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December 20, 2010

VIA FACSIMILE AND MAIL DELIVERY

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RECEIVED
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COMMISSION
2010 DEC 20 PM 4:41
OFFICE OF GENERAL
COUNSEL

Re: MUR 6411
Communications Workers of America
Working Voices and Jeffrey Rechenbach, as
Treasurer

Dear Mr. Jordan:

I am writing on behalf of Communications Workers of America Working Voices and Jeffrey Rechenbach, as Treasurer (together, "CWA WV"), to respond to the complaint ("Complaint") filed by Let Freedom Ring, Inc. ("LFR") in this matter on October 22. As we demonstrate below, the Federal Election Commission should find that there is no reason to believe that CWA WV committed a violation of the Federal Election Campaign Act ("FECA" or "the Act") as alleged in the Complaint, and the Commission therefore should take no further action against CWA WV and should dismiss the Complaint against it.

CWA WV is a federal political committee that registered with the Commission on August 27, 2010, and, in doing so, informed the Commission – in the manner recommended by the Commission following *SpeechNow.org v. Federal Election Commission*, 599 F. 3d 686 (D.C. Cir. 2010) – that it would undertake independent expenditures and would not make any contributions to federal candidates or committees. CWA WV has a connected organization: the Communications Workers of America ("CWA"), a labor organization within the meaning of 2 U.S.C. § 441b(b)(1).

LFR alleges that CWA WV, 24 other organizations, "others to be identified by the [Federal Election] Commission," U.S. House of Representatives Speaker Nancy Pelosi, Rep. John Larson and "unannounced Members of Congress" have violated the Act, in that each of the respondent organizations made unlawful in-kind contributions in the form of coordinated

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expenditures during the 2010 general election period to "candidates and campaigns identified" by LFR. Those candidates and campaigns are evidently all those that were supported, or whose opponents were opposed, by every one of the hundreds of independent expenditures that were unnumbered and duly reported to the Commission by all of the respondent organizations, as itemized in LFR's Attachment 3 to the Complaint. LFR asserts that Reps. Pelosi and Larson and other unidentified candidates and their agents "request[ed] or suggest[ed]" that CWA WV and the other organizational respondents undertake public electoral communications on behalf of Democratic House candidates, and that those groups then "follow[ed] the demands of Pelosi and her henchmen" by doing so.

These sweeping and extraordinary allegations, however, are predicated on pure speculation: connecting, on the one hand, publicly reported general comments in House Democratic caucus meetings by Speaker Pelosi and other Members of Congress, and in the news media by Rep. Larson and unidentified Democratic House staff, with, on the other hand, CWA WV's independent expenditures beginning on September 21 in the Michigan Congressional District 7 ("MI-7") election between incumbent Rep. Mark Schauer (D) and challenger Timothy Walberg (R), as well as (as appears to be alleged) all of the independent expenditures by 24 other respondents that occurred from September 7 through October 19. The Complaint neither asserts nor attaches evidence of any fact whatsoever to support an allegation of coordination with respect to CWA WV.¹

Accordingly, the Complaint falls far short of satisfying the Commission's established standards for the kind of showing a complainant must make in order to warrant a Commission finding that there is reason to believe ("RTB") that a violation of the Act has occurred. For that reason, and because, in fact, no coordination occurred with CWA WV, we respectfully request that the Commission find no reason to believe that CWA WV violated the Act, and that it dismiss the Complaint.

I. The Complaint Alleges No Facts Sufficient to Support a Finding of Reason to Believe That a Violation of the Act Has Occurred

1. The Complaint alleges no facts and presents no evidence suggestive of coordination between CWA WV (including, for purposes of this response, its agents, including CWA) and any candidate, political party or their agents with respect to CWA WV's independent expenditures in the MI-7 race. The only fact presented by the Complaint concerning CWA WV is that, as appears only on the ninth (unnumbered) page of LFR's Attachment 3, CWA WV made these independent expenditures. Absent from the Complaint is any specific allegation, or any evidence of any kind indicating, that CWA WV ever communicated in any manner at any time with Reps. Schauer, Pelosi or Larson or any other candidate, political party or their agents about CWA WV's independent expenditures or, for that matter, about anything else.

¹ Notably, the blunderbuss complaint treats all respondents in precisely the same manner, offering no facts as to any of them except for the existence of their reported independent expenditures.

