FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

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| In the Matter of | ) | |
| Kenneth R. Buck, *et al.* | ) | MUR 6296 |
| | ) | |

**STATEMENT OF REASONS**
**Vice-Chair CAROLINE C. HUNTER and**
**Commissioners DONALD F. McGAHN and MATTHEW S. PETERSEN**

The complaint in this matter alleges several violations of the Federal Election Campaign Act of 1971, as amended ("the Act"). The relevant allegations are that then-U.S. Senate candidate Kenneth R. Buck and his campaign committee coordinated television ads with outside groups resulting in excessive in-kind contributions. The Office of General Counsel ("OGC") recommended that the Commission find no reason to believe the Respondents violated the Act.

We approved OGC's recommendations.[1] Two of our colleagues, however, disagreed with the staff recommendation and voted to find reason to believe that Kenneth R. Buck, Buck for Colorado and Kenneth Salazar, in his official capacity as Treasurer, Jerry Morgensen, and Americans for Job Security ("AJS") violated the Act by making a prohibited coordinated expenditure and in-kind contribution.[2] We write separately to explain why we agreed with the staff recommendation to find no reason to believe the Respondents violated the Act.

* * *

This is not a close case. Indeed, if this complaint sufficed to find reason to believe that coordination occurred and thereby launch a federal investigation, it is hard to imagine any allegations, no matter how unsubstantiated, that would not trigger the reason to believe threshold. But here, there was more than just a complaint bereft of specifics. Buck, his campaign committee, the outside groups involved, and the named individuals all specifically denied coordinating any ads. Moreover, there was no evidence, other than the complainant's accusations, that coordination occurred. Further, even if everyone involved had collaborated on

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[1] For purposes of 2 U.S.C. § 437g(a)(8), the First General Counsel's Report (the "FGCR" or "Report") is incorporated by reference.

[2] MUR 6296 (Buck for Colorado), Certification dated Dec. 14, 2010. Chair Cynthia L. Bauerly did not vote.

the ad at issue, that still would not have resulted in a violation of the Act because the ad did not meet the definition of a coordinated communication under the Commission's rules.

Thus, for the reasons set forth below, we approved OGC's recommendation to find no reason to believe Respondents violated the Act.

## I. Background

Kenneth R. Buck was the 2010 Republican candidate for U.S. Senate in Colorado. His authorized committee was Buck for Colorado. At the time the complaint was filed, Buck was serving as the Weld County District Attorney.[3] The complaint in this matter alleged that Buck and his authorized committee coordinated television advertisements with outside groups through an alleged agent of the campaign, Jerry Morgensen. The pertinent allegations stem from a series of interviews Buck purportedly held with prospective campaign consultants in March 2009, where Buck allegedly stated that Jerry Morgensen, Chairman of Hensel Phelps Construction Co., was prepared to invest $1 million in Buck's campaign. The complaint alleged that Morgensen confirmed during the interviews that he was planning to "invest" one million dollars or more in connection with Buck's campaign.[4] The supplemental complaint alleged that, pursuant to Buck's instructions, Morgensen and Hensel Phelps thereafter "funneled" at least one million dollars to three entities, including AJS, for advertising supporting Buck and opposing other candidates in the race.[5] The complaint's support for these allegations was a news article stating that phone records from Buck's District Attorney's office reflected dozens of calls placed to Hensel Phelps Construction headquarters during March, April, and May of 2009—a year before the ads at issue were aired.[6]

Subsequently, in April 2010, AJS began airing television ads and distributing literature in Colorado that referenced Buck. The complaint argued these ads were paid for with "excessive contributions" from Buck supporters who had already reached the contribution limit with direct contributions to Buck's campaign.[7] The complaint further alleged that Morgensen and/or Hensel Phelps funneled these "contributions" from Buck supporters to the groups, "intending to benefit Buck." Finally, the complaint alleged "upon information and belief" that Buck advised Morgensen and/or other contributors to make "excessive contributions" to these organizations,

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[3] MUR 6296 (Buck for Colorado), Buck and Buck Committee Response at 1.

[4] MUR 6296 (Buck for Colorado), Complaint at 2.

