UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UTILITY WORKERS UNION OF AMERICA, LOCAL 369, AFL-CIO, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case Number: 09-cv-01022-JDB MOTION TO DISMISS

DEFENDANT FEDERAL ELECTION COMMISSION'S
MOTION TO DISMISS THE COMPLAINT

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Federal Election Commission ("Commission") respectfully moves this Court for an order dismissing the Complaint with prejudice for failure to state a claim upon which relief can be granted. A memorandum of law in support of the Commission's motion and a proposed order are attached.

Respectfully submitted,

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Dated: July 31, 2009

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UTILITY WORKERS UNION OF AMERICA, LOCAL 369, AFL-CIO, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case Number: 09-cv-01022-JDB MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

Plaintiff Utility Workers Union of America, Local 369, AFL-CIO ("Local 369") commenced this action to challenge the Federal Election Commission's ("Commission") dismissal of an administrative complaint that Local 369 filed against Covanta Energy Corporation ("Covanta"). The Commission's dismissal of Local 369's administrative complaint was reasonable and is subject to the highly deferential standard governing review of the Commission's interpretation of the statute it administers.

Local 369's Complaint here must be dismissed, because it fails to allege that the Commission acted unreasonably in dismissing Local 369's underlying administrative complaint. Indeed, Local 369 does not challenge the Commission's central determination that a corporate communication that neither encourages recipients to support the activities of the corporation's separate segregated fund ("SSF"), nor facilitates contributions by the recipients to that fund, is not a solicitation under 2 U.S.C. § 441b or 11 C.F.R. § 114.6.

BACKGROUND AND PROCEDURAL HISTORY

A. The Federal Election Commission

The Commission is the United States government agency with exclusive civil jurisdiction over administration of the Federal Election Campaign Act, 2 U.S.C. §§ 431-457 ("FECA"). Any person who believes that FECA has been violated may file with the Commission an administrative complaint regarding that violation. 2 U.S.C. § 437g(a)(1). The Commission then considers the complaint to determine whether it provides "reason to believe" that FECA has been violated. *Id.* § 437g(a)(2). If at least four commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint. *See id.*

When the Commission dismisses a complaint, the complainant may file suit in the United States District Court for the District of Columbia seeking a declaration that the Commission's dismissal was "contrary to law." *Id.* § 437g(a)(8). If the district court declares that the Commission's dismissal was contrary to law, the court can "direct the Commission to conform with such declaration within 30 days." *Id.* § 437g(a)(8)(C).

B. Statutory and Regulatory Background

The Complaint filed by Local 369 purports to implicate provisions in FECA and Commission regulations concerning a corporation's solicitation of employee donations to the corporation's separate segregated fund or "political action committee" to be used for that corporation's campaign contributions and expenditures.[1]

[1] Although FECA uses the term "separate segregated fund" to describe the permissible corporate mechanism for soliciting and accepting contributions for a corporation's federal political activities, 2 U.S.C. § 431(4)(B), "political action committee" or "PAC" is commonly used to refer to separate segregated funds as well as other political committees registered with the Commission that are not connected to corporations or labor organizations. *See, e.g.*,

"The statutory purpose of § 441b . . . is to prohibit contributions or expenditures by corporations or labor organizations in connection with federal elections." *McConnell v. FEC*, 540 U.S. 93, 203 n.86 (2003) (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 201-202 (1982)). The terms "contributions" and "expenditures" as used in § 441b include "anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(a)(i); *id.* § 431(9)(A)(i). FECA excepts from its general prohibition of political contributions and expenditures by corporations "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation . . . ." 2 U.S.C. § 441b(b)(2)(C). FECA and Commission regulations permit a corporation or its separate segregated fund to solicit voluntary contributions to such a fund at any time from the corporation's "restricted class," which consists of the corporation's executive and administrative personnel, its stockholders, and the families of such persons. *Id.* § 441b(b)(4)(A)(i); 11 C.F.R. §§ 114.1(c), 114.5(g)(1). FECA and Commission regulations also permit a corporation, or its separate segregated fund, to make two written contribution solicitations per year to other employees, but require, *inter alia*, that such solicitations are made in writing and sent to an employee's residence. 2 U.S.C. § 441b(b)(4)(B); 11 C.F.R. § 114.6. Both also require a corporation to make available to a labor organization representing any members working for the corporation or its subsidiaries, branches, divisions, or affiliates the same method by which the corporation solicits employees. 2 U.S.C. § 441b(b)(5)-(6); 11 C.F.R. § 114.6(e)(3).