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Instead, the Complaint cites a September 17 *Roll Call* article (Attachment 1) and a September 22 *Politico* article (Attachment 2) that, variously, report on comments allegedly made during closed House Democratic caucus meetings about candidate frustration with the inadequate level of third-party independent advertising in support of their campaigns, attribute comments in these meetings to Speaker Pelosi that, in paraphrase, "she was trying to get liberal allied groups to give House Democrats some air cover," quote Rep. Larson as saying "we hope and trust that people who are inclined to support us get out there and do the job that's going to need to be done," and report that he "said that they ask groups on a 'regular basis' to get involved in the effort to support Democrats this election." LFR's central contention is that "[a]round the same time as these press reports emerged, spending by outside organizations on behalf of Democratic candidates for Congress increased, making it perfectly clear that several organizations yielded to the demands of Democratic leaders and activists." Complaint at 4.

This is wholly insufficient as a matter of law to provide RTB that a coordinated in-kind contribution by CWA WV to Rep. Schauer occurred. To the contrary, a complaint must "contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction." 11 C.F.R. § 111.4(d)(3). Consistent with this requirement, under the Commission's 2007 policy an RTB finding cannot be justified "when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred...." "Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process," 72 Fed. Reg. 12545, 12546 (March 16, 2007). To meet this standard, a complainant "must provide specific facts," unadmitted by the respondent, that demonstrate the alleged violation. MUR 6056 (Protect Colorado Jobs, Inc.), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, at 6 (2009).

But LFR fails to provide any specific facts whatsoever to implicate application to CWA WV of the "request or suggestion" "conduct" standard of the Commission's coordination rules, see 11 C.R.F. § 109.21(d)(1).² Even if the Complaint were read to allege sufficiently that either Speaker Pelosi or Rep. Larson requested or suggested that some group engage in public communications that satisfy the Commission's coordination "content" standard, the Complaint is devoid of facts indicating that any contact occurred with CWA WV. The Complaint instead consists solely of malign speculation about the matter, which "de[os] not form an adequate basis to find reason to believe that a violation of the FECA has occurred." 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 3 (2009).

2. The Complaint does not allege that either Speaker Pelosi, Rep. Larson or any other candidate, political party or agent of any of them acted as an agent of Rep. Schauer with respect to the MI-7 election. The "candidate" as to whom the Commission's coordination conduct

² Nor does the Complaint allege facts that would implicate any of the other conduct standards. See 11 C.F.R. § 109.21(d)(2)-(5).

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standards apply is either the candidate who is identified in the communication, that candidate's opponent, or an "agent" of either. See 11 C.F.R. § 109.21(d)(1)-(3). As the Commission explained in adopting its coordination regulations:

Neither [the "request" nor "suggestion"] prong[] of this conduct standard can be satisfied without some link between the request or suggestion and the candidate or political party who is, or that is, clearly "identified" in the communication. 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 A and the third party payor. However, ...[i]f Candidate A is an "agent" for Candidate B...then the communication would be coordinated.

2003 Coordination E & J, 68 Fed. Reg. at 431-32.

Accordingly, absent any facts showing agency between Speaker Pelosi or Rep. Larson (either being viewed as "Candidate A") and Rep. Schauer ("Candidate B"), even if either Representative had requested or suggested to CWA WV that it make independent expenditures in the MI-7 election – which, again, is not alleged (and which, in fact, did *not* occur, see below) – that would not satisfy the Commission's "conduct" standard.

3. Insofar as the broadly worded Complaint may be read to suggest that the *Roll Call* and *Politics* articles themselves comprised a "request or suggestion" to CWA WV that it undertake independent expenditures, Commission regulatory policy is explicitly to the contrary. Only communications to a "select audience," not the general public, may constitute "requests or suggestions":

A request or suggestion encompasses the most direct form of coordination, given that the candidate or political party committee communicates desires to another person who effectuates them....The "request or suggestion" conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1)....Similarly, a request in a public campaign speech or a newspaper advertisement is a request to the general public and is not covered....

Final Rule, "Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 432 (Jan. 3, 2003) ("2003 Coordination E&J"). Accordingly, the content of the news articles themselves consist of no legally relevant "conduct."