[5] MUR 6296 (Buck for Colorado), Supplemental Complaint at 2. In addition to AJS, the complaint alleged Morgensen funneled money to Declaration Alliance and Campaign for Liberty. The Commission found no reason to believe Declaration Alliance and Campaign for Liberty violated the Act because: (1) there was no evidence Morgensen was involved in any financial transaction with either organization; and (2) their affidavits specifically stated the ads were developed independently of Buck and anyone at his campaign. Thus, the only group at issue is AJS. *See* MUR 6296 (Buck for Colorado), FGCR at 14-15.

[6] *Id.* at 9.

[7] MUR 6296 (Buck for Colorado), Complaint at 3-4.

and that this effort to funnel contributions resulted in illegal coordination, excessive contributions, and prohibited corporate and government contractor contributions.[8]

In support of this allegation, the complaint cited to another news article in which a consultant for the Buck campaign shared details about the AJS ad buy, including the timing and content of the ads.[9] The complaint alleged that this advance knowledge about the advertisements demonstrated an "improper coordinated expenditure by AJS."[10]

Buck, in his individual capacity, as well as Buck for Colorado, Morgensen, and AJS filed responses and affidavits specifically denying that the ads were coordinated. Buck and his campaign committee stated "they have not cooperated with, consulted with, acted in concert with, requested or suggested that...Americans for Job Security or Hensel Phelps Construction, or any of their employees, officers, directors, or agents make any public communications supporting Buck's candidacy."[11]



Likewise, AJS stated that its communications were not made in cooperation, consultation, or concert with or at the request or suggestion of Buck, his agents, his campaign or its agents, or any political party committee or its agents. Moreover, in response to the allegation that the Buck campaign had advance knowledge of the timing and content of the advertisement, AJS stated that, at the time the Buck campaign's consultant made the statements, the ad had already been sent to the stations where all information about the ad, including its content and air date, was publicly available.[12]

Finally, Morgensen's response stated that, while he attended one meeting with Buck and a prospective campaign consultant in March 2009, he "did not make a statement or imply in any way that [he] would invest one million dollars or more in Buck's Senate campaign at this meeting or during any other meeting or conversation."[13] Morgensen further stated that his contributions to Buck were within the contribution limits and that Buck never advised him "to make contributions in excess of the federal limits."[14] Finally, Morgensen denied making contributions to two of the three outside groups. He did not specifically deny making contributions to AJS. However, Morgensen attested that he did not know how much money AJS spent on its advertising.

OGC recommended that the Commission find no reason to believe Respondents violated 2 U.S.C. § 441b by making and accepting corporate contributions in the form of coordinated

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8 *Id.* at 3.

9 MUR 6296 (Buck for Colorado), Supplemental Complaint at 2.

10 MUR 6296 (Buck for Colorado), Complaint at 4.

11 MUR 6296 (Buck for Colorado), Buck and Buck Committee Response, Affidavits of Walter Klein, ¶ 2, Buck, ¶ 2, Perry Buck, ¶ 2, and Kenneth Salazar, ¶ 2.

12 MUR 6296 (Buck for Colorado), Response of AJS at 2.

13 MUR 6296 (Buck for Colorado), Hensel Phelps and Morgensen Response, Morgensen Affidavit, ¶ 5.

14 *Id.*, ¶¶ 6, 7.

communications because there was "not enough information to find that the advertisements were coordinated."[15] OGC based its recommendation on the "complaint's lack of facts regarding Buck's conduct, Buck's response that he was not involved with the communications at issue," and the "specific, definitive responses" filed by the outside groups, including AJS, "that they had no contact with Buck, his Committee or anyone known to be associated with Buck."[16]

Nevertheless, some of our colleagues argued there was reason to believe a violation occurred because Buck could have coordinated with outside groups through an agent. First, they believed that the Respondents' affidavits and sworn declarations denying the coordination charges did not go far enough. Second, they believed that the ad at issue in the complaint expressly advocated the election or defeat of federal candidates, and moreover, that a separate ad, which aired after the complaint was filed, may have been coordinated because it aired within 90 days of the primary elections. Finally, our colleagues believed that Jerry Morgensen, who allegedly donated money both to Buck and outside groups, may have been an agent of the campaign and served as a conduit between the outside groups and the Buck committee.



## II. Legal Analysis

### A. The Complaint and Responses Do Not Establish Reason to Believe a Violation Occurred

Based on our review of the complaints and responses, we approved OGC's recommendation to find no reason to believe Respondents violated the Act. There is no basis in the record for our colleagues' suspicions and no basis in judicial opinion or Commission precedent for their legal interpretations. Moreover, opening an investigation to determine whether we could discover a basis for those suspicions runs counter to the statutory constraints imposed on the Commission.

