



FEDERAL ELECTION COMMISSION
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October 18, 2010

MEMORANDUM

AGENDA ITEM

TO: The Commission

For the Meeting of 2-3-11

FROM: Christopher Hughey *pch*
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SUBJECT: Kucinich for President, Inc. -- Statement of Reasons -- Repayment Determination Upon Administrative Review (LRA # 640)

The attached draft Statement of Reasons concludes that Dennis J. Kucinich and Kucinich for President, Inc. (collectively, "KFP") must repay \$135,518 to the United States Treasury. 26 U.S.C. § 9038(b)(2). The draft Statement of Reasons sets forth the legal and factual basis for the recommended determination after administrative review. 11 C.F.R. § 9038.2(c)(3).

On March 8, 2007, the Commission approved the Audit Report and in that report the Commission determined that KFP must make a *pro rata* repayment of \$135,518 to the United States Treasury. The Commission based this determination on KFP's use of \$454,015 in funds containing matching funds to pay for non-qualified "continuing to campaign" expenses to seek the 2004 Democratic presidential nomination after the candidate became ineligible.¹ KFP disputed, and sought administrative review of, the Commission's repayment determination.

We reviewed KFP's response, and we recommend the Commission make the same repayment determination upon administrative review. We have attached a draft Statement of Reasons that supports the repayment determination.

¹ The Audit Report also recommended that the Committee pay \$1,840 to the United States Treasury for receipt of anonymous cash contributions in excess of the limitations that were not properly disposed. Although KFP also contests this payment, the draft Statement of Reasons does not address it because it is not a repayment determination and thus, is not subject to the administrative review process. See 11 C.F.R. § 9038.2(c).

We would note that it took a significant amount of time for the Office of General Counsel to prepare and to complete higher-level review of the draft Statement of Reasons, due to the complexity of the issues involved and to completing priorities. In other, more recent matters, GLA has sought to more closely track and turn around projects, and to become more chart- and deadline-driven. Directives 68 and 69 have also clarified the priority the Commission places on PFAA matters. We are optimistic that we will be able to submit future matters to the Commission more quickly.

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission:

1. Determine that Dennis J. Kucinich and Kucinich for President, Inc. must repay \$135,518 to the United States Treasury for non-qualified campaign expenses;
2. Approve the Statement of Reasons; and
3. Approve the appropriate letter.

Attachment

Draft Statement of Reasons

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Dennis J. Kucinich) LRA # 640
Kucinich for President, Inc.)

**STATEMENT OF REASONS IN SUPPORT OF REPAYMENT DETERMINATION
AFTER ADMINISTRATIVE REVIEW**

**I. SUMMARY OF REPAYMENT DETERMINATION AFTER ADMINISTRATIVE
REVIEW**

Pursuant to 26 U.S.C. § 9038(b)(2), the Federal Election Commission (“Commission”) determined, on _____, 2010, that Dennis J. Kucinich and Kucinich for President, Inc. (collectively, “KFP”) must repay \$135,518 to the United States Treasury. Therefore, the Commission orders KFP to repay \$135,518 to the United States Treasury within thirty (30) calendar days after service of this repayment determination upon administrative review. 11 C.F.R. § 9038.2(c)(3) and (d)(2). This document is the Statement of Reasons that sets forth the legal and factual basis for the Commission’s repayment determination after administrative review. 11 C.F.R. §§ 9038.2(c)(3).

II. PROCEDUAL BACKGROUND

Congressman Dennis J. Kucinich (“Kucinich”) sought the Democratic Party’s nomination for the office of President of the United States in the 2004 primary election. Kucinich for President, Inc., his principal campaign committee, registered with the Commission on February 21, 2003. Congressman Kucinich applied for matching funds, and the Commission determined him eligible to receive matching funds on December 23, 2003. KFP received a total of \$3,291,963 in matching funds from the United States Treasury.

The Commission determined that Kucinich’s date of ineligibility (“DOI”) was March 4, 2004, after he failed to receive ten percent of the vote in two consecutive primary elections, and notified him by letter dated March 15, 2004. *See* 11 C.F.R. § 9033.5(b). Kucinich could not receive or use matching funds to pay any expenses incurred after his DOI that were for the purpose of seeking his party’s nomination. *See* 11 C.F.R. § 9034.4(a)(3)(ii). Rather, Kucinich could only receive further matching payments to the extent he had net outstanding campaign obligations from his period of eligibility, and could only use those payments to pay those net outstanding campaign obligations and the costs associated with winding down his campaign. *See* 11 C.F.R. §§ 9033.5, 9034.4(a)(3)(ii). Nevertheless, Kucinich continued his primary campaign after his DOI through the date of the Democratic Party nomination on July 29, 2004.

After the presidential election, the Commission audited KFP pursuant to 26 U.S.C. § 9038(a). In the audit, the Commission found that KFP used \$454,015 in funds containing a portion of matching funds to pay for the expenses he incurred seeking the nomination after his DOI. The Commission refers to these expenses as his “continuing to campaign” expenses.¹ On March 8, 2007, the Commission approved the Audit Report and determined that KFP must make a *pro rata* repayment of \$135,518 to the United States Treasury. The *pro rata* repayment of \$135,518 represents the amount of matching funds used for these expenses, and was calculated by multiplying the total expenses of \$454,015 by the repayment ratio of 29.8488%. *See* 11 C.F.R. § 9038.2(b)(2)(iii). KFP’s written response disputing and seeking administrative review of the Commission’s repayment determination is reproduced at Attachments 2 and 3.

¹ The Audit Report also recommended that the Committee pay \$1,840 to the United States Treasury for receipt of anonymous cash contributions in excess of the limitations that were not properly disposed. Although KFP also contests this payment, the Commission is not addressing it in this Statement of Reasons because it is not a repayment determination and thus, is not subject to the administrative review process. *See* 11 C.F.R. § 9038.2(c).

III. REPAYMENT DETERMINATION UPON ADMINISTRATIVE REVIEW

After reviewing KFP's response, the Commission's determination remains the same: KFP must repay \$135,518 to the United States Treasury. *See* 26 U.S.C. § 9038(b)(2). KFP used \$454,015 in funds containing a portion of matching funds to pay for "continuing to campaign" expenses. KFP had not received sufficient contributions after the candidate's DOI to pay for all of its continuing to campaign expenses; thus, it paid some of those expenses with matching funds. Because matching funds cannot be used to pay for continuing to campaign expenses, these expenses were non-qualified campaign expenses that are subject to a *pro rata* repayment. *See* 26 U.S.C. § 9038(b)(2); 11 C.F.R. 9038.2(b)(2). The Commission, therefore, determines that KFP must repay \$135,518 to the United States Treasury.

A. PRINCIPLES OF THE MATCHING FUND SYSTEM

To provide context for this repayment determination, the Commission will begin by delineating some key principles of the primary matching fund system. The system provides public financing to candidates seeking their parties' nomination as candidate for the Office of President. Candidates participating in this system receive funds from two sources: private contributions and matching funds from the United States Treasury. Publicly-financed candidates have a status of either eligible to receive and spend matching funds for the purpose of seeking the nomination, or no longer eligible ("ineligible").

Eligibility status is important because it controls how a candidate may use contributions and matching funds. An eligible candidate may use both contributions and matching funds only for qualified campaign expenses for the purpose of seeking their party's nomination. 11 C.F.R. §§ 9032.9, 9034.4(a)(1). A qualified campaign expense is defined as an expense made in connection with a candidate's campaign for nomination and incurred before his DOI, or winding

down costs incurred after the DOI. *Id.* Any other expenses incurred after the candidate's DOI are not qualified campaign expenses. 11 C.F.R. §§ 9034.4(a)(3) and (b)(3). The Commission may seek repayment for non-qualified campaign expenses. 26 U.S.C. § 9038(b)(2); 11 C.F.R. § 9038.2(b)(2).

Thus, once a candidate becomes ineligible, the candidate's committee generally must use both private contributions and matching funds only to: 1) satisfy the debt from the period when the candidate was eligible; and 2) pay expenses necessary to wind down the campaign. 11 C.F.R. §§ 9032.9, 9034.4(a)(1) and (3), 9034.11. The use of private contributions is restricted both before and after DOI because if private contributions were used to defray nonqualified campaign expenses, then the candidate would require a higher proportion of public funds to defray qualified campaign expenses, including those unpaid expenses incurred when the candidate was eligible. And a central tenet of the matching funds system is that public funds will be used to defray a certain proportion of qualified campaign expenses, but not more. *See* Explanation and Justification for 11 C.F.R. 9034.4, 44 Fed. Reg. 20339 (Apr. 4, 1979).

