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General Counsel's Office

December 10, 2010

By Hand Delivery

Christopher Hughey, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6411

Dear Mr. Hughey

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FEDERAL ELECTION
COMMISSION
2010 DEC 10 PM 3:29
OFFICE OF GENERAL
COUNSEL

This submission on behalf of American Federation of State, County & Municipal Employees PEOPLE and Lee A. Saunders, as treasurer (collectively, "Respondent" or "AFSCME PEOPLE"), responds to the October 22, 2010 complaint filed by Let Freedom Ring, Inc. ("Complainant").

Complainant alleges that because AFSCME PEOPLE's October 2010 independent expenditures were made after the publication of news stories wherein Members of Congress and their staff were quoted expressing frustration at the lack of third-party spending for Democrats, AFSCME PEOPLE's expenditures resulted from a request or suggestion described at 11 C.F.R. § 109.21(d)(1), and, thus, constitute coordinated communications as defined at 11 C.F.R. § 109.21. As explained below, the complaint lacks sufficient facts to allege a violation of a statute or regulation, 11 C.F.R. § 111.4(d)(3), and the facts that are alleged – if true – provide no basis for a reason to believe finding by the Commission. Furthermore, the actual facts contradict Complainant's unsubstantiated assertions that Respondent's communications resulted from a request or suggestion that would cause them to be "coordinated communications."

A. The Complaint Lacks Sufficient Facts to Allege a Violation and Is Insufficient to Warrant a Reason to Believe Finding.

The Commission may find reason to believe only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation. See C.F.R. §§ 114(a), (i). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation. See Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, MUR 4960 (Dec. 21, 2001).

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The complaint alleges, based on news reports published in *Roll Call* on September 17, 2010 and in *Politico* on September 22, 2010, that: (1) in September 2010, some Democratic House Members were frustrated by the lack of third-party spending to support their re-election efforts; (2) this frustration was conveyed to Speaker Nancy Pelosi and Congressman John Larson; (3) an anonymous source quoted Pelosi telling Democratic freshmen Members of Congress, "I'm saying get out there," and "[w]e need more;" (4) that Larson expressed "hope and trust that people inclined to support us will get out there and do the job that's going to need to be done"; (5) Larson says "they" ask groups on a "regular basis" to get involved in the effort to support Democrats; and (6) these statements amount to requests or suggestions that third-parties create, produce or distribute communications. See Complaint at 2 - 3.

Further, the complaint alleges that "[a]ll expenditures by third-party Respondents following the demands of Pelosi and her henchmen are illegal in-kind corporate and union contributions to the campaigns of the aforementioned Democratic candidates."¹ See Complaint at 7. Yet, the complaint is devoid of specific facts that would, if proven true, give rise to a violation of either the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, as amended ("FECA" or "the Act") or the Commission's regulations by AFSCME PEOPLE.

1. Complainant Does Not Allege, and No Evidence Indicates, that Any Person Covered By § 105.21(d)(1) Ever Directed Any Request or Suggestion to AFSCME PEOPLE.

With respect to AFSCME PEOPLE, the only specific fact Complainant offers in support of this allegation is the fact that AFSCME PEOPLE increased its independent expenditure activity after the reports in *Roll Call* and *Politico*.² See Complaint at 5. Complainant offers no evidence - and does not even allege - that Pelosi, Larson or any other candidate, candidate's committee, political party committee or an agent of any of those ever contacted AFSCME PEOPLE (or its connected organization) to request or suggest that it create, produce or distribute a communication referring to any candidate or political party. There is no mention of AFSCME PEOPLE in either the *Roll Call* or *Politico* story, and certainly no reasonable inference can be drawn from either of those stories that any candidate, candidate's committee, political party committee or an agent of any of those ever contacted AFSCME PEOPLE with a request or suggestion that it fund any communication.

To the extent that Complainant intends to allege that the *Roll Call* and *Politico* stories themselves constitute requests or suggestions that AFSCME PEOPLE or some other person create, produce or distribute a communication, the allegation is insufficient to establish a

¹ In fact, Respondent AFSCME PEOPLE is neither a corporation nor a union. Instead, it is a political committee described at 11 C.F.R. § 100.5(b), and its funds are comprised of voluntary contributions from AFSCME's rank-and-file. Thus, even assuming AFSCME PEOPLE's expenditures were coordinated communications - they are not - they could not constitute "illegal in-kind corporate [or] union contributions" as alleged by Complainant.