#### 1. The Reason to Believe Standard

Under the Act, any complaint alleging legal violations must "be in writing, signed and sworn."[17] In addition, Commission regulations provide that a complaint should do the following:

- clearly identify as a respondent each person or entity who is alleged to have committed a violation;
- be accompanied by an identification of the source of information which gives rise to the complainant's belief in the truth of statements if not based upon personal knowledge;

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15 MUR 6296 (Buck for Colorado), FGCR at 10.

16 *Id.* In fact, the complainant in this matter attempted to withdraw the complaint after Buck won the August 2010 primary, further calling into question the complaint's credibility. *See* MUR 6296 (Buck for Colorado), Letter from Charles R. Grice dated May 20, 2010.

17 2 U.S.C. § 437g(a).

- contain a clear and concise recitation of the facts which describe a violation of statute or regulation; and

- be accompanied by any documentation supporting the facts alleged.[18]

The Commission has explained its approach to finding "reason to believe" in prior MURs. For example in MUR 4960 (Hillary Clinton), the Commission summarized the requirements as follows:

> The Commission may find "reason to believe" *only if* a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge *must* identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented. . . .
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> Unwarranted legal conclusions from asserted facts, *see* SOR in MUR 4869 (American Postal Workers Union), or mere speculation, *see* SOR of Chairman Wold and Commissioners Mason and Thomas in MUR 4850 (Fossella), will not be accepted as true. In addition, . . . a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint . . . .[19]

Similarly, in MUR 5467 (Michael Moore), the Commission stated that "[p]urely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe that a violation of the FECA has occurred."[20]

Therefore, under the Act, before making a reason to believe determination, the Commission must assess both the law and the credibility of the facts alleged.[21] To do so, the

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[18] 11 C.F.R. § 111.4(d). At the Commission's January 2009, hearing on agency procedures, one commenter expressed support for making these pleading requirements mandatory. Comments of Jan Witold Baran, Wiley Rein LLP Election Law and Government Ethics Group, Agency Procedures (Notice of public hearing and request for public comments), 73 Fed. Reg. 74,495 (Dec. 8, 2008), at 2 ("The Commission should make compliance with these factors mandatory and should not accept complaints that fail to satisfy them."). We agree.

[19] MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1-2 (emphasis added). We note that, in MUR 4960, the Commission rejected OGC's recommendation to dismiss the matter as not warranting further action relative to other cases pending before the Commission and instead voted to find no reason to believe.

[20] MUR 5467 (Michael Moore), FGCR at 5 (citing MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.), Statement of Reasons at 3.).

[21] In this respect, the standard for finding reason to believe is higher than the Federal Rules of Civil Procedure 12(b)(6) standard– which allows discovery on virtually every complaint that states a potential legal or equitable claim. Under the Federal Rules, a complaint need only make "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. Rule 8(a)(2). Rule 12(b)(6) allows defendants to move to dismiss a complaint for a "failure to state a claim upon which relief can be granted." Under this standard, a court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom. A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief can be granted." *FEC v. Arlen Specter '96*, 150 F. Supp. 2d 797, 802-803 (E.D. Pa. 2001) (internal quotations and citations omitted).

Commission must identify the sources of information and examine the facts and reliability of those sources to determine whether they "reasonably [give] rise to a belief in the truth of the allegations presented."[22] Only once this standard is met may the Commission investigate whether a violation occurred.[23] These requirements are not met here.

### 2. Application of the Reason to Believe Standard

As in MUR 4960 (Hillary Clinton), the complaint in this matter lacked specific facts to establish reason to believe that Buck, his authorized committee, and Morgensen violated the Act. Instead, the complaint was based "upon information and belief," a phrase that appears at least once on every page. None of the allegations were based on personal knowledge and, with two exceptions, the complaint does not identify any source for its allegations, credible or otherwise. Moreover, Respondents sufficiently refuted the factual allegations made in the complaint. Thus, the Commission is required under the statute and its own regulations to find no reason to believe Respondents violated the Act.[24]