Eligibility status is also important because it controls how the candidate's entitlement to matching funds is calculated. For the period of eligibility, a candidate is entitled to matching funds based on contributions that are matchable, up to a total of 50% of the total expenditure limitation. 11 C.F.R. § 9034.1(a) and (d). After the candidate becomes ineligible, however, entitlement is based on receipt of matchable contributions *and* a showing that the candidate has net outstanding campaign obligations, which include expenses from the period while the candidate was eligible, and winding down costs, on the date of payment, as reflected on the candidate's statement of net outstanding campaign obligations ("NOCO Statement"). 11 C.F.R. § 9034.1(b). The amount of an ineligible candidate's entitlement can be expressed in the

following equation: $RE = NOCO - (PC + MF)$, where RE means remaining entitlement after DOI, NOCO means net outstanding campaign obligations including winding down costs, PC means private contributions received after DOI and MF means matching funds received after DOI. *See id.*

The fact that a candidate has become ineligible does not, however, mean that the candidate must abandon his campaign for the party's nomination. *See* 11 C.F.R. § 9034.4(a)(3); *LaRouche v. Federal Election Commission*, 28 F.3d 137 (D.C. Cir. 1994). The candidate may elect to continue to campaign. However, he may not pay for that portion of the campaign with any matching funds. A candidate who has become ineligible but continues to campaign may use only private contributions received *after* the candidate's date of ineligibility to do so. 11 C.F.R. § 9034.4(a)(3). This is an exception to the general rule that candidates must use private contributions received after the DOI only to satisfy debt from the period of eligibility or to pay winding down expenses. *See* 11 C.F.R. §§ 9032.9, 9034.1(b), 9034.4(a)(1) and (3) and (b)(3), 9034.5, 9034.11.

The regulation that creates this exception, section 9034.4(a)(3)(ii), states that a candidate who continues to campaign after becoming ineligible because of insufficient votes may only receive matching funds based on the net outstanding campaign obligations as of the candidate's date of ineligibility. The NOCO statement shall include only costs incurred before DOI for goods and services to be received before DOI, and shall not include winding down costs until the date on which the candidate qualifies to receive winding down costs under section 9034.11. 11 C.F.R. § 9034.4(a)(3)(ii). That date, in turn, is either the date the candidate notifies the Commission of his withdrawal, or the date of the party's nomination, whichever comes first. 11 C.F.R. §§ 9034.4(a)(3)(ii); 9034.11. Matching funds received after the DOI may be used only

to defray the candidate's net outstanding campaign obligations, but shall not be used to defray any costs associated with continuing to campaign. *Id.* Each private contribution dated after the DOI may be used to continue to campaign, and may be submitted for matching funds. 11 C.F.R. § 9034.4(a)(3)(ii). The regulations, however, do not explicitly state how long a candidate may use private contributions to pay for continuing to campaign expenses.

KFP's position, in essence, is that the "continuing to campaign" exception extends indefinitely and that any private contribution received after DOI, even if it is received months after the date of nomination and the general election, may be used to pay for "continuing to campaign" expenses. For the reasons stated below, however, the Commission concludes that the exception ends when the candidate in fact ceases to campaign. In this instance, the candidate ceased to campaign on the date of the Democratic Party's nomination, July 29, 2004. Because KFP did not receive sufficient private contributions between its DOI and July 29, 2004 to pay for all of its continuing to campaign expenses, it used funds containing matching funds to pay for some of those expenses instead; thus, KFP used matching funds for non-qualified campaign expenses and must repay those matching funds.

B. KFP SEEKS ADMINISTRATIVE REVIEW

KFP disputes the repayment determination and makes four main arguments why there should be no repayment or a lesser repayment. *See* Attachments 2 and 3. First, KFP asserts that the Commission should allow it to use private contributions raised after July 29, 2004 to pay for continuing to campaign expenses. KFP calculates that if the \$269,682 in private contributions it received between July 30, 2004 and January 2, 2005 could be used to pay for "continuing to campaign" debts, its repayment would be reduced to \$55,021 ($(\$1,901,309 - \$1,447,294 - \$269,682) \times 29.8488\%$). Second, KFP argues that the issue is not resolved by the statute or

regulation and that if the law is vague or the regulation is deficient, the Commission should set policy concerning the continuing to campaign exception through a rulemaking rather than in the audit and repayment process. Attachment 2 at 3-4, Attachment 3 at 1-3. Third, KFP argues that the calculation of funds available to pay for its continuing to campaign expenditures should include the “non-public portion,” made up of private contributions, of its cash on hand as of the candidate’s DOI. Finally, KFP contends that the amount of its continuing to campaign expenses should be lower because it submitted documentation supporting a reduction and the Commission did not explain why it did not accept the Committee’s calculation.

The Commission is not persuaded by KFP’s arguments and the repayment determination remains unchanged. We discuss KFP’s arguments in more detail in our analysis below.

C. EXCEPTION ALLOWING CANDIDATE TO USE CONTRIBUTIONS TO CONTINUE TO CAMPAIGN AFTER DOI ENDS WHEN CANDIDATE CEASES TO CAMPAIGN

The Commission concludes that the continuing to campaign exception ended for KFP when the candidate ceased to campaign on July 29, 2004, the date of the party nomination. As a result, KFP may not use private contributions raised after that date to pay “continuing to campaign” expenses, but must use those contributions to pay for pre-DOI debts and post-“continuing to campaign” winding down expenses. Once the candidate’s campaign ends, the continuing to campaign exception of 11 C.F.R. § 9034.4(a)(3)(ii) ends as well.²

² When we say that KFP may not use private contributions raised after July 29, 2004 to pay “continuing to campaign” expenses, we do not mean to imply that a committee in KFP’s situation may *never* eventually pay off debts for those expenses. Rather, we mean simply that if it pays those debts while it still has matching funds in its bank account, but did not raise sufficient private funds during the continuing to campaign period to cover them, it must necessarily have used public funds to pay a portion of those non-qualified campaign expenses and must repay the Treasury. Once a committee has paid off all pre-DOI debts, *and* no longer has any matching funds left in its accounts as determined pursuant to 11 C.F.R. §§ 9038(b)(2)(iii) and (iv), then it may use any remaining funds to pay debts for continuing to campaign costs.

The Commission acknowledges that the exception that allows a candidate to use private contributions while he continues to campaign after DOI means that private contributions received during the “continuing to campaign” period could not also be used to help eliminate debt that the candidate incurred during the period when he was eligible. The continuing to campaign rule, however, is a specific regulatory exception to the general rule that after DOI the candidate must use all private contributions to satisfy the debt for qualified campaign expenses incurred prior to DOI plus winding down costs.³ 11 C.F.R. § 9034.4(a)(3)(ii). This narrow exception enables a candidate to continue his campaign after becoming ineligible because of insufficient votes, but it does not grant such a candidate a perpetual license to use all private contributions, whenever received, to pay the debts from his continuing to campaign expenses.⁴ In this case, the candidate continued to campaign after his DOI, but he had not received sufficient private contributions *before* the date of nomination to pay for all of his continuing to campaign expenses. The Commission, therefore, must decide if the private contributions received *after* the date of nomination should be used to pay the debt remaining from the period of eligibility or if they should be used to pay expenses from the continuing to campaign effort.

We conclude that the private contributions received after the candidate ceased campaigning must be used to help eliminate the debt from the candidate’s period of eligibility, not that from the “continuing to campaign” period. The Commission understands the candidate’s

³ Prior to adopting this exception, the Commission reasoned that private contributions could not be used for continuing to campaign because the private contributions could not be separated from the public funds from which they were commingled in the candidate’s accounts. The Commission also reasoned that the use of private contributions in such a manner would affect the candidate’s entitlement. *See* Explanation and Justification for 11 C.F.R. 9034.4, 56 Fed. Reg. 35905 (Jul. 29, 1991).

⁴ The Commission created the exception “to allow a candidate to use post-ineligibility contributions to continue campaigning after the date of ineligibility without such activity resulting in a repayment of funds in excess of entitlement or a repayment of funds used for nonqualified campaign expenses.” *See* Explanation & Justification for 11 C.F.R. § 9034.4(a)(3)(ii), 56 Fed. Reg. 35898, 35905 (Jul. 29, 1991).

desire to continue to seek his party's nomination after he has been declared ineligible and his right to do so, but the Commission must implement the main focus of the public financing program: to provide public funds, matched to private contributions, to finance viable candidates who have established and can maintain their eligibility. *See* 26 U.S.C. § 9033; Congressional Record (Daily Edition) March 18, 1976 S 3533, 3787-91 and 4182-83, *reprinted in* FEDERAL ELECTION COMMISSION, LEGISLATIVE HISTORY OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976, at 365, 439-443 and 522 (1976) (Statements by Senators Cannon, Taft, Bentsen and Dole, including statement by Senator Taft that failure to get 10% of the vote in two consecutive primaries “does not mean that a candidate can no longer run for President” but “taxpayers should no longer be required to finance the apparently fruitless effort.”); *Committee to Elect Lyndon LaRouche v. Federal Election Commission*, 613 F.2d 939, 942-943 (D.C. Cir. 1979). Therefore, any debt remaining from the period when the candidate was eligible and viable (as defined by the eligibility requirements of public financing law) must receive priority over expenses from the candidate's continuing to campaign efforts.