McConnell v. FEC, 540 U.S. 93, 118 (2003); *FEC v. Beaumont*, 539 U.S. 146, 149 (2003). (*See also* Compl. ¶ 6.) Rather than substitute a single terminology, this memorandum retains the characterizations used in the cited authorities and in Local 369's Complaint, and at all times intends to refer to the type of entity at issue here, *i.e.*, a corporation's separate segregated fund.

C. Factual Background

The following facts, derived from Local 369's Complaint, are assumed to be true for purposes of this motion only. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (holding dismissal appropriate "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief"); *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006) ("[I]n considering the claims dismissed pursuant to Rule 12(b)(6), we must treat the complaint's factual allegations as true [and] must grant plaintiff the benefit of all reasonable inferences from the facts alleged . . . .") (quotations omitted).

According to the Complaint, Local 369 is a labor organization currently representing 135 employees at Covanta's SEMASS waste-to-energy facility, which is located in West Wareham, Massachusetts. (Compl. ¶¶ 7, 16-17.)

Local 369 alleges that Covanta "solicit[s] contributions for its *federal* PAC through . . . an 'employee Handbook.'" (*Id.* ¶ 27; Attach. A, 6 (emphasis in original).) According to Local 369, the "Handbook," which is officially entitled the "COVANTA Policy of Business Conduct," and a copy of which is attached as Exhibit 11 to Attachment A to the Complaint,[2] unlawfully

[2] Local 369 incorporates in and attaches to its civil Complaint two attachments: the administrative complaint lodged with the Commission (Attachment A), and the Commission's Factual and Legal Analysis issued in connection with the Commission's dismissal of the administrative complaint (Attachment B). Local 369 also incorporates in and attaches to its civil Complaint the eleven attachments (Attachments 1-11) to Local 369's administrative complaint; "Attachment 11" is a purported copy of the "Handbook" at issue here. All such attachments are properly considered by this Court in connection with the Commission's motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (citing 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004 and Supp. 2007)). To avoid confusion among the various attachments to Local 369's respective complaints, this memorandum refers to the attachments to Local 369's civil Complaint as "Attachments A and B," and to the attachments to the administrative complaint as "Exhibits 1-11."

solicits political contributions through a section entitled "Political Contributions/Lobbying." The entire "Political Contributions" section states:

> *Political Contributions*
>
> Federal, state, and local laws impose various restrictions on political campaign contributions. Under federal law a corporation may not make political contributions to federal political candidates or campaign committees. The extent to which corporations are permitted to contribute to state political candidates or campaign committees varies from state to state.
>
> We will only make political contributions and expenditures if it is in our best interest and we determine that the proposed contribution or expenditure is legal. Contributions include not only donations of cash or property (e.g. monetary contribution to a campaign or political committee, purchases of tickets to political dinners, or paying for advertisements on behalf of candidates) but also the use of our facilities and resources.
>
> **In general, employees are free to make a personal contribution to any political candidates or committees as an individual and not as a representative of Covanta, subject to the individual limitations under state or federal law. However, members of our Board of Directors and our officers who contribute as individuals to candidates for state office in New Jersey and Maryland, may be subject to certain contribution limits and/or disclosure obligations. Contributions by members of the Board, officers and employees with managerial responsibilities for our Connecticut facilities to candidates for certain state offices in Connecticut are prohibited.**
>
> The regulations relating to political contributions are complex and changing. Prior to making or authorizing a corporate contribution or authorizing the use of a Covanta facility or resources for political purposes, please consult our Director of Governmental Affairs and our General Counsel. If you have any questions concerning a personal contribution, please contact our General Counsel.
>
> Primarily in order to make contributions to federal political candidates or committees, we have established a federal political action committee (or "PAC"). Contributions to the PAC by eligible employees are voluntary. Whether an employee contributes or not results in no favor, disfavor or reprisal from

> Covanta. The PAC will comply with all related federal and state laws.
>
> The Company also has written procedures which must be followed before a proposed political contribution or expenditure is made or any action is taken regarding a contribution or expenditure. Only our Director of Government Affairs may initiate these procedures.

(Compl. Attach. A, Ex. 11, at 11-12 (bold in original).)

Local 369 asserts that some of the above-excerpted language from the COVANTA Policy of Business Conduct (the "Covanta Policy" or the "Policy") "constitutes a solicitation by Covanta of employees outside its 'restricted class' for Covanta's federal PAC." (*Id.* ¶ 30.)