² There is nothing unusual about an organization increasing its election-related spending as the election approaches. As the Commission is well aware, most television and radio ads referencing candidates run in the time period leading up to an election. See Opp. Br. of Defs. at 97, *McConnell v. FEC*, 251 F.Supp.2d.175 (D.D.C. 2003).

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violation of the Act or the Commission's regulations.³ As the Commission explained in its *Explanation and Justification* for 11 C.F.R. § 109.21(G)(1), the request or suggestion conduct standard is not intended to cover requests or suggestions made to the general public, but only those that are made directly to a discrete group or select audience, such as during a speech at an invitation-only dinner. See *Explanation and Justification*, 68 Fed. Reg. 432 (Jan. 3, 2003).

AFSCME PEOPLE made independent expenditures in 4 congressional districts (MI-7, OH-16, PA-3 and PA-8) after the publication of the *Roll Call* and *Politico* reports.⁴ It is important to note that none of the candidates running in any of those districts is mentioned in either the *Roll Call* or *Politico* stories, and it is not alleged, nor is there any evidence, that any of the candidates in those 4 congressional districts or their committees (or an agent of either) ever requested or suggested that AFSCME PEOPLE or any other person create, produce or distribute any communication.

2. Complainant Does Not Allege, and No Evidence Indicates, that Pelosi or Larson Is an Agent of Any Other Candidate.

Even if Pelosi or Larson did request or suggest that some third party create, produce or distribute a communication satisfying the content prong of 11 C.F.R. § 109.21 and which was distributed in a congressional district other than Pelosi's or Larson's, the request or suggestion would not cause a resulting communication to be a coordinated communication unless the requestor or suggestor was the agent of the candidate (or of the opponent of the candidate) referenced in the communication. See *Explanation and Justification*, 68 Fed. Reg. 431 (Jan. 3, 2003) ("Where Candidate A requests or suggests that a third party pay for an ad expressly advocating the election of Candidate B, and the third party publishes a communication with no reference to Candidate A, no coordination will result between Candidate B and the third party payor. However, if Candidate A is an 'agent' for Candidate B... then the communication would be coordinated.").

Complainant never alleges that Pelosi or Larson has "actual authority, either express or implied," to act on behalf of any other candidate. See 11 C.F.R. § 109.3. According to the *Roll Call* story cited in the complaint, by the time Congressman Larson is presented with complaints about third-party spending, he responds that he asks groups to "get involved" on a "regular basis." Likewise, according to the *Politico* story, Pelosi's response to the complaints was that

³ This is the case even assuming that the statements attributed to Pelosi, Larson and others in the *Roll Call* and *Politico* reports (both of which are chock-a-block with anonymous sources) are accurate. To express "hope and trust that people will get out there and do the job that's going to need to be done," or to "ask groups on a 'regular basis' to get involved in the effort to support Democrats this election," Complaint at Att. 1, does not amount to requesting or suggesting that any person create, produce or distribute a public communication referring to a clearly identified candidate or political party. See 11 C.F.R. § 109.21. Nor do the statements "I'm saying get out there," or "[w]e need more." Complaint at Att. 2. Instead, even if it is true that Pelosi was "trying to get allied liberal groups to give House Democrats some air cover," Complaint at id., this does not mean Pelosi was suggesting or requesting that a group make any communication that would satisfy the content prong of 11 C.F.R. § 109.21.

⁴ Attachment 2 to the Complaint states that AFSCME PEOPLE made a \$750,000 independent expenditure on October 6, 2010 to oppose Reid Ribble in Wisconsin's 8th congressional district. AFSCME PEOPLE did not make any such expenditure. Rather, AFSCME made that independent expenditure. See FEC filing 496966.

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she was already telling groups "we need more." Both of these stories suggest that the Democrats lodging the complaints were unaware that Pelosi and Larson had already been encouraging third parties to "get involved" or "get out there," implying that if any request or suggestion was made by Pelosi and Larson, it was made while acting without actual authority.

Even assuming *arguendo* that Pelosi and/or Larson was an "agent" of some candidate, there is not a scintilla of evidence offered, nor is it even alleged, that Pelosi and/or Larson was the "agent" of a candidate on the ballot in one of the 4 congressional districts where AFSCME PEOPLE made independent expenditures.