The regulations recognize that the party nomination marks the end of the campaign for candidates who continue to campaign through the convention. *See* 11 C.F.R. §§ 9034.4(a)(3)(ii), 9034.11(d). A candidate must be either actively campaigning or else winding down after the end of his campaign. For candidates who do not withdraw, the date of the party nomination is the end point marking the change from the active primary campaign to the post-election wind down when the candidate can begin to receive and use matching funds to pay for winding down costs.⁵ *See* 11 C.F.R. § 9034.11(d). A candidate “is not eligible to receive matching funds for winding

⁵ Similarly, the Commission considers the date of nomination as the turning point in its “bright line” rules for allocating various expenses between a party nominee's primary and general campaigns. *See* 11 C.F.R. § 9034.4(e).

down costs until the candidate is no longer continuing to campaign.” *See* Explanation & Justification for 11 C.F.R. § 9034.4(a)(3)(ii), 56 Fed. Reg. 35898, 35905 (Jul. 29, 1991); 11 C.F.R. §§ 9034.4(a)(3)(ii); 9034.11. The same date that marks the beginning of the winding down period when all candidates may only receive or use matching funds to pay for debts from the period of eligibility and winding down costs should also be the date when candidates who continued to campaign must begin to use private funds only for debts from the period of eligibility and winding down costs rather than for “continuing to campaign” debt.

Moreover, allowing a “continuing to campaign” candidate the benefit of the exception even after he is no longer campaigning would unfairly make permanent a potential windfall to that candidate’s remaining entitlement compared to that of an ineligible candidate who simply drops out of the race. As previously noted, the formula for calculating an ineligible candidate’s remaining entitlement is $RE = NOCO - (PC + MF)$. *See* 11 C.F.R. § 9034.1(b). In other words, an ineligible candidate’s entitlement is ordinarily the NOCO reduced by the sum of the contributions and matching funds he receives after DOI. However, for a candidate who continues to campaign after DOI, private contributions are, in effect, excluded from this calculation because they can be used to pay for continuing to campaign expenses, resulting in a potential increase to his entitlement. *See* 11 C.F.R. § 9034.4(a)(3)(ii). Such a candidate’s entitlement is reduced only by the amount of matching funds he receives post-DOI, while a candidate who proceeds to wind down directly after his DOI has his entitlement reduced both by all post-DOI matching funds and all post-DOI contributions received. There is no reason to extend this disparate treatment indefinitely. Once a candidate is no longer continuing to campaign, he is winding down his campaign like any other candidate after DOI and should be treated the same.

The Commission's underlying goal in creating the continuing to campaign exception in section 9034.4(a)(3)(ii) was "to treat candidates who continue to campaign *as fairly* as those who withdraw as of the date of ineligibility," not more favorably. *See Explanation & Justification for 11 C.F.R. § 9034.4(a)(3)(ii), 56 Fed. Reg. 35898, 35905 (Jul. 29, 1991) (emphasis added).* Yet, if the exception is extended beyond the end of the campaign, candidates who continued to campaign would be treated *more favorably* than other candidates. Allowing candidates to use private funds dated and received after the candidate has stopped continuing to campaign to pay for "continuing to campaign" debt, as KFP proposes, would, in effect, create a larger entitlement for candidates who continue to campaign than for similarly situated candidates who do not because the entitlement would not be reduced by the amount of private contributions they received after their campaign was over. If the contributions received after the campaign ends by a candidate who continued to campaign are not used to reduce that candidate's net outstanding campaign obligations in calculating remaining entitlement, that candidate might use a larger proportion of matching funds to pay his net outstanding campaign obligations. Under KFP's proposed interpretation, candidates who continue to campaign would receive more matching funds to pay the same amount of debts and winding down costs after the end of their campaigns than candidates who did not continue to campaign, and in effect, their debts and winding down costs would be paid with a greater proportion of matching funds. To avoid this inequity, the Commission concludes that the continuing to campaign exception must end when the candidate stops campaigning.

The Commission is not persuaded by KFP's argument that its continued fundraising after the convention enabled it to eventually pay all of its continuing to campaign expenses with

private contributions.⁶ *See* Attachment 2 at 2. Specifically, KFP argues that it ultimately replaced any matching funds “initially used” for those expenses with private contributions. *Id.* KFP appears to acknowledge that it “initially used” some amount of matching funds to pay for continuing to campaign expenses; however, *any* matching funds KFP used to pay for continuing to campaign expenses would result in non-qualified campaign expenses.⁷ *See* 11 C.F.R. § 9034.4(a)(3)(ii). Moreover, as the continuing to campaign exception ended on July 29, 2004, KFP could not use any private contributions received after that date to somehow replace matching funds previously used for continuing to campaign expenses.

D. THE COMMISSION MAY NARROWLY CONSTRUE THE EXCEPTION

The Commission is also not persuaded by KFP’s second major argument, that the regulation is vague or deficient and that the Commission should set policy concerning the continuing to campaign exception through a rulemaking rather than in the audit and repayment process. KFP argues that if the Commission recognizes that there is vagueness or deficiency in

⁶ Several of KFP’s other contentions in support of its proposal are unclear and difficult to understand. KFP calls the Commission’s approach an “artificial carve out.” Attachment 2 at 2. KFP contends that this issue is “intertwined” with the calculation of its net outstanding campaign obligations and remaining entitlement because of “the fungible nature of money and the seamless continuation of the campaign,” which, it notes, does not stop and restart after a candidate becomes ineligible. *Id.* Further, KFP asserts that it is incongruent to require it to repay matching funds used to continue to campaign when it continued to be entitled to matching funds for debt retirement. *Id.* KFP argues that it is inequitable to reduce its remaining entitlement by contributions received after July 29, 2004 but not allow those contributions to be used for continuing to campaign expenses, which “effectively punishes a candidate for continuing to campaign.” Attachment 2 at 3.

Although KFP correctly observes that the use of funds to continue to campaign is linked to the calculation of a candidate’s entitlement, its contention that it was somehow penalized by the Commission’s entitlement calculation is unpersuasive. The Commission’s decision in this matter might have had a detrimental impact on the candidate’s entitlement to matching funds if the Commission had sought a repayment for funds received in excess of entitlement, or if the Commission had reduced the actual matching fund payments. The calculation of the candidate’s net outstanding campaign obligations in the Commission’s Audit Report, however, concluded that Kucinich did not receive matching funds in excess of his entitlement. Indeed, KFP had remaining entitlement and its matching fund payments were never reduced based on insufficient entitlement.

⁷ Most of the amount at issue here was both incurred and paid before July 29, 2004, but \$30,171 was incurred before July 29, 2004 and paid after that date.

its regulations, it should not set policy during an audit and retroactively apply that policy.⁸

Attachment 2 at 3, Attachment 3 at 1. Rather, KFP contends that the Commission should only adopt a policy or regulation prospectively after public comment. Attachment 2 at 4 (citing Commission actions in audits and Commissioner statements of reasons in other matters). KFP elaborated upon this argument in its supplemental response, asserting that while the Commission’s choice between rulemaking and adjudication is subject to an “abuse of discretion” standard of review, courts have repeatedly recognized that rulemaking, not case-by-case adjudication, is the preferred option when establishing an agency policy. Attachment 3 at 2 (citing cases). KFP cites examples of cases where, it argues, the Commission declined to proceed in enforcement matters because of the absence of clear regulatory standards. Attachment 3 at 3 (citing statements of reasons by various Commissioners).

The Commission disagrees. The continuing to campaign rule is an exception to a general rule. What the Commission is doing here is no more than the familiar task of construing an exception to a general rule. In interpreting this regulation, the Commission is following the basic principle of statutory or regulatory construction that an exception to a general rule should be construed narrowly. *See, e.g., Commissioner v. Clark*, 489 U.S. 726, 739 (1989) (Statutory exceptions are to be construed “narrowly in order to preserve the primary operation of the provision.”) The Commission’s narrow reading of the continuing to campaign exception is consistent with longstanding Commission policies of treating all candidates equitably, *see* 56 Fed. Reg. 35905, and preserving public funds by not permitting candidates to artificially increase

⁸ KFP asserts that Commission staff has acknowledged that neither the statutes nor the regulations deal directly with this issue. Attachment 2 at 3, Attachment 3 at 1. KFP quotes a memorandum from the Commission’s Office of General Counsel, and asserts that staff recognized that KFP “raises a legitimate argument.” Attachment 2 at 3, Attachment 3 at 1. KFP cannot, however, rely upon Commission staff memoranda because staff memoranda do not set forth the Commission’s position. *See Fulani v. FEC*, 147 F.3d 924 (D.C. Cir. 1998).

their entitlement. Moreover, the regulation is not deficient. The date that the continuing to campaign exception ends is the same date the campaign ends, and that date is best determined on a case-by-case basis because candidates who continue to campaign will end their campaigns for various reasons under different factual circumstances. The Commission has discretion to interpret its rules and address issues through case-by-case adjudication or rulemaking. *See Shays v. FEC*, 511 F.Supp.2d 19, (D.D.C. 2007)(the “decision of whether to proceed through case-by-case adjudication or by general rulemaking lies largely within the agency’s discretion.”); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)(The “choice between a general rule” and an individual case “lies primarily in the informed discretion of the administrative agency.”).