D. Procedural History

Local 369 lodged its underlying administrative complaint with the Commission on October 20, 2008. The Commission dismissed the administrative complaint on April 2, 2009, concluding that "the language in Covanta's employee handbook does not rise to the level of a solicitation because it does not encourage support for [Covanta's federal] PAC or facilitate the making of contributions to the PAC." (*Id.* Attach. B, at 4 (collecting Commission advisory opinions).) On June 1, 2009, Local 369 filed the instant action pursuant to 2 U.S.C. § 437g(a)(8) to challenge the Commission's dismissal of its administrative complaint.

ARGUMENT

I. STANDARD OF REVIEW

Dismissal of a complaint is appropriate when, accepting the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the complaint fails as a matter of law to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Twombly*, 550 U.S. at 558; *Hicks v. Ass'n of Am. Med. Coll.*, 503 F. Supp. 2d 48, 50-51 (D.D.C. 2007).

A court reviewing the Commission's dismissal of an administrative complaint under 2 U.S.C. § 437g(a)(8) "may set aside the FEC's dismissal of a complaint only if its action was 'contrary to law.'" *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (citing § 437g(a)(8)); *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986) (same). The Commission's dismissal of an administrative complaint cannot be disturbed unless it is based on "an impermissible interpretation of [FECA]" or is "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161. *See also FEC v. Democratic Senatorial Campaign Comm.* ("*DSCC*"), 454 U.S. 27, 31 (1981).

To affirm the agency's action, "it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *DSCC*, 454 U.S. at 39. Instead, the court engages in "the narrower inquiry into whether the Commission's construction [is] sufficiently reasonable to be accepted by a reviewing court." *Id*. (quotation marks and citations omitted). This inquiry is "highly deferential" to the Commission's interpretation of the statutes it administers. *DSCC v. FEC*, 918 F. Supp. 1 (D.D.C. 1994).

In addition, the court "review[s] the Commission's interpretation of its own regulations pursuant to an exceedingly deferential standard . . . [and that] interpretation will prevail unless it is plainly erroneous or inconsistent with the plain terms of the disputed regulation." *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 182 (D.C. Cir. 2001) (quotation marks and citations omitted).

II. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE THE COMMISSION REASONABLY DETERMINED THAT THE COVANTA POLICY IS NOT A SOLICITATION

The Complaint fails to state a claim upon which relief can be granted because, even accepting all of Local 369's factual allegations as true for purposes of this motion, the Commission's dismissal of Local 369's administrative complaint was not "contrary to law."

Local 369 does not claim that the Commission's legal standard for what constitutes a "solicitation" under 2 U.S.C. § 441b is unreasonable. *See DSCC*, 454 U.S. at 39. Indeed, rather than challenge the propriety of that standard developed by the agency Congress entrusted to interpret FECA, Local 369 simply asserts its disagreement with the Commission's application of that standard. *Cf. Northwest Coal. for Alternatives to Pesticides v. Lyng*, 673 F. Supp. 1019, 1024 (D. Or. 1987) (where Bureau of Land Management "has historically and statutorily been charged with management of our public lands," plaintiffs' disagreement with BLM on best management of public lands is insufficient to establish that BLM's decisions are contrary to law). But even if Local 369's divergent conclusion were itself reasonable — indeed, even if this Court might have reached a different conclusion had the question originated in a judicial rather than administrative forum — this Court must defer to the Commission's decision unless that decision is contrary to law. *DSCC*, 454 U.S. at 39. It is not.

A. The Commission Properly Defined the Circumstances in which a Corporate Communication Amounts to a "Solicitation" under Section 441b

FECA does not define the meaning or scope of the term "solicitation" as used in § 441b. In the absence of a statutory definition, the Commission, as a proper exercise of its "authori[ty] to 'formulate general policy with respect to the administration of [FECA],'" *Buckley v. Valeo*, 424 U.S. 1, 110 (1976), applied its own interpretation of that term. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

The Commission's interpretation — that "a communication regarding SSF activity is not a solicitation under 441b where the information provided would neither encourage readers to support the SSF activities nor facilitate contributions to the SSF" — reflects the same standard the Commission has repeatedly invoked in various advisory opinions addressing whether the Commission would deem a particular corporate communication to be a solicitation. (Compl., Attach. B, at 4.) *See, e.g.*, FEC Advisory Op. 2003-14, 2003 WL 21543562, at *2 (collecting other Commission advisory opinions articulating the same standard); *see also* FEC Advisory Op. 2000-07, 2000 WL 725744, at *3; FEC Advisory Op. 1991-3, 1991 WL 415550, at *2; FEC Advisory Op. 1988-2, 1988 WL 170400, at *2.[3]

