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November 29, 2010

Christopher Hughey
General Counsel
Federal Eleetion Commission
999 E Street, NW, 6th Floor
Washington DC 20463

Re: MUR 6394

Dear Mr. Hughey:

This constitutes the response of Pingree for Congress, Anne Rand, as Treasurer, Rochelle M. Pingree, and Magic Carpet Enterprises LLC (collectively, the "Respondents") to the complaint filed by the Maine Republican Party (the "Complainant") on October 6, 2010. For the reasons set forth below, this complaint should be dismissed.

I. Factual Background

On September 13, 2010, Congresswoman Rochelle M. Pingree took a personal trip from Portland, Maine to White Plains, New York with her fiancé, Donald Sussman. The couple flew on a jet (hereinafter, "the jet") owned by Magic Carpet Enterprises, LLC, a limited liability company owned entirely by Mr. Sussman. The jet took off from Portland and landed at the Westchester County Airport in White Plains, New York at 1:20 p.m. (hereinafter, "Flight 1").

The purpose of the trip was personal. Due to their busy schedules, it is not uncommon for Mr. Sussman (who often has meetings in New York) and Ms. Pingree to fly to New York together for an afternoon or evening, so that they can have extra time together before Ms. Pingree returns to Washington D.C. These trips also offer Ms. Pingree an opportunity to visit with her son and grandson, who both live in New York. On September 13, 2010, Mr. Sussman had a personal meeting in New York that he wanted Ms. Pingree to attend with him. After attending this meeting, Ms. Pingree visited with her son and grandson. Finally, at the end of the day, Ms. Pingree went to a campaign fundraiser on the East Side of Manhattan. After the fundraiser ended, Mr. Sussman and Ms. Pingree drove back to the Westchester County Airport, arriving in time to take a 9:22 p.m. flight to Dulles International Airport (hereinafter, "Flight 2").

II. Legal Discussion

The Complainant alleges that, by traveling on the jet on September 13, 2010, Ms. Pingree violated the Honest Leadership and Open Government Act ("HLOGA").

This allegation is without merit. When assessing whether a flight is subject to HLOGA, the key question is whether the cost of the flight constitutes a campaign "expenditure" under the Federal Election Campaign Act of 1971, as amended (the "Act"). Because the primary purpose of the trip was personal, and because Mr. Sussman would have invited Ms. Pingree to accompany him irrespective of her candidacy, the cost of Flights 1 and 2 was *not* an "expenditure" under the Act.

Any other conclusion would be contrary to Commission precedent. In 2002, the Commission concluded that a flight from the candidate's hometown to Washington D.C. was not a campaign "expenditure" – even though the candidate planned to engage in campaign activity while in Washington D.C. – because the primary purpose of the trip was not campaign-related and the candidate would have taken the flight irrespective of her candidacy.[1] The same rule governs here. Because the cost of Flights 1 and 2 was not an "expenditure," HLOGA does not apply. Consequently, the complaint should be dismissed.[2]

A. The HLOGA regulations apply only to flights on noncommercial aircraft, when the cost of the flights constitutes an "expenditure" under the Act.

HLOGA – and the Commission's regulations implementing it (hereinafter, the "HLOGA regulations") – generally prohibit "House candidates, their authorized committees, and their leadership PACs from *making any expenditure* for noncommercial travel on aircraft."[3] HLOGA's requirements "apply only to travel *expenditures* of federal candidates, their authorized committees, House leadership PACs, and other political committees making in-kind contributions to federal candidates in the form of travel payments."[4] They do not apply to

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[1] *See* Advisory Opinion 2002-5 (Hutchinson).

[2] The complaint does not name Magic Carpet Enterprises as a Respondent. The Commission's letter to Magic Carpet Enterprises dated October 15, 2010 states that "the Federal Election Commission received a complaint that indicates that Magic Carpet Enterprises may have violated the Federal Election Campaign Act of 1971, as amended ("the Act")." The letter does not specify which provision in the Act that Magic Carpet Enterprises may have violated. This makes it difficult for Magic Carpet Enterprises to formulate a response to the letter. Because the cost of the flights was not an "expenditure" under the Act, however, neither flight was subject to the restrictions or limitations of the Act. Consequently, the complaint against Magic Carpet Enterprises should be dismissed.