E. CONTRIBUTIONS RECEIVED PRIOR TO DOI CANNOT BE USED TO CONTINUE TO CAMPAIGN

The Commission is also not persuaded by KFP’s third major argument. KFP contends that what it calls the “non-public portion” of its cash on hand as of the DOI, by which it means contributions from individuals, should be considered available to pay for continuing to campaign expenditures. Attachment 2 at 4. KFP argues that a portion of the cash on hand as of DOI was made up of “non-public” contributions. KFP calculated this “non-public” amount by using the repayment ratio.

Generally, the repayment ratio is used to calculate the amount of the repayment when a candidate has used matching funds to defray the cost of non-qualified campaign expenses. 11 C.F.R. § 9038.2(b)(2)(iii). The basic premise is that candidates pay all expenses from a commingled pool of matching funds and contributions, but must repay only the proportion of matching funds used. *See Kennedy for President v. FEC*, 734 F.2d 1558, 1562 (D.C. Cir 1984). The repayment ratio is used to calculate that proportion. KFP reversed the repayment ratio to

calculate the proportion of funds in the mixed pool that are *not* matching funds; thus, it contends that as the repayment ratio of 29.8488% represents matching funds, the remainder of 70.1512% is not matching funds. KFP had \$365,397 in cash on hand as of the DOI, including contributions dated before the DOI but deposited after that date. KFP multiplied the total cash on hand as of DOI (\$365,397) by 70.1512% to calculate the amount of the cash on hand that it asserts was the portion of its cash-on-hand derived from contributions, \$256,330. KFP calculates that this “non-public” portion, \$256,330, should have been added to the contributions deposited during the continuing to campaign period of \$1,447,294 for a total of \$1,703,624 in private contributions that were available to pay for continuing to campaign expenses. KFP calculates that allowing it to use the non-public portion of its cash on hand as of DOI to pay for continuing to campaign expenses would reduce its repayment to \$49,907.

KFP further asserts that there is no regulation prohibiting use of the non-public portion of cash on hand as of DOI for continuing to campaign expenses, nor requiring any sort of segregated fund for paying continuing to campaign expenses. KFP contends that as cash on hand is included in calculating entitlement to matching funds and can result in a lower entitlement, the Commission would be penalizing a candidate who chose to continue to campaign if it did not allow the candidate to use the non-public portion of the cash on hand as of DOI to continue to campaign.

The Commission is not persuaded by this argument because it contradicts the language of the Commission’s continuing to campaign rule. None of KFP’s cash on hand as of the DOI could be used for continuing to campaign expenses. The continuing to campaign exception in section 9034.4(a)(3)(ii) states that the funds that “may be used to continue to campaign” are those contributions “dated after the candidate’s date of ineligibility.” KFP’s cash on hand as of

the candidate's DOI does not include any contributions dated after that date, and thus, may not be used to pay for any continuing to campaign expenses. While it is true that some portion of the Committee's cash on hand as of the DOI was "non-public" in that it was made up of private contributions, those private contributions cannot be separated out to be used for continuing to campaign expenses. The cash on hand as of the DOI was a commingled pool of matching funds and contributions, which could only be used to pay for qualified campaign expenses. *See* 11 C.F.R. § 9034.4(a)(1). The expenses related to continuing to campaign were incurred after DOI and would be non-qualified campaign expenses if paid with funds that contained any portion of matching funds. *See* 11 C.F.R. §§ 9034.4(a)(3) and (b)(3), 9038.2(b)(2)(ii)(D). Just as KFP could not use private contributions received after the end of the continuing to campaign period to pay for continuing to campaign expenses while it still had pre-DOI debt, it also could not use private contributions received before that period began that were contained in its cash on hand as of the DOI to pay for continuing to campaign expenditures.

Therefore, KFP could not use any private contributions it received after the end of the candidate's campaign on July 29, 2004 nor any private contributions it had received prior to DOI, to pay for continuing to campaign expenses. Only those contributions received *while* the candidate was actually continuing to campaign, between the DOI and July 29, 2004, may be used to pay for KFP's continuing to campaign expenses.

F. PAYMENTS FOR CONTINUING TO CAMPAIGN EXPENSES MADE AFTER JULY 29, 2004 WERE NON-QUALIFIED CAMPAIGN EXPENSES

The Commission concludes that KFP used matching funds to pay expenses related to the candidate's continuing to campaign efforts. This conclusion requires a repayment. To calculate the amount of the repayment, the Commission must first determine the amount of contributions

received after the DOI but before the date of nomination. The Commission must also determine the amount of continuing to campaign expenses. The Commission concludes that the contributions KFP received after the DOI but before the date of nomination total \$1,447,294 and that KFP's continuing to campaign expenses total \$1,901,309.

The Commission concluded in the Audit Report that the total amount of KFP's continuing to campaign expenses was \$1,901,309, a reduction of \$34,005 based on KFP's response to the Preliminary Audit Report ("PAR"). KFP argues that some of these expenses were not continuing to campaign expenses, but instead were really campaign expenses from before the DOI. KFP proposes specific reductions reflecting these assertions. KFP contends that it submitted documentation in response to the PAR supporting a \$64,490 reduction in the amount of its continuing to campaign expenses, but the Commission only reduced those expenses by \$34,005. KFP argues that the Commission did not explain in the Audit Report which portions of KFP's submission it accepted and why the reduction was limited to \$34,005. KFP requests that it be informed of which items were not accepted, but argues that it provided sufficient documentation to support the \$64,490 reduction. Attachment 2 at 1.

The Commission concludes that KFP's documentation supports a reduction of only \$34,005. KFP provided invoices for expenses it contended were for services provided before the DOI but billed to KFP after that date. Although the Commission reduced the total by \$34,005 for pre-DOI expenses, its review of these invoices produced different amounts than the Committee's calculations. The details of the Commission's review and the amounts the Commission did not accept are explained in the attached schedule. Attachment 5; *see also* Attachment 4. For expenses related to both the pre-DOI and post-DOI periods, the Commission calculated the pre-DOI amount of the expense, but its calculations differed from KFP's

calculations. For some expenses, KFP provided no documentation to support its calculations. Attachments 4 and 5. In other instances, the invoice indicated the expense was incurred and paid during the continuing to campaign period. *Id.* The Commission provided KFP a schedule of the expenses detailing its review of the Committee's proposed reductions to the continuing to campaign expenses and showing the Audit staff's calculations by electronic mail on August 13, 2007. Attachment 5. The schedule included notations, such as "no documentation," explaining why the Commission did not accept the Committee's proposed reductions to particular expenses. Therefore, the amount of KFP's continuing to campaign expenses is \$1,901,309.

Next, the Commission must determine the pool of contributions and matching funds that were used to pay for the continuing to campaign expenses. Generally, all contributions and matching funds are considered commingled in a mixed pool, *see Kennedy for President v. FEC*, 734 F.2d 1558, 1562 (D.C. Cir 1984), and any payment from that pool of funds would contain some amount of matching funds as long as KFP's accounts still contained any matching funds. *See* 11 C.F.R § 9038.2(b)(2)(iii)(B). Because some matching funds were used to pay for some of the continuing to campaign expenses, those expenses were non-qualified and subject to repayment. *See* 11 C.F.R. §§ 9034.4(a)(3) and (b)(3), 9038.2(b)(2)(ii)(D).

The Commission uses the following formula to calculate the amount of non-qualified campaign expenses: Contributions dated and received after DOI and on or before July 29, 2004 (\$1,447,294) are subtracted from the total continuing to campaign expenses paid (\$1,901,309). Thus, KFP paid \$454,015 more for continuing to campaign expenses than it received in contributions during the period while the candidate continued to campaign between March 5, and July 29, 2004 [$\$1,901,309$ (CTC expenses) - $\$1,447,294$ (contributions received during CTC period) = $\$454,015$]. Because KFP had not received sufficient contributions to pay for all of

those continuing to campaign expenses when it paid them, it must have paid the difference in expenses totaling \$454,015 with a mixed pool of contributions and matching funds. Matching funds may not be used to pay for continuing to campaign expenses. *See* 11 C.F.R.

§§ 9034.4(a)(1) and (3)(ii). Thus, the continuing to campaign expenses totaling \$454,015 were non-qualified campaign expenses subject to *pro rata* repayment.