II. CWA WV's Independent Expenditures in Fact Were Not Coordinated

Although, as we have just demonstrated, the Complaint should be dismissed due to its own legal inadequacy, CWA WV in fact denies that it received any "request or suggestion" regarding its independent expenditures within the meaning of the Commission's coordination

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conduct standard, or any of the other conduct standards that the Complaint does not address. To the contrary, if there were an investigation, CWA WV witnesses would testify as follows:

1. CWA and CWA WV decided to undertake, and began to create, the MI-7 independent expenditures advertisements during August 2010, a month before the *Roll Call* and *Palinco* articles appeared.
2. CWA WV's independent expenditures were effectively firewalled from CWA personnel and others who might have contact with Reps. Schauer, Pelosi or Larson, other federal candidates, political parties or their agents.
3. All aspects of CWA WV's independent expenditures in the MI-7 race were undertaken without any request or suggestion from, let alone any contact with or information from, Reps. Schauer, Pelosi or Larson, any other federal candidate, any political party or their agents.

Given the legal inadequacy of the Complaint, so further specific evidentiary showing by CWA WV is necessary in this response. See, e.g., MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Darryl J. Wold and Commissioners David M. Mason and Scott E. Thomas, at 2 ("A mere conclusory accusation without any supporting evidence does not shift the burden of proof to respondents. While a respondent may choose to respond to a complaint, complainants must provide the Commission with a reason to believe violations occurred. The burden of proof does not shift to a respondent merely because a complaint is filed.") (2000) (emphasis in original).

III. The Complaint Is More Political Than Legal, and the Commission Should Resist Its Invitation to Launch an Intrusive Investigation

Finally, the Complaint should be considered as what it really is: a highly charged political document by an organization that declares it was "formed to counter the attacks of anti-conservative groups on patriotic candidates..." <http://www.letfreedomringusa.com/about>, that was released with fanfare just ten days before the election with hyperbolic, non-lawyerly language ("demands by Pelosi and her brethren") in order to chill private organizations that had been campaigning for Democratic candidates. LFR accompanied the filing of the complaint with a conference call press conference featuring its president and its lawyer and a public statement that surpassed even the Complaint's formal demands on the Commission by asserting that "[t]he FEC must investigate this matter for criminal wrongdoing." See <http://www.letfreedomringusa.com/news/read/1468>. Plainly, LFR could have filed the Complaint a month before it did when the two news articles appeared, which was weeks after the independent expenditures about which LFR complains began to air. But filing it at the height of the homestretch of the election presumably maximized its intended publicity and *in terrorem* effect.

That CWA WV itself was created and then undertook its independent expenditures within the last two months of the general election is, of course, entirely unremarkable as a matter of

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general political practice. As the Commission itself empirically determined in preparing its 2006 revisions to the coordination regulations, "nearly all Senate and House candidate advertising takes place within 60 days of an election.... The data show that a minimal amount of activity occurs between 60 and 90 days before an election, and that beyond 90 days, the amount of candidate advertising approaches zero." Final Rule, "Coordinated Communications," 71 Fed. Reg. 33190, 33194 (June 8, 2006). That in turn reflects a political reality: "It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short time frames in which speech can have influence." *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 895 (2010). Here, CWA WV complied with the Act in devising and reporting its constitutionally protected independent political speech.

We recognize, of course, that even a politically motivated complaint by a highly partisan organization may have substantive merit. But that is not this complaint. LFR, on the basis of nothing, demands that the Commission unleash its investigative apparatus on CWA WV and a score of other perceived political adversaries.³ As it is, investigations of allegations of coordination are widely and correctly perceived as among the most intrusive and sensitive kinds of Commission investigations that can occur. See generally *AFL-CIO v. Federal Election Commission*, 333 F. 3d 168, 175-78 (D.C. Cir. 2003). The Commission should reject LFR's demand that it embark down that road here.

Conclusion

Presenting no specific facts credibly alleging a violation of the Act, the Complaint does not provide the Commission with any, let alone sufficient, evidence to warrant an RTB finding and ensuing investigation into the activities of CWA WV, and, in any event, its speculative assertions are false as a matter of fact. Accordingly, we respectfully request that the Commission find no reason to believe that CWA WV, or Jeffrey Rechenbach, as Treasurer, violated the Act, and that the Commission dismiss the Complaint.

Yours truly,



Laurence E. Gold

Counsel to Communications of America Working
Voices and Jeffrey Rechenbach, as Treasurer

³ LFR's zeal to do so is underscored by its incorrect public assertion as to how FECA operates here: "[The respondents] have a burden of proof to demonstrate that their action was taken independently," said Colin Hanna, Let Freedom Ring's president. "That is quite a heavy burden." See <http://www.letfreedomringusa.com/news/read/1470>.

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