For our colleagues, however, Respondents' refutation of the complaint—not the deficiencies of the complaint itself—broke down upon closer inspection. For them, the complaint's allegations were inartful, but denials of the complaint's language were carefully worded and created suspicion that Respondents violated the Act. A review of the allegations they found problematic shows they demand too much. For example, our colleagues found potential for violations in each of the following:

- The complaint alleges that Morgensen was "upon information and belief, a member of the finance or fundraising committee of the Buck Committee."[25] In a sworn affidavit,

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[22] MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1. *See also, e.g.*, MUR 4545 (Clinton-Gore '96 Primary Committee, Inc.), FGCR at 17 ("While the available evidence is inadequate to determine whether the costs [associated with President Clinton's train trip to the Democratic National Convention in August 1996] were properly paid, the complainant's allegations are not sufficient to support a finding of reason to believe ...."). Likewise, in MUR 3534 (Bibleway Church of Atlas Road), OGC acknowledged that the complaint was "lengthy and rather disjointed," "voluminous and rambling ... consisting mostly of letters [written to numerous federal and state agencies requesting an investigation of the respondent]," cites to no specific statutory provisions which Respondents allegedly violated," and is "apparently based on" two allegations "buried deep within [the] complaint." MUR 3534 (Bible Church of Atlas Road), FGCR at 1-2. OGC nonetheless recommended a reason to believe finding. In rejecting OGC's recommendation, however, a unanimous Commission explained the "several reasons" supporting its decision, including that "the complaint was quite vague," "there was a lack of evidence," and "any investigation would require a significant amount of Commission resources and a thorough legal analysis of what statutes, if any, were violated by the alleged activity." *See* MUR 3534 (Bible Church of Atlas Road), Statement of Reasons of Chairman Scott E. Thomas, Vice Chairman Trevor Potter, and Commissioners Joan D. Aikens, Lee Ann Elliot, Danny Lee McDonald, and John Warren McGarry at 2.

[23] Despite several Commissions legislative recommendations, Congress has refused to lower the standard to "reason to investigate." *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007) (noting past legislative recommendations to "clarify" that reason to believe means reason to investigate).

[24] 2 U.S.C. § 437g(a)(1); 11 C.F.R. § 111.4.

[25] MUR 6296 (Buck for Colorado), Complaint at 2.

Morgensen responded that "I am not, nor have I ever been a member of the finance or fundraising committee of the Buck Committee."[26] Our colleagues argued that this denial may be evidence that he had a role in the campaign other than as a member of the finance or fundraising committee.

- The complaint alleges that, in some meetings with Buck and campaign consultants, Morgensen "confirmed that he was planning to 'invest' one million dollars or more in Buck's senate campaign."[27] In his sworn affidavit, Morgensen responded "I attended one meeting with Kenneth Buck and a prospective campaign consultant, but I did not make a statement or imply in any way that I would invest one million dollars or more in Buck's Senate campaign at this meeting or during any other meeting or conversation."[28] Our colleagues argued this denial may be evidence that Morgensen confirmed an intent to invest a sum of less than one million dollars.

- The complaint alleges that, "Upon information and belief, Buck has advised Morgensen and other potential donors who are financially able to contribute more than the maximum allowable contribution of $2,400 to make excess contributions to Declaration Alliance in care of John Hotaling."[29] In his sworn affidavit, Morgensen responded "I was never advised by Ken Buck to make contributions in excess of federal limits in care of Jon Hotaling or anyone else. Neither I nor Hensel Phelps has made any contributions in excess of federal limits for the benefit of Buck or the Buck campaign."[30] Our colleagues argued that this denial may be evidence that either someone other than Buck advised him to make excessive contributions, or he made excessive contributions even though no one advised him to do so.

A respondent cannot be required to guess what Commissioners are thinking when he denies the allegations of a complaint. Yet, it seems this is exactly what some Commissioners expect. They seem frustrated by the fact that the Commission is prohibited from asking respondents questions unless the Commission first finds reason to believe. But, as the Commission has already been warned, "mere 'official curiosity' will not suffice as the basis for FEC investigations."[31] As this matter illustrates, the Act's complaint requirements and limits on Commission investigatory authority serve no purpose if the Commission proceeds anytime it can imagine a scenario under which a violation may have occurred.

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[26] MUR 6296 (Buck for Colorado), Hensal Phelps and Morgensen Response, Affidavit of Jerry L. Morgensen, ¶3.

[27] MUR 6296 (Buck for Colorado), Complaint at 3.