Finally, the Commission must determine the portion of the matching funds from the pool that was used to pay those continuing to campaign expenses. The matching funds from this pool represent the exact amount that KFP must repay to the United States Treasury. For this calculation, the Commission relies on the concept that non-qualified campaign expenses are subject to *pro rata* repayment. The *pro rata* repayment calculation is \$454,015 multiplied by the repayment ratio of 29.8488%, resulting in a repayment of \$135,518. Therefore, KFP must repay \$135,518, the *pro rata* portion of the funds representing the amount of matching funds used for the non-qualified campaign expenses. *See* 26 U.S.C. § 9038(b)(2); 11 C.F.R. 9038.2(b)(2). This analysis is consistent with the analysis of a similar issue in a previous election cycle. *See* Statement of Reasons – Keyes 2000, Inc. (approved Mar. 4, 2004) (Repayment for the *pro rata* amount spent in excess of funds received during the continuing to campaign period).

IV. CONCLUSION

Based on the foregoing, the Commission has determined that Dennis J. Kucinich and Kucinich for President, Inc. must repay \$135,518 to the United States Treasury for non-qualified campaign expenses. 26 U.S.C. § 9038(b)(2); 11 C.F.R. 9038.2(b)(2).

Attachments

1. Audit report approved March 8, 2007
2. Kucinich for President, Inc. Response dated May 7, 2007
3. Kucinich for President, Inc. Response dated May 29, 2007
4. Memorandum “Audit Comments Regarding Kucinich for President, Inc.’s Response to Repayment Determination” (Sept. 4, 2007)

Kucinich for President, Inc.

Statement of Reasons – Repayment Determination Upon Administrative Review

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5. Electronic mail from Audit Division to Donald J. McTigue (Aug. 13, 2007).

LFA 640
3/19/07



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 19, 2007

MEMORANDUM

TO: ROBERT W. BIERSACK
PRESS OFFICER
PRESS OFFICE

FROM: JOSEPH F. STOLTZ *JFS*
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: PUBLIC ISSUANCE OF THE REPORT OF THE AUDIT DIVISION ON
KUCINICH FOR PRESIDENT, INC.

Attached please find a copy of the final audit report and related documents on Kucinich for President, Inc. that was approved by the Commission on March 8, 2007.

All parties involved have received informational copies of the report and the report may be released to the public.

Attachment as stated

cc: Office of General Counsel ✓
Office of Public Disclosure
Reports Analysis Division
FEC Library
Web Manager

ATTACHMENT 1
PAGE 1 OF 26



Report of the Audit Division on Kucinich for President, Inc.

February 13, 2003 – September 30, 2004

Why the Audit Was Done

Federal law requires the Commission to audit every political committee established by a candidate who receives public funds for the primary campaign.¹ The audit determines whether the candidate was entitled to all of the matching funds received, whether the campaign used the matching funds in accordance with the law, whether the candidate is entitled to additional matching funds, and whether the campaign otherwise complied with the limitations, prohibitions, and disclosure requirements of the election law.

Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

About the Committee (p. 2)

Kucinich for President, Inc. (KFP) is the principal campaign committee for Congressman Dennis J. Kucinich, a candidate for the Democratic Party's nomination for the office of President of the United States. KFP is headquartered in Columbus, OH. For more information, see the chart on Campaign Organization, p.2.

Financial Activity (p. 3)

- **Receipts**
 - Contributions from Individuals \$ 8,015,122
 - Matching Funds Received 2,955,963
 - Contributions from Political Committees 16,015
 - Loans Received 1,507,000
 - All Other Receipts 226,076
 - **Total Receipts** \$ 12,720,176
- **Disbursements**
 - Operating Expenditures \$ 10,953,171
 - Exempt Legal and Accounting 56,393
 - Loan Repayments 1,507,000
 - All Other Disbursements 50,702
 - **Total Disbursements** \$ 12,567,266

Findings and Recommendations (p. 4)

- Net Outstanding Campaign Obligations (Finding 1)
- Costs Associated with Continuing to Campaign (Finding 2)
- Misstatement of Financial Activity (Finding 3)
- Itemization of Contributions from Individuals (Finding 4)
- Receipt of Currency in Excess of Limitations (Finding 5)

¹ 26 U.S.C. §9038(a).

Report of the Audit Division on Kucinich for President, Inc.

February 13, 2003 – September 30, 2004



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Part I

Background

Authority for Audit

This report is based on an audit of Kucinich for President, Inc. (KFP), undertaken by the Audit Division of the Federal Election Commission (the Commission) as mandated by Section 9038(a) of Title 26 of the United States Code. That section states "After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received [matching] payments under section 9037." Also, Section 9039(b) of the United States Code and Section 9038.1(a)(2) of the Commission's Regulations state that the Commission may conduct other examinations and audits from time to time as it deems necessary.

Scope of Audit

This audit examined:

1. The receipt of excessive contributions and loans.
2. The receipt of contributions from prohibited sources.
3. The disclosure of contributions and transfers received.
4. The disclosure of disbursements, debts and obligations.
5. The recordkeeping process and completeness of records.
6. The consistency between reported figures and bank records.
7. The accuracy of the Statement of Net Outstanding Campaign Obligations.
8. The campaign's compliance with spending limitations.
9. Other campaign operations necessary to the review.

Inventory of Campaign Records

The Audit staff routinely conducts an inventory of campaign records before it begins the audit fieldwork. KFP's records were substantially complete and the fieldwork began immediately.

Part II

Overview of Campaign

Campaign Organization

Important Dates	Kucinich for President, Inc.
• Date of Registration	February 21, 2003
• Eligibility Period ²	December 23, 2003 – March 4, 2004
• Audit Coverage	February 13, 2003 – September 30, 2004 ³
Headquarters	Columbus, OH
Bank Information	
• Bank Depositories	Five
• Bank Accounts	Nine – Checking Accounts
	Two – Savings Accounts
	One – Certificate of Deposit
Treasurer	
• Treasurer When Audit Was Conducted	Donald J. McTigue
• Treasurer During Period Covered by Audit	Donald J. McTigue
Management Information	
• Attended FEC Campaign Finance Seminar	Yes
• Used Commonly Available Campaign Management Software Package	Yes
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff

² This period began with the date the candidate satisfied matching fund eligibility requirements and ended when the candidate received insufficient votes as determined by the Commission. See 11 CFR §9033.5(b)

³ Limited reviews of receipts and expenditures were performed after September 30, 2004 to determine whether the candidate was entitled to receive additional matching funds.

Overview of Financial Activity (Audited Amounts)

Cash on hand @ February 13, 2003	\$ 0
o Contributions from Individuals	\$ 8,015,122 ⁴
o Matching Funds Received	2,955,963 ⁵
o Contributions from Political Committees	16,015
o Loans Received	1,507,000
o Offsets to Expenditures	223,198
o Interest Received	2,878
Total Receipts	\$ 12,720,176
o Operating Expenditures	\$ 10,953,171
o Exempt Legal and Accounting	56,393
o Loan Repayments	1,507,000
o Contribution Refunds	38,764
o Other	11,938
Total Disbursements	\$ 12,567,266
Cash on hand @ September 30, 2004	\$ 152,910

⁴ Approximately 138,000 contributions received from about 74,600 individuals.

⁵ KFP received an additional \$336,000 in matching funds after 9/30/04 for a total of \$3,291,963. This represents 18% of the maximum entitlement (\$18,655,000).

Part III

Summaries

Findings and Recommendations

Finding 1. Net Outstanding Campaign Obligations

A review of KFP's financial activity through December 31, 2006, and estimated winding down costs through June 30, 2007 indicates that KFP did not receive matching fund payments in excess of the Candidate's entitlement.

(For more detail, see p. 6)

Finding 2. Costs Associated With Continuing to Campaign

Congressman Kucinich continued to campaign after his date of ineligibility, March 4, 2004, until July 29, 2004, the date on which the Democratic Party nominated its candidate for President of the United States. KFP was permitted to use only private funds received during this period, not matching funds, to fund campaign activity. The Audit staff determined that while continuing to campaign, KFP paid expenses that exceeded private contributions received by \$454,015. These expenses were paid with funds that contained matching funds. Such funds are subject to a pro rata repayment to the U.S. Treasury. The Audit staff recommends that the Commission determine that \$135,518 is repayable to the U.S. Treasury.

(For more detail, see p. 10)

Finding 3. Misstatement of Financial Activity

A comparison of KFP's reported financial activity to bank records revealed misstatements of receipts and disbursements in calendar year 2003. The PAR recommended that KFP amend its disclosure reports. In response, KFP filed the requested amended reports.