Complainant has failed to recite any facts demonstrating that a candidate, candidate's committee, political party committee (or an agent of one of those) ever requested or suggested that AFSCME PEOPLE create, produce or distribute any communication, or that any of AFSCME PEOPLE's communications resulted from such a request or suggestion. Furthermore, Complainant has offered no evidence to show that even if Pelosi or Larson had made a request or suggestion of some third-party, they did so as an agent of *any* candidate, much less one of the candidates in the 4 congressional districts where AFSCME PEOPLE made independent expenditures. Because the Complaint fails to set forth specific facts alleging that AFSCME PEOPLE's independent expenditures resulted from a request or suggestion described at 11 C.F.R. §109.21(d)(1), Complainant's allegation that AFSCME PEOPLE's independent expenditures are coordinated is not credible, and Complainant's legal conclusions result from mere speculation and are unwarranted. Thus, the complaint fails to give rise to a reasonable inference that a violation has occurred. For this reason, the Commission should find that there is no reason to believe that AFSCME PEOPLE has violated the Act or the Commission's regulations. See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545-6 (Mar. 16, 2007).

B. AFSCME PEOPLE's Independent Expenditures Were Not Coordinated Communications:

The facts plainly demonstrate that the communications funded by AFSCME PEOPLE were not coordinated with any candidate, candidate's committee, political party committee or an agent of any of those. First, to ensure that neither AFSCME's nor AFSCME PEOPLE's public communications for the 2010 elections would be coordinated with any Federal, state or local candidate or political party, AFSCME established a staff firewall policy in accordance with 11 C.F.R. § 109.21(h).⁵ Second, the fact that AFSCME PEOPLE's independent expenditures were made after the publication of the *Roll Call* and *Politico* stories cited by Complainant was a result of budgetary planning, not a result of a request or suggestion described at 11 C.F.R. § 109.21.

⁵ This firewall policy is described in Attachments 1 and 2⁵ attached hereto.

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1. All Material Decisions Regarding AFSCME PEOPLE's Independent Expenditures Were Made By An Individual Subject to AFSCME's Firewall Policy.

On March 2, 2010, four AFSCME employees were assigned to work on the AFSCME/AFSCME PEOPLE Independent Expenditure Program ("IEP").⁶ See Attachment 2 at 1. The IEP included all communications to the general public funded by either AFSCME or AFSCME PEOPLE. See Attachment 2 at 2. Persons assigned to the IEP were prohibited from, among other things, communicating with candidates, candidate committees, political party committees (and any agent of those), or with any AFSCME officer, staff member, affiliate officer, affiliate staff member or AFSCME consultant not assigned to the IEP regarding any non-public information about any candidate's campaign plans, projects, activities or needs, or about any non-public information regarding IEP communications. See Attachment 2 at 2-3, Attachment 1 at 2.

Further, AFSCME employees assigned to the IEP were prohibited from conducting any IEP work as a result of any request or suggestion of a candidate, a candidate's committee, a political party or an agent of any of those. See Attachment 2 at 3. They were also prohibited from tailoring any aspect of an IEP communication in response to any request or suggestion of any candidate, candidate's committee, political party or an agent of one of those. See Attachment 2 at id.

Richard "Ricky" Feller was assigned to administer the IEP program. See Feller Decl. at 2. Mr. Feller was assisted in managing the day-to-day operations of the IEP by Seth Johnson, and Mr. Feller and Mr. Johnson reported to Paul Booth for the purpose of receiving approval for the expenditure of AFSCME or AFSCME PEOPLE funds. See Attachment 1 at 1. However, it was Mr. Feller's responsibility to select the Federal, state and local races where AFSCME and/or AFSCME PEOPLE would make IEP communications relating to the 2010 elections. See Feller Decl. at 3. In particular, it was Mr. Feller who decided that AFSCME PEOPLE would make the communications complained of in this matter, and he was responsible for approving all material aspects of these communications. See Feller Decl. at 3. While making these decisions, Mr. Feller complied with the terms set forth in AFSCME's firewall policy. See Feller Decl. at 4 - 10.

2. The Timing of AFSCME PEOPLE's Independent Expenditures Was a Result of Budgetary Planning and Not a Product of a Request or Suggestion Described at 11 C.F.R. § 109.21(d)(1).

The entire time he was assigned to the IEP, Mr. Feller never received a request or suggestion from any candidate, candidate's committee, political party committee or an agent of any of those for AFSCME or AFSCME PEOPLE to fund any communication. See Feller Decl. at 8. And, no 2010 IEP work or communications resulted from any request or suggestion of any

⁶ One of these employees, Larry Scanlon, was reassigned to a different program within 24-hours and did not perform any IEP-related work. The other three employees, Paul Booth, Ricky Feller and Seth Johnson were assigned to the IEP through the general election.