[28] MUR 6296 (Buck for Colorado), Affidavit of Jerry L. Morgensen, ¶5.

[29] MUR 6296 (Buck for Colorado), Complaint at 3.

[30] MUR 6296 (Buck for Colorado), Affidavit of Jerry L. Morgensen, ¶7.

[31] *FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981). In comparing the FEC's investigative statutory authority to other agencies such as the SEC and FTC, the court stated "the FEC has no such roving statutory functions. On the contrary, investigations such as the one conducted here [an investigation into whether nine "draft Kennedy" committees were affiliated under the Act] may begin *only* if an individual first files a signed, sworn, notarized *complaint* with the Commission. The Commission's duty thereafter is 'expeditiously' to conduct a confidential investigation *of the complaint*." *Id.* (emphasis added).

### B. There Is No Basis to Find Reason to Believe that the Communications were Coordinated

Under the Act, no person may make a contribution, including an in-kind contribution, to a candidate and his or her authorized political committee with respect to any election for Federal office which, in the aggregate, exceeds $2,400.[32] The Act defines in-kind contributions as, *inter alia*, expenditures by any person made "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committee, or their agents ...."[33] A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent thereof if it meets a three-part test: (1) payment by a third-party; (2) satisfaction of one of four "content" standards; and (3) satisfaction of one of six "conduct" standards.[34]

Importantly, all three parts of the test must be satisfied; if one part is not satisfied the analysis ends.[35] There is no question that a third party paid for the ad. Although the complainant and OGC did not directly address the content standard, the ads that the complaint identifies do not meet the content standard. In our view the analysis should have ended there. However, even if the content standard had been met, the conduct standard was not.[36]

#### 1. The April 2010 Ad Did Not Meet the Content Standard

Under Commission regulations, the content standard is satisfied if the communication (1) meets the definition of electioneering communication; (2) "disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee"; (3) expressly advocates the election or defeat of a clearly identified candidate; or (4) in the case of a House or Senate candidate, references a clearly identified candidate and is publicly distributed or disseminated in that candidate's jurisdiction within 90 days of the candidate's primary, general, special, or runoff election.[37]

The ad at issue in the complaint aired in April 2010, more than 90 days before the primary election, which was held on August 10, 2010. Thus, the only factor relevant here is

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32 2 U.S.C. § 441a(a)(1)(A); *see also* 2 U.S.C. § 431(8)(a)(i); 11 C.F.R. § 100.52(d)(1).

33 2 U.S.C. § 441a(a)(7)(B)(i).

34 11 C.F.R. § 109.21.

35 For instance, if the communication does not contain content that meets one of the four content standards, then it does not matter whether there was conduct. Parties are free to collaborate on communications that do not meet the content standard.

36 In this instance, the failure to address the content standard would not have been a problem if our colleagues had agreed with OGC's conclusion that the conduct prong was not satisfied. Instead, our colleagues disagreed with OGC and were prepared to find reason to believe based on conduct alone.

37 11 C.F.R. § 109.21(c)(1)-(4).

whether the ad expressly advocates the election or defeat of a clearly identified candidate.[38] The following is a transcript of the ad:

> NARRATOR:
> It's coming.
> The favorite day of big government liberals – Tax Day.
> They want your money to take over healthcare and grow government.
> But Ken Buck's plan for Washington starts by getting tough on out-of-control spending.
> The DC insiders use your money for bailouts and bonuses while Colorado families struggle.
> Washington loves Tax Day but they [sic] despise conservative leaders like Ken Buck who stand up to their reckless spending.
> Call Ken Buck and tell him – keep fighting for taxpayers who've had it with big government spending and debt.
> Americans for Job Security is Responsible for the Content of this Advertising.

The Commission, in the wake of the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"),[39] and the Ninth Circuit's decision in *FEC v. Furgatch*,[40] attempted to define "express advocacy" by promulgating 11 C.F.R. § 100.22, which has been held unconstitutional by several courts.[41] The regulation, which for purposes of reaching our decision in this matter we assume *arguendo* to be constitutional and enforceable, provides that:

> Expressly advocating means any communication that:
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> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the

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[38] The other criteria are not met as the ad was not an electioneering communication; the ad did not reproduce, republish, or disseminate materials prepared by the campaign; and finally, the ad aired outside the relevant time window. *See* 11 C.F.R. § 109.21(c)(1)-(2), (4).