(For more detail, see p. 12)

Finding 4. Itemization of Contributions from Individuals

A sample review of contributions from individuals indicated that KFP failed to itemize a significant number of contributions that required itemization. The sample results projected that contributions totaling \$520,530 were not itemized as required. The Audit staff recommended that KFP amend its reports to itemize the contributions. In response to the recommendation, KFP filed amended reports which substantially correct its filings.

(For more detail, see p. 14)

Finding 5. Receipt of Currency in Excess of Limitations

A review of 698 deposits of currency determined that 117 of them could not be associated with individual contributors or fundraising events. The Audit staff treated these as anonymous cash contributions subject to a \$50 limit per deposit. After allowing a \$50 contribution from each deposit, there remained \$41,410 in anonymous contributions that exceeded the limit. The Audit staff recommended that KFP submit

information that showed that no single anonymous cash contribution exceeded \$50 or, dispose of the amount in excess of the limit in a manner that is not related to Federal elections. In response to the PAR recommendation, KFP calculated that the anonymous cash contributions exceeded the limit by \$39,570. KFP provided copies of negotiated checks paid to organizations not related to Federal elections. The response did not address a \$1,840 (\$41,410 minus \$39,570) reduction in the amount in excess of the limit. The Audit staff recommends that \$1,840 be paid to the U.S. Treasury.
(For more detail, see p. 15)

Summary of Amounts Owed to the U.S. Treasury

• Finding 2	Costs Associated with Continuing to Campaign	135,518
• Finding 5	Receipt of Currency in Excess of Limitations	<u>1,840</u>
	Total Due U.S. Treasury	\$137,358

Part IV

Findings and Recommendations

Finding 1. Net Outstanding Campaign Obligations

Summary

A review of KFP's financial activity through December 31, 2006, and estimated winding down costs through June 30, 2007 indicates that KFP did not receive matching fund payments in excess of the Candidate's entitlement.

Legal Standard

Net Outstanding Campaign Obligations (NOCO). Within 15 days after the candidate's date of ineligibility (see definition below), the candidate must submit a statement of "net outstanding campaign obligations". This statement must contain, among other things:

- The total of all committee assets including cash on hand, amounts owed to the committee and capital assets listed at their fair market value;
- The total of all outstanding obligations for qualified campaign expenses; and
- An estimate of necessary winding down costs. 11 CFR §9034.5(a).

Date of Ineligibility. The date of ineligibility is whichever of the following dates occurs first:

- The day on which the candidate ceases to be active in more than one state;
- The 30th day following the second consecutive primary in which the candidate receives less than 10 percent of the popular vote;
- The end of the matching payment period, which is generally the day when the party nominates its candidate for the general election; or
- In the case of a candidate whose party does not make its selection at a national convention, the last day of the last national convention held by a major party in the calendar year. 11 CFR §§9032.6 and 9033.5.

Qualified Campaign Expense. Each of the following expenses is a qualified campaign expense.

- An expense that is:
 - Incurred by or on behalf of the candidate (or his or her campaign) during the period beginning on the day the individual becomes a candidate and continuing through the last day of the candidate's eligibility under 11 CFR §9033.5;
 - Made in connection with the candidate's campaign for nomination; and
 - Not incurred or paid in violation of any federal law or the law of the state where the expense was incurred or paid. 11 CFR §9032.9.
- An expense incurred for the purpose of determining whether an individual should become a candidate, if that individual subsequently becomes a candidate, regardless of when that expense is paid. 11 CFR §9034.4.

- An expense associated with winding down the campaign and terminating political activity. 11 CFR §9034.4(a)(3).

Value of Capital Assets. The fair market value of capital assets is 60% of the total original cost of the assets when acquired, except that assets that are received after the date of ineligibility must be valued at their fair market value on the date received. A candidate may claim a lower fair market value for a capital asset by listing the asset on the NOCO statement separately and demonstrating, through documentation, the lower fair market value. 11 CFR §9034.5(c)(1).

Entitlement to Matching Payments after Date of Ineligibility. If, on the date of ineligibility (see above), a candidate has net outstanding campaign obligations as defined under 11 CFR §9034.5, that candidate may continue to receive matching payments provided that on the day when the matching payments are made the sum of contributions plus matching funds received on or after the date of ineligibility is less than the candidate's net outstanding campaign obligations. 11 CFR §9034.1(b).

Facts and Analysis

The Audit staff prepared a Statement of Net Outstanding Campaign Obligations as of the candidate's date of ineligibility (DOI), March 4, 2004. The audited statement was presented in the preliminary audit report (PAR) and showed KFP to be in a deficit position in the amount of \$1,222,331. After accounting for funds received after March 4, 2004, the Audit staff calculated that KFP had received \$182,162 in matching fund payments in excess of the Candidate's entitlement.

After considering documentation provided in response to the PAR and adjusting actual winding down costs through December 31, 2006 and estimated winding down costs through June 30, 2007, the Audit staff prepared an updated NOCO that appears on the next page. The changes between the NOCO statement in the preliminary audit report and the statement that follows are discussed below the statement.

Kucinich for President, Inc.
Statement of Net Outstanding Campaign Obligations

As of March 4, 2004

Prepared on February 16, 2007

Assets

Cash on Hand	\$ 365,397	[a]
Accounts Receivable	40,593	
Capital Assets	<u>15,258</u>	
Total Assets		\$ 421,248

Liabilities

Accounts Payable for Qualified Campaign Expenses	\$ 679,077	[b]
Qualified Convention Expenses (11 CFR §9034.4(a)(6))	50,000	
Winding Down Costs:		
Paid Winding Down Costs (7/30/04 – 12/31/06)	976,245	[c]
Estimated Winding Down Costs (1/1/07 - 6/30/07)	162,000	[d]
Amounts Payable for Excessive Anonymous Cash Contributions	41,410	[e]
Total Liabilities		<u>\$ 1,908,7320</u>
Net Outstanding Campaign Obligations (Deficit) as of March 4, 2004		<u><u>(\$ 1,487,484)</u></u>

Footnotes to NOCO Statement:

- [a] Amount includes contributions dated before DOI but deposited after DOI.
- [b] Includes \$46,778 in contribution refunds made after DOI for contributions received before DOI.
- [c] This amount does not include expenses incurred between March 5, 2004 and July 29, 2004, the period during which the candidate continued to campaign. See Finding 2.
- [d] Estimated winding down costs are based on KFP's NOCO estimates. Actual winding Down costs will be compared to the estimate and adjustments made as necessary.
- [e] KFP donated \$39,570 to charity and the remaining \$1,840 is payable to the U.S. Treasury. See Finding 5.

Candidate's Remaining Entitlement to Matching Funds

Shown below are adjustments to the deficit for funds received after March 4, 2004 through January 3, 2005, the date of receipt of the last matching fund payment. KFP has not received matching fund payments in excess of the amount to which it was entitled, as presented below:

Net Outstanding Campaign Obligations (Deficit) as of 3/4/04	(\$ 1,487,484)
Less: Private Contributions ⁶ 7/30/04 — 1/2/05	269,682
Matching Funds Received 3/5/04 — 1/3/05	<u>1,128,578</u>
Remaining Entitlement to Matching funds	(\$ 89,224)

Committee Response to Preliminary Audit Report and Audit Staff's Assessment

KFP's response to the PAR noted that the Capital Assets presented in the PAR were overstated. The Audit staff agreed and the correct amount is reflected in the NOCO presented above.

KFP also disagreed with the Audit staff's calculation of Accounts Payable for Qualified Campaign Expenses. KFP identified a number of expenses billed after the DOI which included goods and services provided both before and after the DOI that should have been prorated accordingly. The total amount proposed by KFP to be added to Accounts Payable when the post-DOI bills were pro rated was \$64,490.

The Audit staff reviewed the supporting documentation submitted by KFP and increased Accounts Payable by \$34,005 for goods and services provided before DOI. As a result, the Audit staff increased Accounts Payable for Qualified Campaign Expenses from \$645,072 to \$679,077.

Estimated Winding Down Costs included in the statement presented above is based on a revised estimate provided by KFP that includes additional legal and storage fees.

Finally, KFP disagreed with the amount of private contributions used in the Audit staff's calculation of the Net Outstanding Campaign Obligations. The response stated that the calculation included \$6,234 which was the proceeds from the sale of a capital asset. The Audit staff verified the sale and adjusted the amount of private contributions received from 7/30/04 to 11/1/04 by \$6,234. The correct amount appears above in the calculation for remaining entitlement.

Therefore, after making the adjustments to capital assets and accounts payable as noted above and adjusting for changes in the actual and estimated winding down costs, the Audit staff calculated that KFP has not received matching fund payments in excess of the Candidate's entitlement.

⁶ Contributions received from 3/5/04 – 7/29/04 were allowed to be used for continuing to campaign and are not included in this amount. See Finding 2.