The D.C. Circuit has held that "advisory opinions of the Federal Election Commission . . . that reflect[] its considered judgment made pursuant to congressionally delegated lawmaking power and that ha[ve] binding legal effect [a]re due *Chevron* deference" — *i.e.*, deference where they "represent a 'permissible construction of the statute.'" *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 466 (D.C. Cir. 2007); *Nat'l Rifle Ass'n*, 254 F.3d at 186 (quoting *Chevron*, 467 U.S. at 843). Here, because the Commission's advisory opinions reflect a "permissible" interpretation of the meaning of the term "solicitation" in § 441b, the Court must defer to the Commission's interpretation.

[3] Additional advisory opinions reflecting the Commission's articulation and application of this standard are available on the Commission's website. *See, e.g.*, FEC Advisory Op. 1983-38, *available at* http://saos.nictusa.com/aodocs/1983-38.pdf; FEC Advisory Op. 1982-65, *available at* http://saos.nictusa.com/ aodocs/1982-65.pdf; FEC Advisory Op. 1980-65, *available at* http://saos.nictusa.com/aodocs/1980-65.pdf; FEC Advisory Op. 1979-66, *available at* http://saos.nictusa.com/aodocs/1979-66.pdf (all last visited July 30, 2009).

B. The Commission Reasonably Applied Its Interpretation of the Meaning of "Solicitation"

The Commission dismissed Local 369's administrative complaint based on its conclusion that "[t]he language in Covanta's employee handbook does not rise to the level of a solicitation because it does not encourage support for the PAC or facilitate the making of contributions to the PAC." (Compl., Attach. B, at 4.) The Commission reached its conclusion by considering its analogous determinations in past Commission advisory opinions "that internal intranet postings and newsletter articles would not be considered solicitations under 2 U.S.C. § 441b when they consisted only of limited informational statements without additional encouragement." (*Id.* Attach. B, at 4 (citing FEC Advisory Op. 2000-07, 2000 WL 725744; FEC Advisory Op. 1983-38).) In those advisory opinions, the Commission had reasoned that such communications "merely convey[ed] information that might engender inquiry, rather than encouraging or facilitating a contribution." (*Id.* Attach. B, at 4.) Here, too, the Commission concluded that "[t]he language in Covanta's employee handbook appears to be merely a statement that the PAC exists, not a solicitation." (*Id.* Attach. B, at 5.) As the text quoted *supra* pp. 5-6 reveals, the handbook language merely explains that Covanta has created a PAC, that the laws about political contributions are "complex and changing," that "[c]ontributions to the PAC by eligible employees are voluntary," and that the "PAC will comply with all related federal and state laws." Although this language "might engender inquiry," it does not encourage or facilitate a contribution within the meaning of the Commission's interpretation of "solicitation." (*Id.* Attach. B, at 4.)

Local 369 does not purport to challenge the permissibility of the Commission's interpretation of "solicitation" as excluding communications that neither encourage support of, nor facilitate contributions to, a corporation's separate segregated fund. On the contrary, Local

369 *invokes* the Commission's interpretation, asserting that "Covanta's Handbook . . . *encourages readers to support* the Covanta PAC's activities." (*Id.* ¶¶ 49, 52 (emphasis added); *see also id.* ¶ 55 (claiming that the Covanta Policy "encourage[es] participation in the PAC").) Specifically, Local 369 asserts six reasons for its alternative conclusion that the Covanta Policy constitutes a corporate solicitation in violation of § 441b. (*Id.* ¶¶ 31-36.) None of Local 369's asserted reasons, whether considered independently or collectively, provides a basis for finding that the Commission's opposite conclusion is contrary to law.

First, Local 369 incorrectly claims that the Policy "effectively invites contributions to Covanta's federal PAC, stating that 'eligible employees' *may make voluntary contributions*." (*Id.* ¶ 31 (emphasis added).) The Policy does not so state. Instead, the actual Policy language provides that "[c]ontributions to the PAC by eligible employees are voluntary." (*Id.* Attach. A, Ex. 11, at 11.) Local 369's mischaracterization of the Policy not only substitutes "eligible employees" for "contributions" as the subject of the sentence, it inserts the words "may make," which are entirely absent from the actual Policy language. Thus, while Local 369 suggests that a statement entirely absent from the Policy could "*effectively* invite[] contributions" to Covanta's PAC (*id.* ¶ 31 (emphasis added)), Local 369 does not claim that any of the Policy language *actually* invites such contributions.