[39] 479 U.S. 238 (1986).

[40] 807 F.2d 857 (9th Cir. 1987), *cert. denied* 484 U.S. 850 (1987).

[41] *See Me. Right to Life Comm. v. FEC*, 914 F. Supp. 8, 12-13 (D. Me. 1995), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996) (per curiam), *cert. denied*, 118 S. Ct. 52 (1997) (Under 100.22(b), "what is issue advocacy a year before the election may become express advocacy on the eve of the election and the speaker must constantly re-evaluate his or her words as the election approaches."); *FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd* 92 F.3d 1178 (4th Cir. 1997) (unpublished) and *FEC v. Christian Action Network*, 110 F.3d 1049, 1052-54 (4th Cir. 1997) (concluding that "the entire premise of the court's analysis [in *Furgatch*] was that words of advocacy such as those recited in footnote 52 were required to support Commission jurisdiction," and that "[i]t is plain that the FEC has simply selected certain words and phrases from *Furgatch* that give the FEC the broadest possible authority to regulate political speech (*i.e.* 'unmistakable,' 'unambiguous,' 'suggestive of only one meaning,' 'encourage[ment]'), and ignored those portions of *Furgatch*...which focus on the words and text of the message." The court also imposed fees and costs on the Commission for its enforcement efforts.); *Va. Soc'y for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001) (finding 100.22(b) unconstitutional); *Right to Life of Duchess Co., Inc. v. FEC*, 6 F.Supp. 2d 248 (S.D.N.Y. 1998) (finding that "100.22(b)'s definition of 'express advocacy' is not authorized by FECA as that statute has been interpreted by the United States Supreme Court in *MCFL* and *Buckley*") (citations omitted). *See also* MUR 5831 (Softer Voices), Statement of Reasons of Commissioner Donald F. McGahn.

> Republican challenger for the U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified federal candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or
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> (b) When taken as a whole and with limited reference to external events, such as proximity to the election, could only be interpreted by a reasonable person as containing express advocacy of the election or defeat of one or more clearly identified candidate(s) because
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> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
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> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.[42]

The complaint did not allege the ads contained express advocacy under (a) or (b). And as stated earlier, OGC did not analyze the ads under the content standard. But, in order for our colleagues to have found reason to believe the ad in question was coordinated, they were required to determine that this ad constituted express advocacy.

Clearly, the communication does not contain so-called "magic words" of express advocacy, or otherwise come within the reach of section 100.22(a). Nor does it fall within section 100.22(b). The ad, which aired in April, concerned tax issues, and specifically referenced "Tax Day." It discussed how tax dollars are being used for bailouts and to fund large government programs, such as "healthcare," and to "grow government," while "Colorado families struggle." The ad noted that Buck's "plan for Washington" would be to control reckless spending, and concluded by encouraging viewers to call Buck and tell him to keep fighting against big government spending and debt.

Importantly, the ad does not exhort the public to vote for, campaign for, or contribute to Buck. It does not explicitly refer to Buck as a candidate or reference an election.[43] Rather, it discusses public policy issues and a public official's position on those issues, and asks viewers to contact that official and communicate their views. As the Ninth Circuit in *Furgatch* made clear, a message requires more than just "informative content" to constitute express advocacy —it must

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[42] 11 C.F.R. § 100.22.

[43] *See* Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5604 (Feb. 7, 2007) ("Express advocacy also includes exhortations 'to campaign for, or contribute to, a clearly identified candidate.'").

contain a clear call to electoral action.[44] This ad lacks such a call and a reasonable person could view this ad as encouraging actions other than to vote for Buck.

Our colleagues, however, appear to believe the communication contained express advocacy as defined under section 100.22(b). However, their reasons are unpersuasive. That the ad aired when Buck was running for Senate does not convert the ad into an express advocacy communication.[45] The government is simply not permitted to assume that listeners know that Buck is a candidate and, from there, conclude that this ad was run to promote his candidacy. In fact, the Supreme Court has made clear that the Commission may not look to the subjective intent of a speaker or impressions of the viewer in determining whether or not a communication contains express advocacy.[46] This approach also improperly shifts the burden to the speaker to prove that the advertisement is not express advocacy even though the communication references a candidate for federal office.

