

# **Executive Summary and Staff Analysis**

## **PDC Case No. 12-149**

### **Americans for Prosperity, et al.**

This summary highlights staff's findings, conclusions, and recommendations regarding the allegations contained in PDC Case No. 12-149, a 45-day citizen action letter filed on January 24, 2012, by Charles Kimbrough, through his counsel, Knoll Lowney, against Americans for Prosperity (AFP), the Americans for Prosperity Foundation, and several other named individuals. The summary also briefly reviews the Commission's order issued February 8, 2012, dismissing two earlier complaints against AFP and its Washington State chapter (AFP-WA) (PDC Case No. 11-019) involving similar allegations.

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#### **Allegations in 45-Day Citizen Action Letter**

The citizen action letter alleges violations of RCW 42.17 by AFP, Americans for Prosperity Foundation, and the following named individuals, who are alleged to have acted in concert with AFP in committing the violations:

- David Koch, Chairman of the AFP Foundation
- Charles Koch, together with David Koch, a founder of the AFP-precursor group, Citizens for a Sound Economy
- Tim Phillips, President of AFP
- John Flynn, AFP Vice President and General Counsel
- Kirby Wilbur, former Washington State Director of AFP
- Richard Alvord
- W.R. Monkman
- Ron Cohn
- Sarah Rindlaub

The citizen action letter alleges the following violations of RCW 42.17:

- AFP was a "political committee" as defined in RCW 42.17.020(39) and relevant case law in the period leading up to the 2010 general election, and failed to register as such under RCW 42.17.040;
- AFP failed to report contributions, including contributions pledged but not received, and payments or promises to pay for reportable activity, as required of political committees under RCW 42.17.080, RCW 42.17.090, and RCW 42.17.565;
- Alternatively, if AFP was not an in-state political committee, AFP was an out-of-state political committee, and failed to disclose contributions and expenditures as required under RCW 42.17.093;
- AFP's activity constituted independent expenditures, political advertising, and/or electioneering communications, and that AFP failed to disclose this activity as required under RCW 42.17.100, RCW 42.17.103, and RCW 42.17.565; and

- AFP failed to correctly identify AFP as the sponsor of alleged independent expenditure political advertising and/or electioneering communications, and failed to include disclaimers and contributor listings required under RCW 42.17.510.

### **Summary of PDC Case No. 11-019**

At its January 26, 2012, regular meeting, the Commission acted to dismiss two complaints filed against AFP-WA involving similar allegations in PDC Case No. 11-019. The Order of Dismissal found and concluded that AFP was not a political committee during the period leading up to the 2010 election, and therefore had no political committee reporting obligations; and that AFP's communications did not meet the legal definitions of "political advertising," "independent expenditures," or "electioneering communications" and therefore were not subject to the sponsor identification or related reporting requirements applicable to those types of communications.

In reaching its decision, the Commission considered staff's investigation into communications sponsored by AFP in October 2010 that identified thirteen incumbent Washington State legislators who were candidates for election or re-election in 2010. The Commission also considered additional information regarding whether there were any other AFP communications directed to Washington residents during the two years prior to the timeframe involved in the complaints, as well as legal briefing submitted by Respondents and staff.

### **Investigative Findings for Citizen Action Letter**

Staff's initial review of the citizen action letter determined that it appeared to contain largely the same allegations as those in the earlier complaints, but it did not include any documentary evidence or identify any specific information to distinguish Mr. Kimbrough's allegations from those dismissed in the earlier case.

Staff's further investigation into the citizen action letter revealed that the allegations are substantially the same as those made in PDC Case No. 11-019. Staff confirmed that the complainant has no additional new or factual information to support the allegations and essentially simply disagrees with the Commission's legal conclusions regarding the facts previously investigated.

### **New Allegations/Respondents**

Although similar, the allegations in the complaint and citizen action letter are not identical. The citizen action letter differs from the earlier complaints in two respects: first, it adds an alternative allegation that if AFP is not a political committee as defined at RCW 42.17.020(39), then it is an out-of-state political committee required to report under RCW 42.17.093; and second, it names AFP, AFP Foundation, and several individuals who were not named as respondents in the earlier complaints and alleges that they acted in concert with AFP in committing the alleged violations.

Regarding the first new allegation, the complainant provided no evidence, and staff found no evidence, that AFP qualified to report as an out-of-state political committee or

that it made expenditures that supported or opposed a candidate that would be reportable under RCW 42.17.093. To qualify as an out-of-state political committee eligible to report on PDC form C-5, an entity must, among other things, be a political committee registered and actively filing campaign disclosure reports in one or more other states for the preceding two years and be originally formed and currently organized for the purpose of soliciting contributions or making expenditures in another state's election campaigns. WAC 390-16-049. No information was provided or found that AFP met these requirements or that its expenses supported or opposed a candidate.

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Regarding the second new allegation, again the complainant provided no new evidence or information tending to establish violations by AFP, or by any of the named individuals. The complainant also provided no information establishing a relationship between any of the named individuals and AFP that would lead to a conclusion that they "acted in concert" to commit any violations. Staff's investigation found that some of the named individuals had no formal or on-going relationship with AFP or AFP Foundation, and no role in directing or participating in AFP's activities other than as donors to AFP. To the extent other individuals may have had a more formal or on-going relationship with AFP or AFP Foundation, or may have had a role in directing or participating in AFP's activities, because staff has not found AFP to have committed any violations, there are no violations for which the named individuals "acted in concert."

### **Conclusion and Recommendation:**

Most of the allegations in the citizen action letter are essentially the same as the allegations in the complaints that were previously dismissed by the Commission. The citizen action letter provides no factual or legal basis to reach a different conclusion than the Commission has already reached. Staff recommends the allegations in the citizen action letter should be dismissed to the extent they are substantially the same as the allegations previously dismissed in PDC Case No. 11-019.

Where the allegations differ, there is insufficient basis to find any violations. The citizen action letter provided no evidence, and staff found no evidence, that AFP qualified to report as an out-of-state political committee or that it made expenditures that supported or opposed a candidate that would be reportable under RCW 42.17.093. This allegation should be dismissed.

The citizen action letter provided no evidence, and staff found no evidence, that AFP Foundation or any of the individuals named as Respondents violated any sections of RCW 42.17 included in the allegations. The allegations against each of the named Respondents should be dismissed.

In conclusion, PDC staff recommends that the Commission dismiss all allegations against all Respondents in the citizen action letter, as noted above.