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candidate, candidate's committee, political party committee, or an agent of any of those. See Feller Decl. at 7, 9. Nor was any AFSCME or AFSCME IEP communication made in response to the *Roll Call* or *Politico* stories which serve as the basis for Complainant's larger allegation. See Feller Decl. at 10.

As discussed above, the only specific fact Complainant offers in support of its unfounded allegation is the fact that AFSCME PEOPLE increased its independent expenditure activity after the reports in *Roll Call* and *Politico* were published in September 2010. See Complaint at 5. However, as Mr. Feller explains in his declaration, AFSCME PEOPLE's increase in spending resulted from a budgeting strategy Mr. Feller employed from the beginning of the IEP. See Feller Decl. at 11 - 13. The funds budgeted to the IEP were comprised of both AFSCME treasury funds and AFSCME PEOPLE funds.⁷ See Feller Decl. at 11. Mr. Feller's budget plan was to spend only AFSCME treasury funds to pay for IEP activities as long as possible before spending any AFSCME PEOPLE funds. See Feller Decl. at 11 - 12.

The public record supports Mr. Feller's statement that his plan was to rely on AFSCME treasury funds for IEP communications as long as possible before using AFSCME PEOPLE funds. During the period April 1 through June 30, 2010, AFSCME made \$2,161,117.70 in independent expenditures. See Form 5-July 15, 2010 Quarterly Report, American Federation of State, County & Municipal Employees, AFL-CIO, at fec.gov.⁸ During the same period, AFSCME PEOPLE made none. See Form 3X, May, June and July 2010 Monthly Reports, American Federation of State, County & Municipal Employees PEOPLE, at fec.gov.⁹ From July 1, 2010 through September 30, 2010, AFSCME made \$3,298,037.27 in independent expenditures. See Form 5 October 15, 2010 Quarterly Report, American Federation of State, County & Municipal Employees, AFL-CIO, at fec.gov.¹⁰ During that period, AFSCME PEOPLE made none. See Form 3X, August, September and October 2010 Monthly Reports, American Federation of State, County & Municipal Employees PEOPLE, at fec.gov.¹¹

In October 2010, Mr. Feller finally resorted to using AFSCME PEOPLE funds for IEP communications. See Feller Decl. at 13. From October 8 through October 25, 2010, AFSCME PEOPLE made \$4,279,147 independent expenditures. See Form 3X, Pre-general and Post-general Reports, American Federation of State, County & Municipal Employees PEOPLE, at fec.gov.¹² During all of October 2010, AFSCME made only \$1,850,523.80 in independent expenditures. See Form 5 Reports filed October 1, 8, 20, 27, and 28, 2010, American Federation of State, County & Municipal Employees, AFL-CIO, at fec.gov.¹³

To reiterate, the only specific fact underlying Complainant's allegation that AFSCME PEOPLE coordinated its spending, is the fact that AFSCME PEOPLE's spending occurred after

⁷ These funds were at all times maintained in separate bank accounts and no union treasury funds were commingled with AFSCME PEOPLE funds.

⁸ <http://images.nictusa.com/pdf/262/10930970262/10930970262.pdf#navpanes=0>.

⁹ <http://images.nictusa.com/cgi-bin/fecimg/?C00011114>

¹⁰ <http://images.nictusa.com/pdf/926/10931434926/10931434926.pdf#navpanes=0>

¹¹ <http://images.nictusa.com/cgi-bin/fecimg/?C00011114>

¹² <http://images.nictusa.com/cgi-bin/fecimg/?C00011114>

¹³ <http://images.nictusa.com/cgi-bin/fecimg/?C00011172>

the publication of the *Roll Call* and *Politico* stories cited by Complainant. See Complaint at 5. As the public record demonstrates – and as Mr. Feller explains – AFSCME PEOPLE's increased spending occurred only because the AFSCME treasury funds in the overall IEP budget had largely been depleted by October 2010, and by that point the AFSCME PEOPLE funds comprised the bulk of the IEP's remaining funds.