Further, under section 100.22(b), it is not enough to conclude that an ad contains an "electoral portion" simply because a person identified in an ad, which is run in close proximity to a federal election, may be a candidate.[47] The regulation only reaches communications that "when taken as a whole and with limited reference to external events, such as proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election



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[44] *Furgatch*, 807 F.2d at 864 ("First, even if it is not presented in the clearest, most explicit language, speech is 'express' for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed 'advocacy' if it presents a *clear plea for action*, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be 'express advocacy of the election or defeat of a clearly identified candidate' when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.") (emphasis added); *see also California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) ("Furgatch... presumed express advocacy must contain some explicit *words* of advocacy.") (emphasis in original).

[45] This context-specific approach is similar to the multi-factor balancing tests that the Court rejected in *FEC v. Wisconsin Right to Life* ("*WRTL*"), 551 U.S. 449, 467-68 (2007) and *Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010) ("In fact, after this Court in WRTL adopted an objective 'appeal-to-vote' test for determining whether a communication was the functional equivalent of express advocacy, FEC adopted a two-part, 11-factor balancing test to implement *WRTL's* ruling."); *see also Leake*, 525 F.3d at 283 ("This sort of ad hoc, totality of the circumstances-based approach provides neither fair warning to speakers that their speech will be regulated nor sufficient direction to regulators as to what constitutes political speech.").

[46] The Court in *WRTL* rejected intent- or effect-based tests. 551 U.S. at 468-69 (declining to adopt a test turning on "speaker's intent to affect an election" or the effect speech has on a communication's audience). Specifically, the Court held that "an intent-based test would chill core political speech by opening the door to a trial on every ad...on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. . ." and a test based on the effect speech has on an election or audience "puts the speaker ... wholly at the mercy of the varied understanding of his hearers." *Id.* at 469.

[47] For purposes of this discussion, we need not reach the problems inherent in focusing on the so-called "electoral portion" of a communication. *See* MUR 5831 (Softer Voices), Statement of Reasons of Commissioner Donald F. McGahn at 13 ("Is not divining a communication's 'electoral portion' a self-fulfilling prophecy—after all, once a regulator declares part of a communication to be the 'electoral portion,' how could that portion be read any way other than as 'electoral' and thus sufficiently election-related to constitute express advocacy under the regulation?").

or defeat of one or more clearly identified candidates(s) *because ... the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning.*"[48] Moreover, the regulation also requires that one determine whether "reasonable minds could not differ as to whether [the electoral portion] encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."[49] Thus, the fact that Buck was a candidate is not enough.

The other argument offered is that Buck's "plan for Washington" constituted the electoral portion because Buck, as a local district attorney, would have no reason to fight for ending bailouts or lowering federal taxes, or otherwise discuss other federal issues. Thus, there would be no reason for him to have a "plan for Washington." But having a "plan for Washington" does not constitute a discernable electoral portion that is "unmistakable" and "unambiguous" and suggestive of only one meaning – to vote for Buck. Any individual, including a local district attorney, is free to have policy positions and publicize them. One does not need to be a federal candidate to do so. And, as noted above, the ad contains no mention of an election or Buck's candidacy. Rather, it addresses the issue of taxes, with the only call to action being a request to contact Buck and tell him to "keep fighting for taxpayers who've had it with big government spending and debt." We simply are not permitted to intuit the reasoning behind the communication, but rather, with limited reference to context, must address only the four corners of the ad. And here, the plain language of the communication simply does not include express advocacy.



Thus, the AJS ad does not contain express advocacy under section 100.22, meaning the content prong of the coordination rule was not met. Therefore, there is no reason to believe the ad constituted a prohibited coordinated expenditure and in-kind contribution to Buck or the Buck committee.

### 2. The Conduct Standard is Not Satisfied Because There Is No Factual Basis to Believe that Morgensen Had Actual Authority from Buck

Even if the content prong had been met (which, as shown above, it was not), the ad at issue still would not have been a coordinated communication because the conduct prong was not satisfied either. The Commission's coordination regulations apply not only to the candidate and his or her authorized committee (or principals), but also to their agents. An "agent" is defined as any person who has *actual authority*, either express or implied, to engage in certain enumerated activities on behalf of a federal candidate, including *inter alia*:

(1) to *request or suggest* that a third-party create the communication;
(2) to make or authorize a communication that meets one or more of the content standards set forth in 11 C.F.R. § 109.21(c);
(3) to request or suggest that any other person create, produce, or distribute any communication; or

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[48] 11 C.F.R. § 100.22(b) (emphasis added).