Second, Local 369 assumes that the Covanta Policy is a solicitation, and, under that assumption, asserts that the Policy violates the statutory and regulatory requirements restricting distribution of federal PAC solicitations to a limited class of "stockholders and high-level personnel." (*Id.* ¶ 32.) *See* 2 U.S.C. § 441b(b)(4); 11 C.F.R. § 114.6(c). But because the

Commission reasonably concluded that the Covanta Policy is *not* a solicitation, the Court need not reach Local 369's second contention.[4]

Third, Local 369 claims that the Covanta Policy is a solicitation, because it "indicates Covanta's support for a separate Covanta federal PAC." (Compl. ¶ 33.) This assertion is flawed for at least two reasons. First, it repeats, and relies on, the mischaracterization of the Policy language invoked in support of Local 369's first assertion. (*See id.* ¶ 33 (asserting that the Covanta Policy "indicates Covanta's support for a separate Covanta federal PAC, in that the language references its establishment . . . that voluntary contributions may be made by 'eligible' employees").) In addition, Covanta's explanation of the purpose of its federal PAC, "[p]rimarily in order to make contributions to federal political candidates or committees," and statement of its policy to "only make political contributions and expenditures if it is in [Covanta's] best interest and [Covanta] determine[s] that the proposed contribution or expenditure is legal," disclose the existence and explain the purpose and function of Covanta's federal PAC, rather than advocate Covanta's "support" of the PAC. (*See id.* Attach. A, Ex. 11, at 11.) And, even if this language can be construed as an indication of Covanta's *own* support for its political action committee, it does not amount to encouragement of such support *on the part of its employees*. *See, e.g.*, FEC Advisory Op. 2000-07, 2000 WL 725744, at *1, *3 (internet-based notice stating that "Alcatel USA supports Alcatel PAC" and otherwise "describ[ing] generally the functions of any corporate SSF and the laws applicable to its operations" is not a solicitation); FEC Advisory Op. 1982-65, *supra* p. 9 n.3 (indication in Union Carbide Corporation's annual report that it "supports the

[4] The Commission's reasonable conclusion that the Covanta Policy is not a solicitation likewise moots Local 369's challenge of the Commission's consequential determination that Local 369 was not deprived of a statutory or regulatory right to engage in the same "solicitation" of Covanta employees. (Compl. ¶¶ 12-14.) Because the Covanta Policy does not implicate 2 U.S.C. § 441b(b)(5) or 11 C.F.R. § 114.6(e), Local 369 has no legal right to access Covanta employees through the same method.

operation of the Union Carbide Corporation Political Action Committee" is not a solicitation). The Complaint fails to identify any language in the Policy reflecting the latter.

Fourth, Local 369 strains to associate the Covanta Policy with a separate mail solicitation to Covanta's state PAC, asserting that unspecified "refer[ences] to the contributions for activities at the state (and local) levels[] effectively link[] the Handbook with Covanta's direct appeal to employees for contributions to the 'Covanta MA PAC.'" (Compl. ¶ 34.) The Complaint fails to identify, let alone explain, the supposed link between the Covanta Policy and any Covanta state PAC solicitation.[5] In any event, even if such a link existed, the presence of an indirect solicitation to Covanta's state PAC would not constitute a solicitation to Covanta's federal PAC.

Fifth, Local 369 states, as a "reason why" the excerpted language from the Policy "constitutes a solicitation," the fact that the Covanta Policy "directs inquiries about political contributions to the Company's Director or Governmental (or Government) Affairs and its General Counsel." (*Id.* ¶¶ 30, 35.) Local 369 fails to identify what significance it attributes to this fact. The Commission has repeatedly concluded that a corporate communication "may engender some inquiries" about the company's separate segregated fund, including "from readers who are not solicitable," without being deemed a solicitation. *See, e.g.*, FEC Advisory Op. 2000-

[5] In dismissing Local 369's administrative complaint, the Commission also rejected any claim by Local 369 concerning solicitations to Covanta's state PAC. (*See* Compl. Attach. B, at 3.) The Commission relied on Local 369's own acknowledgment of its apparent misunderstanding that the solicitation sought donations to Covanta's federal PAC; communications with Covanta's counsel had apparently clarified that the solicitation actually sought donations to a state PAC. (*Id.* Attach B, at 3.) Local 369 never attempted to rebut Covanta's clarification, and the Commission thus found that Local 369's ostensible claim regarding the solicitation to Covanta's state PAC lacked any merit. (*Id.*) Local 369 nevertheless reiterates in its civil Complaint allegations concerning its misunderstanding regarding the mail solicitations to Covanta's state PAC. (*Id.* ¶¶ 20-26.) Again, Local 369 acknowledges that "subsequent correspondence among counsel for Local 369 and Covanta . . . explained that [the solicitation in question] had in fact been a solicitation for a *state* PAC and was therefore not subject to federal election law or FEC regulations." (*Id.* ¶ 25 (emphasis in original).) And again, Local 369 does not appear to dispute this "expla[nation]."

