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BY HAND DELIVERY

Mr. Adam Schwartz
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5819 (U.S. Chamber of Commerce)

Dear Mr. Schwartz:

On July 30, 2007, we requested that the Office of General Counsel hold this matter in abeyance for 120 days to accommodate the Commission's initiation and conclusion of a rulemaking of potentially direct applicability. We received your August 2, 2007, letter reiterating what you had told me earlier that day over the phone – the Office of General Counsel had denied our request.

During that call, you represented to me that the Commission had already concluded that *FEC v. Wisconsin Right to Life, Inc.* 127 S. Ct. 2652 (2007) ("*WRTL II*") did not affect this matter and, therefore, there was no reason to suspend these proceedings until the rulemaking implementing *WRTL II* is concluded. That representation is remarkable for a number of reasons.

First, *WRTL II does* directly affect this matter. It is a Supreme Court case that addresses the boundaries of regulated political speech, including "express advocacy." *WRTL II* reinforces the conclusion reached in three federal courts that the definition of "express advocacy" at 11 C.F.R. § 100.22(b) – the only substantive provision of the FEC regulations our client is accused of violating – is unconstitutional. *See Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Maine Right to Life Comm v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998). In addition, the Petition for Rulemaking to implement *WRTL II* indicates in its title and text that the validity of 11 C.F.R. § 100.22(b) is going to be squarely at issue in the forthcoming rulemaking. *See* Petition for Rulemaking: Protecting "Genuine Issue Ads" from the "Electioneering Communication" Prohibition & Repealing 11 C.F.R. § 100.22(b) (July 18, 2007), *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/2007/petition_center_for_free_speech.pdf.

Second, *WRTL II* is not even mentioned – let alone distinguished – in the Commission's Factual and Legal Analysis. If the Commission has, in fact, assessed the impact of *WRTL II* to this matter, then its Factual and Legal Analysis is woefully incomplete and is seemingly inconsistent with the statutory requirement that the Commission notify MUR respondents of the basis of the findings against them. *See* 2 U.S.C. § 437g(a)(2). By omitting any discussion of *WRTL II* from its Factual and Legal Analysis, the Commission has put us in the impossible position of formulating a substantive response based on our best guess of the Commission's application of *WRTL II* to this matter. The situation is even more frustrating given that the Commission has apparently articulated a view of *WRTL II* that it refuses to share with us.

Third, if the Commission has already decided how and in what circumstances *WRTL II* applies, then it has predetermined the outcome of the rulemaking it is now initiating. In so doing, the Commission will have violated the Administrative Procedure Act which requires that the Commission allow for public comment on a proposed rule and consider those comments, as well as all other "relevant matter presented," before promulgating a rule. 5 U.S.C. § 553(c); *see also Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) ("The APA requires agencies to provide notice and an opportunity to comment on proposed rules ... which means that the agency's mind must be open to considering them."); *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1018 (2d Cir. 1986) (basis of agency's decision deemed "arbitrary and capricious" because it was "not exposed public comment, so that the Commission cannot be said to have considered all relevant factors in making its decision").

For these reasons, we are reserving our right under the Equal Access to Justice Act, 5 U.S.C. § 504, to seek the legal fees our client is now incurring as a result of the Office of General Counsel's seemingly unjustified refusal to hold this matter in abeyance. *See Mendenhall v. NTSB*, 92 F.3d 871, 874 (9th Cir. 1996) (fees awarded "when the record contains no evidence on which [the agency] could have rationally based" its decision or "an agency's position was based on violations of the Constitution, federal statute or the agency's own regulations"); *In re: Sealed Case*, 245 F.3d 233, 237 (D.C. Cir. 2001); *Air Transp. Ass'n of Canada v. FAA*, 156 F.3d 1329, 1332-33 (D.C. Cir. 1998).

We are also reserving our right to substantively respond to the Commission's Factual and Legal Analysis as the rulemaking proceeds.

Sincerely,

Jan Witold Baran
Caleb P. Burns