[49] *Id.*

(4) to be *materially involved* in the decisions regarding content, intended audience, means or mode of the communication, specific media outlet used, the timing or frequency, or the size or prominence of a written communication or duration of a broadcast, cable, or satellite communication.[50]

There is no allegation that Buck directly coordinated with AJS, and OGC correctly concluded that the complaint lacked any specifics that could establish or suggest that Morgensen was acting as an agent of Buck or the Buck campaign. The only potential link between the Buck campaign and AJS is the possibility that Morgensen contributed to both groups, which is perfectly legal.[51] There is no support for the complaint's allegation that Morgensen worked for or volunteered on behalf of the Buck campaign. Certainly, attendance at one meeting and phone records from a year before the ads even aired do not establish that fact. Moreover, even if Buck instructed Morgensen to give to AJS (and there is no evidence he did), it is still not sufficient to establish that Morgensen had actual authority, express or implied, to act on behalf of the Committee.

Our colleagues, however, suggested that OGC followed an overly formalistic approach to determining whether Morgensen acted as an agent. They argued that OGC relied too heavily on Morgensen's attestation that he was not a member of the finance committee, and opined instead that there were other ways he could have been an agent of the Buck campaign. They found probative Morgensen's and Buck's friendship, frequent phone calls, and press accounts stating they attended meetings together as evidence that Morgensen may be an agent of Buck or his campaign. For those reasons, our colleagues argued that a very short investigation was required to simply ask the question. But the Act does not allow us to open an investigation to ask questions or to determine whether a reason to believe finding is warranted. Instead, the Act permits the Commission to commence an investigation only if it first finds reason to believe a violation of the Act occurred or is about to occur. Thus, we cannot open a federal investigation just to ask a few questions when the complaint has provided no evidence to support any of its accusations and the Respondents have provided sufficient responses to those allegations. In such an instance as we have here, there simply is no reason to believe a violation has occurred.

Moreover, even if Morgensen had "apparent authority" to act on behalf of Buck or the Buck Committee (and there are no facts to suggest he did), such a relationship between an individual and a committee is not sufficient to trigger coordination under the Commission's definition of "agent." The Commission considered whether to include "apparent authority" in the definition of agent and declined to do so.[52] Therefore, even if the facts supported an agency

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[50] 11 C.F.R. § 109.21(d)(2)-(5) (emphasis added).

[51] The allegation by the complainant that a consultant for the Buck campaign had advance knowledge and information about the AJS ad is sufficiently refuted because information about the media buy was publicly available.

[52] The Commission deliberately excluded apparent authority from the definition of "agent" because "it would expose principals to liability based solely on the actions of a rogue or misguided volunteer and 'place the definition of 'agent' in the hands of a third party.'" *See* Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975 (Jan. 31, 2006); Advisory Opinion 2003-10 (Reid) at 3 ("The Commission made clear that under BCRA, the definition of agent 'does not apply to individuals who do not have any actual authority to act on their [principal's] behalf, but only 'apparent

theory based on apparent authority, that would not be enough to find a violation of the Act occurred.

Simply put, there are no facts to suggest that Morgensen had any kind of actual authority, express or implied, to act as an agent for Buck or Buck's Committee.[53] Thus, the conduct standard is not met and, as a result, there is no reason to believe Buck, the Buck Committee, Morgensen, and AJS violated the Act.

## III. Conclusion

For the foregoing reasons, we supported the Office of General Counsel's recommendations to find no reason to believe Respondents violated the Act.



authority' to do so.'") (quoting Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,082 (July 29, 2002)).

[53] This holds true for the AJS ad that aired in July 2010, as well. Our colleagues voted to find reason to believe respondents violated the Act with respect to this ad—an allegation not made in the complaint because the ad aired after the complaint in this matter was filed. Even assuming *arguendo* that the July ad meets the content standard because it aired within 90 days of the primary election, for the reasons set forth above, we do not agree that there is reason to believe the conduct standard was met so as to make that ad coordinated.

CAROLINE C. HUNTER
Vice-Chair

6/14/2011
Date

DONALD F. McGAHN II
Commissioner

6/14/2011
Date

MATTHEW S. PETERSEN
Commissioner

6/14/2011
Date