[3] *See* Campaign Travel, 74 F.R. 63951, 63952 (Dec. 7, 2009) (emphasis added).

[4] *See* Commissioner Matthew Petersen, FEC Implemented Congress' Vision on Travel Rules, Roll Call (Dec. 1, 2009), *available at* http://www.rollcall.com/issues/55_62/-40988-1.html (last visited on November 22, 2010) (emphasis added).

personal travel.

B. When determining whether a travel expense is an "expenditure", the "personal use" regulations govern.

In 1977, the Commission promulgated regulations governing so-called "mixed purpose travel," *e.g.* travel that had both campaign and non-campaign purposes. Under these regulations, each trip was divided into "campaign-related" and "non-campaign related" stops. The cost of the trip was then "calculated on the actual cost-per-mile of the means of transportation actually used, starting at the point of origin of the trip, via every campaign-related stop and ending at the point of origin."[5] The expenses allocable to "campaign-related" stops were treated as reportable "expenditures." Notably, if a candidate conducted any campaign-related activity in a stop, the stop was considered "campaign-related" and *all* travel expenditures to and from that stop would be treated as reportable expenditures.[6] For these purposes, where a candidate made one "campaign-related" appearance in a city, the trip to that city was considered "campaign-related."[7]

At the time the Commission issued these regulations in 1977, the Act permitted Federal candidates to convert campaign funds to personal use. Under the 1977 regulations, for example, a candidate could use campaign funds to pay for travel to or from any "campaign-related stop," regardless of how much personal activity took place at that stop.[8] However, over the next decade, Congress amended the Act to forbid the conversion of campaign funds to personal use.[9]

In response to Congress' clear directive, the Commission promulgated new regulations in 1995. These regulations took a different approach to "mixed purpose" travel. Rather than assign each stop an explicit "campaign" or "non-campaign" purpose, these regulations mandate that "[i]f a committee uses campaign funds to pay expenses associated with travel that involves both personal activities and campaign or officeholder-related activities, the incremental expenses that

[5] 11 C.F.R. § 106.3(b)(2).

[6] 11 C.F.R. § 106.3(b)(3). However, "[c]ampaign-related activity shall not include any incidental contacts." *Id.*

[7] *See* Explanation and Justification of the Disclosure Regulations (Jan. 12, 1977), at 50. *See also* Advisory Opinions 1992-34 (Castle) and 1994-37 (Schumer).

[8] *See* Advisory Opinion 2002-5 (noting that without considering the personal use regulations, "the regulations at 11 CFR 106.3(b)(3) [would] seem to require that, rather than just a portion, the entire amount of the travel expenses for the trip would be considered campaign related, unless the campaign related portion is incidental.").

[9] *See* 2 U.S.C. § 439a(b)(1) ("A contribution or donation described in subsection (a) shall not be converted by any person to personal use.").

result from the personal activities are personal use."[10]

In 2002, the Commission was asked, for the first time, to reconcile these two sets of regulations. Ann Hutchinson, the Mayor of Bettendorf, Iowa and a U.S. House candidate, was planning to travel to Washington D.C. as part of a four-city mayoral delegation to meet with elected officials regarding local issues. In addition to attending these meetings in her mayoral capacity, Mayor Hutchinson also planned to engage in campaign activity (*e.g.* meet with Democratic Party officials regarding her candidacy) and personal activity (*e.g.* engage in sightseeing) while in Washington D.C.

