).[5] The circumstances the Commission considers "reasonably unforeseen" include such systemic failures as a breakdown of Commission computers or Commission-provided software, 11 C.F.R.

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[5] Conway cites (Conway Mem. at 7) 11 C.F.R. § 104.7, which defines "best efforts" in the context of collecting information about a committee's contributors — a context not relevant here. Conway also cites (Conway Mem. at 8) the Commission's "Statement of Policy Regarding Treasurers Best Efforts," 72 Fed. Reg. 31,438 (June 7, 2007), but that statement specifically does not apply to administrative fines cases. *Id.* at 31,440 ("This Policy Statement does not affect the Commission's AFP [Administrative Fines Program] . . . .").

§ 111.35(c)(1); widespread disruptions to the internet (not specific to the respondent or its internet service provider), 11 C.F.R. § 111.35(c)(2); or severe weather or a disaster-related incident, 11 C.F.R. § 111.35(c)(3).[6] The Commission's regulations categorically exclude from its best-efforts defense any errors that arise from the negligence or inexperience of the committee's staff. *See* 11 C.F.R. § 111.35(d).

Conway does not even argue — much less provide evidence — that any of the specified "unforeseen circumstances" apply to Conway's failure to file its year-end report.[7] Instead, Conway claims that "[a]ssuming *arguendo* that the report was in fact not filed, the FEC should have undertaken a 'best efforts' analysis based on the evidence." (Conway Mem. at 8.) In other words, Conway argues that the Commission was required to ask *sua sponte* whether the respondent's evidence *could* state a best-efforts defense, and, if so, to make that argument affirmatively on Conway's behalf. Alternatively, Conway acknowledges that the Commission "had discretion not to apply the best efforts analysis," but plaintiff claims that the exercise of such discretion required the Commission to explain why it was *not* making a best-efforts determination. (*See* Conway Mem. at 9.) Under either theory, Conway argues, the Commission's failure to explain the absence of a best-efforts analysis is arbitrary and capricious.

Conway's argument has no basis in law. The Commission is not aware of any authority for the proposition that an agency must raise and consider a defense that an administrative respondent never raised on its own behalf. Indeed, that proposition cannot be reconciled with the extensive case law discussed above holding that a respondent's failure to raise an argument

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[6] In addition, the respondent can invoke the best efforts defense only if the report was "filed no later than 24 hours after the end of these circumstances." 11 C.F.R. § 111.35(b)(3)(ii). Conway has not alleged that it filed its report within 24 hours after the conclusion of any unforeseen circumstances.

[7] Indeed, no internet-related excuse could possibly apply here, given that Senate candidates (unlike almost all other committees) must file their reports by mail. *See supra* p.2.

waives it. The only authority Conway cites (Conway Mem. at 8) is *Lovely v. FEC*, 307 F. Supp. 2d 294 (D. Mass. 2004). In that case, the administrative respondents had "raised and preserved" a best-efforts defense before the Commission, *id*. at 300, and the Commission had rejected that defense without explaining why, *id*. at 300-01. Conway, in contrast, did not raise this defense before the agency, so the Commission had no obligation to consider it.

In any event, the evidence developed by the Reviewing Officer and set forth in the administrative record establishes that Conway could not have availed itself of the best-efforts defense because it failed to file its year-end report due to its own negligence. Although Conway's staff may all have intended that the year-end report be timely filed, they failed to exercise the care necessary to ensure that the requisite report in fact was transmitted. Conway's failure to submit the requisite report was, in other words, simple negligence. Conway, like any other principal, has a duty to supervise its agents and is responsible for the agents' actions within the scope of their authority. "[I]t is elementary that … impersonal entities [like partnerships, corporations and other associations] can be guilty of . . . violations of regulatory statutes through the doctrine of respondent superior." *United States v. A & P Trucking Co.,* 358 U.S. 121, 125 (1958). Thus, the failure of Conway's staff to take the basic steps necessary to place the correct report in the correct envelope forecloses application of the Commission's regulatory best-efforts defense. 11 C.F.R. § 111.35(d).

CONCLUSION

For the foregoing reasons, the Commission's imposition of an administrative fine on plaintiff was reasonable and fully supported by the administrative record. Accordingly, the

Commission's motion for summary judgment should be granted, and plaintiffs' motion for summary judgment should be denied.

Respectfully submitted,

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