07, 2000 WL 725744, at *1, *3 (no solicitation where communication states that "[e]mployees desiring additional information on their eligibility or about the activities of the Alcatel PAC may contact Alcatel USA Political Action Committee" and providing the address, name, phone number, and e-mail address of an Alcatel PAC official); FEC Advisory Op. 1982-65, *supra* p. 9 n.3 (no solicitation where company's annual report indicated that "[s]hareholders [including non-solicitable foreign shareholders] desiring additional information about the activities of the [company's PAC] may write to the Secretary" of the company and providing the address to direct such correspondence). To the extent Covanta employees desire further information about Covanta's federal PAC, the Covanta Policy "places the burden on the [employees] to affirmatively request the information. Thus, the [employees] must take the initiative to obtain the information, and [Covanta] is the passive conduit of such information." FEC Advisory Op. 1982-65, *supra* p. 9 n.3. The Commission has determined that such a communication "in no way encourages support of [the company's PAC] or facilitates contributions to it" and "[t]hus, it is not a solicitation." *Id.*

Sixth, Local 369 appears to suggest that the Covanta Policy should be deemed a solicitation, because it contains language "similar" to that which Commission regulations permit a corporation to include in a solicitation for donations to its separate segregated fund. (Compl. ¶ 36 ("Commission's regulations state that in making a permissible solicitation to the appropriate employees, the employer may include language stating that a decision on whether to make a contribution will not 'favor or disadvantage' the employee. Similar language appears in the Handbook.") (citing 11 C.F.R. § 114.5(a)(2)(ii)).) This assertion presents a false converse: The fact that Commission regulations *permit* certain language to appear in a solicitation does not mean that the inclusion of that language in a corporate communication necessarily renders the

communication a solicitation. Local 369 does not contend that the statement "[w]hether an employee contributes or not results in no favor, disfavor or reprisal from Covanta" (*Id.* Attach. A, Ex. 11, at 11), somehow encourages support for, or facilitates the making of, contributions to Covanta's federal PAC. It does not.

Local 369's assertions not only fail to challenge the reasonableness of the Commission's determination; they highlight the unreasonableness of the outcome Local 369 seeks. Section 114.5 of the Commission's regulations, which Local 369 invokes, was promulgated to "ensur[e] the voluntary nature of contributions to separate segregated funds." FEC Advisory Op. 2003-06, 2003 WL 21210186, at *1. Indeed, the Commission's advisory opinions "note[] the importance of ensuring that any contributions solicited for [a separate segregated fund] [are] voluntary and that no penalty [will] attach to any person who decides not to make a contribution." AO, 1996-18, 1996 WL 341161, at *3 n.3 (citing 2 U.S.C. § 441b(b)(3); 11 C.F.R. § 114.5(a)). A determination that Covanta violated FECA and Commission regulations by informing its employees of the voluntary nature of any contributions to Covanta's federal PAC would be antithetical to the very purpose of § 441b(b)(3) and § 114.5(a).

In sum, Local 369 alleges no colorable basis for its claim that the Covanta Policy "constitutes a solicitation by Covanta of employees outside its 'restricted class' for Covanta's federal PAC" (Compl. ¶ 30), let alone that the Commission's contrary conclusion was unreasonable.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court dismiss the Complaint with prejudice for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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Dated: July 31, 2009

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UTILITY WORKERS UNION OF AMERICA, LOCAL 369, AFL-CIO, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case Number: 09-cv-01022-JDB [PROPOSED] ORDER

[PROPOSED] ORDER

This matter is before the Court on Defendant Federal Election Commission's motion to dismiss the Complaint. It is hereby

ORDERED that Defendant's motion to dismiss the Complaint is GRANTED; and it is

FURTHER ORDERED that the Complaint is dismissed with prejudice.

SO ORDERED.

_____
John D. Bates
United States District Judge

DATE: _____