Under the 1977 regulations, the *entire* cost of Mayor Hutchinson's trip – including the airfare to and from Washington D.C. – could have been treated as an "expenditure" to be paid with campaign funds, even though the primary purpose of the trip was not campaign-related. In Advisory Opinion 2002-5, however, the Commission determined that such an outcome would be inconsistent with the "personal use" restrictions, because it would result in campaign funds being used to pay for non-campaign activities:[11]

> Section 106.3(b)(3) and the advisory opinions applying the regulation predate the current personal use regulations. It is significant that section 106.3, promulgated in 1977, reflects a policy which was also less restrictive regarding the personal use of campaign funds. This personal use approach was substantially altered in 1995 when the Commission adopted the current personal use regulations at Part 113. ***Therefore, when applying 11 CFR 106.3(b)(3), the Commission's more recent policy concerns and interpretations regarding the personal use prohibition must be given greater significance.***

Ultimately, the Commission concluded that "rather than treating [an] entire trip as campaign related pursuant to 106.3(b)(3), the approach in section 113.1(g) would be incremental."[12]

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[10] 11 C.F.R. § 113.1(g)(1)(ii)(C). The "increased costs would be calculated by determining the cost of a fictional trip that includes only the campaign and officeholder related stops, that is, a trip that starts at the point of origin, goes to every campaign related or officeholder related stop, and returns to the point of origin. The difference between the transportation costs of this fictional, campaign related trip and the total transportation costs of the trip actually taken is the incremental cost attributable to the personal leg of the trip." Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 F.R. 7862, 7869 (Feb. 9, 1995).

[11] *See* Advisory Opinion 2002-5 (emphasis added).

[12] *Id.* As the Commission has made clear, previous opinions addressing section 106.3(b) are likely obsolete. *See id.*, n. 7 (noting that "[a]n incremental approach toward travel expenses of trips with multiple purposes departs from the interpretation of 11 CFR 106.3(b)(3) in Advisory Opinions 1992-34 and 1994-37. Therefore, the portions of these two opinions dealing with section 106.3(b)(3) that are inconsistent with the analysis adopted in this opinion are hereby superseded.").

Because it has not been superseded by any subsequent advisory opinions, Advisory Opinion 2002-5 provides the most appropriate framework with which to analyze Flights 1 and 2.

C. Because the primary purpose of Ms. Pingree's trip was not campaign-related and because Mr. Sussman would have paid for the flight irrespective of Ms. Pingree's candidacy, the cost of Flights 1 and 2 did not constitute an "expenditure."

When a third party pays for a personal expense that would have existed irrespective of candidacy, the Commission applies section 113.1(g)(6) to determine whether the payment is a campaign "expenditure." This section of the regulations – known as the "third party payment" provision – states that "[n]otwithstanding that the use of funds for a particular expense would be a personal use ... payment of that expense by any person other than the candidate or the campaign committee shall be a contribution ... *unless the payment would have been made irrespective of the candidacy.*"[13] As the Commission noted in 2008, the "third-party payment provision asks whether the payment would have been made by the third party irrespective of the Federal candidate's candidacy for office. In other words, would the third party pay the expense if the candidate was not running for Federal office? If the answer is yes, then the payment does not constitute a contribution."[14]

In Advisory Opinion 2002-5, the Commission applied this test to determine whether Bettendorf, Iowa – rather than Mayor Hutchinson's campaign – could pay for the flight from Washington D.C. to Iowa. Noting that a "a slightly different approach would apply to the cost of the actual airfare to Washington," the Commission determined that "[b]ecause the airfare represents a defined expense that would have existed irrespective of any personal or campaign related activities, the entire cost of the ticket may be paid for by City with no obligation by Ms. Hutchinson or her campaign committee to reimburse the City."[15] In other words, because the third party would have paid for the flight irrespective of Mayor Hutchinson's candidacy, it was not a campaign "expenditure" and did not have to be paid with campaign funds.