Finding 2. Costs Associated With Continuing To Campaign

Summary

Congressman Kucinich continued to campaign after his date of ineligibility, March 4, 2004, until July 29, 2004, the date on which the Democratic Party nominated its candidate for President of the United States. KFP was permitted to use only private funds received during this period, not matching funds, to fund campaign activity. The Audit staff determined that while continuing to campaign, KFP paid expenses that exceeded private contributions by \$454,015. As a result, these expenses were paid with funds that contained matching funds. Such funds are subject to a pro rata repayment to the U.S. Treasury. The Audit staff recommends that the Commission determine that \$135,518 is repayable to the U.S. Treasury.

Legal Standard

Continuing To Campaign After Date of Ineligibility. If the candidate continues to campaign after becoming ineligible, the candidate may only receive matching funds based on net outstanding campaign obligations as of the candidate's date of ineligibility. The statement of net outstanding campaign obligations shall only include costs incurred before the candidate's date of ineligibility for goods and services to be received before the date of ineligibility and for which written arrangement or commitment was made on or before the candidate's date of ineligibility, and shall not include winding down costs until the date on which the candidate qualifies to receive winding down costs. Contributions dated after the candidate's date of ineligibility may be used to continue to campaign, and may be submitted for matching fund payments. Payments from the matching payment account that are received after the candidate's date of ineligibility may be used to defray the candidate's net outstanding campaign obligations, but shall not be used to defray any costs associated with continuing to campaign unless the candidate reestablishes eligibility. 11 CFR §9034.4(a)(3)(ii)

Entitlement to Matching Payments after Date of Ineligibility. If, on the date of ineligibility (see above), a candidate has net outstanding campaign obligations as defined under 11 CFR §9034.5, that candidate may continue to receive matching payments provided that on the day when the matching payments are made the sum of contributions plus matching funds received on or after the date of ineligibility is less than the candidate's net outstanding campaign obligations. 11 CFR §9034.1(b).

Post-ineligibility Expenditures. Any expenses incurred after a candidate's date of ineligibility are not qualified campaign expenses except for winding down expenses permitted under 11 CFR §9034.4(a)(3)(i). 11 CFR §9034.4(b)(3)

Convention Expenses. Expenses incurred by an ineligible candidate to attend, participate in, or conduct activities at a national nominating convention may be treated as qualified campaign expenses, but such convention-related expenses shall not exceed a total of \$50,000. 11 CFR §9034.4(a)(6)

Repayments. The Commission may determine that amount(s) of any payments made to a candidate from the matching payment account were used for purposes other than defrayal of qualified campaign expenses, repayment of loans which were used to defray qualified campaign expenses, and the restoration of funds (other than contributions which were received and expended to defray qualified campaign expenses) which were used to defray qualified campaign expenses. The Regulations state, in part, that the Commission may make a repayment determination for funds which were expended for costs associated with continuing to campaign after the candidate's date of ineligibility.
11 CFR §9038.2(b)(2)(i) and (ii)(D).

Facts and Analysis

The Commission determined that Congressman Kucinich's date of ineligibility was March 4, 2004. However, Congressman Kucinich continued to campaign until July 29, 2004, the date on which the Democratic Party nominated its candidate for President of the United States. In the preliminary audit report, the Audit staff calculated that during the period that the Congressman continued to campaign, KFP paid expenses of \$1,985,314, including expenses incurred to attend the Democratic National Convention. To partially offset these expenses, KFP deposited contributions totaling \$1,447,294. The balance, \$488,020 (\$1,985,314 – \$1,447,294 – a \$50,000 exemption for convention expenses) was paid with funds containing matching funds; and, as such, was subject to a pro rata repayment to the U.S. Treasury.

At the exit conference, the Audit staff provided KFP's treasurer with a worksheet showing the calculation of the continuing to campaign expenses. The treasurer acknowledged that Congressman Kucinich had continued to campaign until the Democratic National Convention. The treasurer stated that he would review the auditors' calculations to confirm whether or not the expenses included were for continuing to campaign or for expenses incurred prior to DOI.

Preliminary Audit Report Recommendation

The Audit staff recommended that KFP submit documentation to demonstrate that matching funds were not used to fund the continuing to campaign effort between March 5 and July 29, 2004. Absent such documentation, the Audit staff would recommend that the Commission determine that \$145,668 (\$488,020 multiplied by the repayment ratio, 29.8488%⁷) is repayable to the U.S. Treasury.

Committee Response to Recommendation

In response to the PAR recommendation, KFP disagreed with the Audit staff's calculation that while continuing to campaign KFP's expenses exceeded private contributions by \$488,020. In summation, KFP responded that:

1. Contributions raised from August 1, 2004 to December 31, 2004, should be applied to debts associated with continuing to campaign, not exclusively to wind down.

⁷ This figure (29.8488%) represents KFP's repayment ratio as calculated pursuant to 11 CFR §9038.2(b)(2)(iii).

2. The only question about whether any repayment is due involves the cutoff date chosen for calculating private funds raised as offset against continuing to campaign expenses.
3. The Audit staff did not account for the pro rata portion of pre-DOI expenses represented in the post-DOI billings.

For these reasons the Committee contends that it did not exceed its entitlement to public funds and, therefore, does not owe a repayment to the U.S. Treasury.

Audit Staff's Assessment

Contributions raised from August 1, 2004 to December 31, 2004, were not available to pay for continuing to campaign expenses. Although the Candidate is allowed to use private contributions to continue to campaign, this is an exception that is limited to contributions raised while the candidate is actively continuing to campaign. The candidate ceased campaigning on July 29, 2004, the date on which the Democratic Party nominated its candidate for President of the United States. Contributions received after July 29, 2004 must be applied to outstanding campaign debts incurred through DOI and winding down expenses. If these contributions were allowed to be used to pay continuing to campaign debt, for every dollar used, a dollar of additional entitlement to matching funds would be created. This results in public funds being used to finance the continuing to campaign effort, clearly not the intent of 11 CFR §9034.4(a)(3)(ii).

Regarding accounts payable for goods and services provided before DOI but billed after, the Audit staff reviewed the supporting documentation submitted by KFP. As a result the Audit staff reduced the amount of expenses considered to be for continuing to campaign by \$34,005 to \$1,901,309⁸ and recalculated the amount of funds containing matching funds used to pay for continuing to campaign expenses as \$454,015 (\$1,901,309 - \$1,447,294⁹). A pro rata repayment of \$135,518 (\$454,015 multiplied by the repayment ratio, 29.8488%) is due the U.S. Treasury.

The Audit staff recommends that the Commission determine that \$135,518 is repayable to the U.S. Treasury.

Finding 3. Misstatement of Financial Activity

Summary

A comparison of KFP's reported financial activity to bank records revealed misstatements of receipts and disbursements in calendar year 2003. The PAR recommended that KFP amend its disclosure reports. In response, KFP filed the requested amended reports.

⁸ See Finding 1, Net Outstanding Campaign Obligations.

⁹ Contributions deposited by KFP from March 4, 2004 through July 29, 2004, the period after DOI during which Congressman Kucinich continued to campaign.

Legal Standard

Contents of Reports. Each report must disclose:

- The amount of cash on hand at the beginning and end of the reporting period;
- The total amount of receipts for the reporting period and for the election cycle ; and
- The total amount of disbursements for the reporting period and for the election cycle.
- Certain transactions that require itemization on Schedule A (Itemized Receipts) or Schedule B (Itemized Disbursements). 2 U.S.C. §434(b)(1), (2), (3), (4), and (5).

Facts and Analysis

The Audit staff reconciled the reported activity to the bank records and determined there was a misstatement of receipts and disbursements in calendar year 2003. The following chart details the discrepancies between the totals on KFP's disclosure reports and bank records.

2003 Activity			
	Reported	Bank Records	Discrepancy
Opening Cash Balance	\$ 0	\$ 0	\$ 0
Receipts	\$ 6,603,802	\$ 6,710,525	\$ (106,723)
Disbursements	\$ 5,354,942	\$ 5,462,562	\$ (107,620)
Ending Cash Balance	\$ 1,248,860	\$ 1,247,963	\$ 897

The understatement of receipts was the result of the following:

- | | |
|---|-------------------------|
| • Contributions not reported | \$185,753 |
| • Vendor refunds and bank interest not reported | 19,396 |
| • Miscellaneous reporting errors | (36,224) |
| • Debit card returns reported in error | (9,766) |
| • Unexplained difference | <u>(52,436)</u> |
| • Net Understatement of Receipts | <u>\$106,723</u> |

The understatement of disbursements was the result of the following:

- | | |
|--|-------------------------|
| • Disbursements not reported | \$77,162 |
| • In-kind transaction not reported | 770 |
| • Bank fees not reported | 18,941 |
| • Payroll reporting errors | (30,917) |
| • Debit card returns reported in error | (9,766) |
| • Unexplained difference | <u>51,430</u> |
| • Net Understatement of Disbursements | <u>\$107,620</u> |

Preliminary Audit Report Recommendation and Committee Response

The Audit staff recommended that KFP file amended reports to correct the misstatements noted above. In response, KFP filed such amended reports.