The facts set forth above plainly contradict Complainant's specious allegation that AFSCME PEOPLE independent expenditures were coordinated communications under 11 C.F.R. § 109.21. AFSCME employees and consultants working on AFSCME and AFSCME PEOPLE IEP communications were subject to a staff firewall that complied with 11 C.F.R. 109.21(h). The person responsible for making material decisions about the IEP communications never received any request or suggestion from a candidate, candidate's committee, political party committee or an agent of any those for AFSCME or AFSCME PEOPLE to make any communication. And, no AFSCME or AFSCME PEOPLE communications resulted from any such suggestion or request, or from the *Roll Call* or *Politico* stories referenced in the complaint.

C. CONCLUSION

For the reasons set forth above, the complaint lacks sufficient facts to allege a violation of a statute or regulation, and even if the facts that are alleged were true, they provide no basis for a reason to believe finding by the Commission. Furthermore, the actual facts contradict Complainant's unsubstantiated assertions that Respondent's communications resulted from requests or suggestions that would name them to be "coordinated communications" within the meaning of 11 C.F.R. § 109.21. Therefore, Respondent respectfully requests that the Commission find no reason to believe AFSCME PEOPLE has violated the Act or the Commission's regulations.

Thank you for your consideration of this submission.

Respectfully submitted,


Jessica Robinson

Enclosures

cc: L. Saunders
L. Weinberg, Esq.

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ATTACHMENT 1



Gerald W. McEwen
President

William Lucy
Secretary-Treasurer

John C. Donaghy
Larry P. Weinberg
General Counsel

Margaret A. McCann
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Nicole A. Pollard
Jessica Robinson
Michael L. Aris
Associate General Counsel

General Counsel's Office

March 3, 2010

MEMORANDUM

To: All International Staff, Councils and Unaffiliated Locals
From: Larry Weinberg, Jessica Robinson
Re: AFSCME Staff Firewall Policy for 2010 Elections

The purpose of this memorandum is to inform you that AFSCME has established a staff "firewall" in order to comply with the Federal Election Campaign Act and state campaign finance laws that prohibit AFSCME from coordinating certain types of public communications with federal or state candidates or political party committees.

AFSCME is running two separate political programs for the 2010 elections. First, we are undertaking our member communications program which can be coordinated with candidates and political parties. Second, we are running an independent expenditures program which, under federal law and most state laws, cannot be coordinated with candidates or political parties.

The Federal Election Commission's regulations allow unions to insulate themselves from complaints alleging illegal coordination by establishing a firewall between its officers, staff and consultants working on membership communications and those officers, staff and consultants working on independent expenditures and other public communications. For this reason, AFSCME has established a staff firewall.

AFSCME has assigned to Ricky Feller and Seth Johnson the responsibility of planning its independent expenditures on behalf of state and federal candidates, other issue advocacy communications, ballot measure communications to the public, nonpartisan voter registration/get-out-the-vote activity, and work with outside organizations engaging in independent activity in connection with the 2008 elections. Ricky and Seth will be "walled off" from other AFSCME staff through November 2, 2010. Ricky and Seth will report directly to Paul Booth for the purpose of receiving approval for the expenditure of AFSCME or PEOPLE funds. Paul will also be walled-off through November 2, 2010. You will be notified if additional staff are walled-off.

American Federation of State, County and Municipal Employees, AFL-CIO

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Memorandum to:
All International Staff, Councils and Unaffiliated Locals
March 3, 2010

In order to protect the integrity of AFSCME's firewall and to ensure that AFSCME does not engage, or appear to engage, in illegal coordination we are asking you not to have any communication with AFSCME's walled-off personnel about any of the following subjects:

1. Non-public information regarding the plans, projects, activities, campaign strategy, or needs of any state candidate, federal candidate, political party committee;
2. Any aspect of AFSCME's or an AFSCME affiliate's 2010 political membership communications program including, but not limited to, communications that are planned or made as part of that membership communications program or activities that are planned or conducted as part of that program;
3. The creation, planning, production, or distribution of any independent expenditure, issue advocacy communication, ballot measure communication to the public, voter registration/get-out-the-vote communication to the public or any information that is used in creating, planning, producing, or distributing such communications;
4. The message, structure, timing, format, or intended audience for voter registration/get-out-the-vote activity or ballot measure activity aimed at the general public; or
5. Non-public information about independent political committees and organizations or ballot measure committees.

You can continue to communicate freely about any subject including the 2010 election with all AFSCME officers and staff other than walled-off staff. And, you may continue to have work-related or other communications with Paul, Ricky and Seth as long as your communications do not involve the subject matters listed above.

If you have any questions about AFSCME's firewall policy or how it may affect your work for AFSCME, please contact Larry Weinberg or Jessica Robinson in the General Counsel's Office.