Likewise, because the cost of Flights 1 and 2 would have existed irrespective of the campaign fundraiser, it was not an "expenditure." The purpose of the September 13, 2010 trip was personal in nature. Mr. Sussman and Ms. Pingree are engaged to be married. Since their relationship began, Mr. Sussman and Ms. Pingree have traveled on the jet on numerous occasions for personal reasons, including several trips to the New York area. On September 13, 2010, Mr. Sussman had a personal meeting in New York that he wanted Ms. Pingree to attend

[13] 11 C.F.R. § 113.1(g)(6) (emphasis added).

[14] *See* Advisory Opinion 2008-17 (KITPAC).

[15] *See* Advisory Opinion 2002-5.

with him. Ms. Pingree also wanted to visit with her son and grandson, as she typically does when she is in New York. Because Mr. Sussman allowed Ms. Pingree to fly on the jet for non-campaign purposes on many occasions prior to September 13, 2010, there is no doubt that Mr. Sussman would have asked Ms. Pingree to join him on his September 13, 2010 trip – and that Ms. Pingree would have accepted this invitation – even if there had been no fundraiser on her schedule.[16]

Just as Mayor Hutchinson did not have to use campaign funds to pay for the flight to Washington D.C., Ms. Pingree was not required to use her campaign funds to pay for Flight 1 or Flight 2. Consequently, the cost of the flights was not an "expenditure" and the HLOGA regulations do not apply.

D. The House Ethics Rules further limit the extent to which Members can accept free air travel for non-campaign purposes.

By allowing Members to fly on noncommercial aircraft for non-campaign purposes, the Commission is not at risk of inadvertently undermining the HLOGA regulations. Under House Ethics Rules, Ms. Pingree is able to accept free travel on the jet, only because she is Mr. Sussman's fiancée.[17] In most instances, the House Ethics Rules would prohibit Members from accepting free travel on noncommercial aircraft for non-campaign purposes.

In its letter to Ms. Pingree, for example, the Standards Committee wrote:[18]

> Accordingly, a House Member, officer, or employee may accept an unlimited number of gifts, of any dollar value, from the individual's fiancé. The exception would permit the acceptance of unlimited gifts of transportation, including travel by private aircraft, where the donor is the fiancé of the recipient.

The letter made clear however, that if Mr. Sussman were *not* Ms. Pingree's fiancé – and the flights did not qualify for another exception – the flights would have been impermissible under the House Ethics Rules.[19]

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[16] *See, e.g.*, 11 C.F.R. § 113.1(g)(6)(iii) (noting that payments would not be considered "contributions" or "expenditures" if "[p]ayments for that expense were made by the person making the payment before the candidate became a candidate.").

[17] The House Committee on Standards of Official Conduct confirmed this in an informal opinion issued to Ms. Pingree in 2009 and again in a formal written opinion issued on September 24, 2010.

[18] *See* Letter from Reps. Zoe Lofgren and Jo Bonner to Rep. Chellie Pingree (Sept. 24, 2010), *available at* http://www.bangordailynews.com/external/Pingree/standardscommittee.house.gov.pdf.

[19] *Id.*, citing House Rule 25, cl. 5(a)(1)(A)(i).

When viewed in tandem, the HLOGA regulations and the House Ethics Rules prevent Members from accepting a flight on noncommercial aircraft unless (i) the cost of the flight is not an "expenditure" under the campaign finance laws *and* (ii) the offer of the flight is exempt from the restrictions in House Rule 25. The instances in which a flight satisfies both of these criteria – as both Flight 1 and Flight 2 do – are likely to be rare. Thus, by allowing Members to fly on noncommercial aircraft with their relatives for non-campaign purposes, the Commission is not at risk of inadvertently undermining the HLOGA regulations.

III. Conclusion

The HLOGA regulations do not prohibit a U.S. House candidate from taking a personal trip on a noncommercial aircraft. Because the cost of Flights 1 and 2 was not an "expenditure" by Ms. Pingree's campaign, the HLOGA regulations are inapposite. Consequently, this complaint should be dismissed.

Very truly yours,

Marc E. Elias

cc: Frankie D. Hampton, Paralegal
Complaints Examination and Legal Administration