Finding 4. Itemization of Contributions From Individuals

Summary

A sample review of contributions from individuals indicated that KFP failed to itemize a significant number of contributions that required itemization. The sample results projected that contributions totaling \$520,530 were not itemized as required. The Audit staff recommended that KFP amend its reports to itemize the contributions. In response to the recommendation, KFP filed amended reports which substantially correct its filings..

Legal Standard

Itemization Required for Contributions from Individuals. An authorized candidate committee must itemize any contribution from an individual if it exceeds \$200 per election cycle, either by itself or when combined with other contributions from the same contributor. 2 U.S.C. §434(b)(3)(A).

Required Information for Contributions from Individuals. For each itemized contribution from an individual, the committee must provide the following information:

- The contributor's full name and address (including zip code);
- The contributor's occupation and the name of his or her employer;
- The date of receipt (the date the committee received the contribution);
- The amount of the contribution; and
- The calendar year-to-date election cycle-to-date total of all contributions from the same individual. 2 U.S.C. §434(b)(3)(A) and 11 CFR §§100.12 and 104.3(a)(4)

Sampling. In conducting an audit of contributions, the Commission uses generally accepted statistical sampling techniques to quantify the dollar value of related audit findings. Apparent violations (sample errors) identified in a sample are used to project the total amount of violations. A committee must take any action required by the Commission with respect to a sample-based finding. 11 CFR §9038.1(f) Such action will include obtaining, submitting and reporting contributor information on amended reports.

Facts and Analysis

The Audit staff reviewed contributions from individuals on a sample basis. The sample results projected that a material number of contributions from individuals whose aggregate total contributions exceeded \$200 per election cycle, were not itemized as required. The projected amount of such contributions was \$520,530. The itemization errors occurred because contributor information from various sources was not consistently entered into KFP's contributions database. As a consequence, multiple ID numbers were assigned to the same contributor, preventing proper aggregation and itemization of the contributions. For example, contributor John D. Smith may have been

entered as John Smith, J.D. Smith, John Donald Smith, or John Smith, Jr., with each name variation assigned a unique contributor identification number.

At the exit conference, the KFP treasurer stated that he had spent time merging contributor IDs in the database in order to file amended reports but was notified of the audit before the amendments were filed.

Preliminary Audit Report Recommendation and Committee Response

The Audit staff recommended that KFP file amended reports to itemize the contributions as required. The response to the recommendation stated that KFP reviewed its contributor data base and changes were made where necessary to allow proper aggregation. KFP filed amended reports that itemized correctly the contributions required to be itemized.

Finding 5. Receipt of Currency in Excess of Limitations

Summary

A review of 698 deposits of currency determined that 117 of them could not be associated with individual contributors or fundraising events. The Audit staff treated these as anonymous cash contributions subject to a \$50 limit per deposit. After allowing a \$50 contribution from each deposit, there remained \$41,410 in anonymous contributions that exceeded the limit. The Audit staff recommended that KFP submit information that showed that no single anonymous cash contribution exceeded \$50 or, dispose of the amount in excess of the limit in a manner that is not related to Federal elections. In response to the PAR recommendation, KFP calculated that the anonymous cash contributions exceeded the limit by \$39,570. KFP provided copies of negotiated checks paid to organizations not related to Federal elections. The response did not address a \$1,840 (\$41,410 minus \$39,570) reduction in the amount in excess of the limit. The Audit staff recommends that \$1,840 be paid to the U.S. Treasury.

Legal Standard

Anonymous Cash Contribution Limit. A candidate or committee receiving an anonymous cash contribution in excess of \$50 shall promptly dispose of the amount over \$50. The amount over \$50 may be used for any lawful purpose unrelated to any Federal election, campaign, or candidate. 11 CFR §110.4(c)(3)

Recordkeeping Requirements for Receipts. Political committees must keep records of:

- All contributions received by or on behalf of the committee;
- The name and address of any person who makes a contribution in excess of \$50, together with the date and amount of the contribution; 2 U.S.C. §432(c).

Preserving Documents. Committees must preserve these records for 3 years after a report is filed. 2 U.S.C. §432(d).

Facts and Analysis

The Audit staff identified 698 deposits of currency totaling \$179,030. Some of the currency deposits were itemized on the disclosure reports using the contributor name "Unnamed Cash" or "Gate Receipts." Other currency deposits, generally those in amounts less than \$200 were reported as unitemized contributions.

During the audit fieldwork, the treasurer stated that the currency was received at KFP events where donations were accepted, campaign paraphernalia was sold, or volunteers conducted fundraising activities. He stated that the currency receipts were sent to the KFP Cleveland, OH office and then periodically forwarded to him in Columbus for deposit into a KFP bank account. To avoid sending cash through the mail, money orders were purchased by KFP in Cleveland and sent along with any contributions made by personal checks. A transmittal memoranda that provided information related to the money orders and checks was also forwarded.

The Audit staff reviewed the transmittal memoranda and other documents related to the currency deposits and determined that 117 of the currency deposits could not be associated with individual contributors or fundraising events. The Audit staff treated these as anonymous cash contributions subject to a \$50 limit per deposit. After allowing a \$50 contribution from each deposit, there remained \$41,410 in anonymous cash contributions that exceeded the limit.

Preliminary Audit Report Recommendation

The Audit staff recommended that KFP submit information that demonstrates that no single anonymous cash contribution in excess of \$50 was received. Absent such a demonstration, the Audit staff recommended that KFP dispose of the amount in excess of the limit in a manner that is not related to Federal elections.

Committee Response to Recommendation and Audit Staff's Assessment

In response to the recommendation, KFP acknowledged that anonymous contributions exceeded the limit and reported charitable contributions totaling \$39,570 on Schedule B-P of the 2005 Year End Report to organizations not related to Federal elections. KFP provided copies of the negotiated checks to verify that the charitable contributions were made. However, KFP's response does not address a \$1,840 (\$41,410 minus \$39,570) reduction in the amount in excess of the limit and the Audit staff recommends that the \$1,840 be paid to the United States Treasury.

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May 7, 2007

Federal Elections Commission
999 E Street, NW
Washington, D. C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2007 MAY - 8 P 3: 57

Re: March 8, 2007 Repayment Determination

Dear Commissioners:

Kucinich for President, Inc. (KFP) respectfully requests, pursuant to 11 CFR §9038.2(c)(2), an administrative review of the Commission's March 8, 2007 determination that KFP must repay to the U. S. Treasury \$137,358 of the public matching funds received in connection with Congressman Kucinich's 2004 campaign for the Democratic Party nomination for President. Specifically, KFP disputes Findings 2 and 5 of the Report of the Audit Division. On May 4, 2007, KFP requested in writing a fifteen day extension to submit arguments and documents to demonstrate that no or a lower repayment is warranted. KFP hereby submits a partial legal argument in support of its position while it awaits a determination of its request for an extension. If the extension is granted KFP fully anticipates making a further submission.

FINDING 2. Costs Associated with Continuing to Campaign

In Finding 2, the Report of the Audit Division recommends that the Commission determine that \$135, 518 is repayable. This recommendation rests on the premise that matching funds were used in part to pay for continuing to campaign expenses during the period March 5, 2004 through July 29, 2004. KFP became ineligible for continued matching funds on March 4, 2004 (DOI). Rather than discontinue his campaign for the Democratic Party nomination, Congressman Kucinich continued to campaign as he is entitled to do up through the Democratic Party's Nominating Convention. During this time KFP incurred expenses for continuing to campaign. KFP also raised significant amounts in additional private contributions to pay such expenses. The Audit Division repayment calculation is on page 12 of the Audit Report. KFP has three points of contention with the calculation.

First, based on documentation submitted by KFP in response to the Preliminary Audit Report (PAR), the Audit Division decreased the amount of expenditures considered to be for continuing to campaign (CTC) by \$34,005. However, the documentation previously submitted by KFP supports a higher reduction amount of \$64,490. The following explanation of the

ATTACHMENT 2

documentation and justification for this amount was set forth on pages 3-4 of KFP's December 19, 2005 response to the PAR:

Also as discussed *supra* the Committee has developed a spreadsheet based upon the Audit staff's spreadsheet entitled "CTC Expenses for Exit." The Exhibit A takes the original Audit staff date, calculates the number of days of billed activity which fall prior to the DOI, and then computes a revised (pro rata) amount of the bill which represents an obligation to pay prior to March 5, 2004. In those instances where the expenditure represents itemized expenses, the expenses which fell prior to the DOI were simply totaled. The total difference found by the Committee when the post-DOI bills were pro rated is \$64,490.

There is no explanation in the Audit Division's February 28, 2007 Report for how it arrived at the \$34,005 figure or which portions of KFP's submission it accepted and which it did not and why. Without these details it is impossible for KFP to address any particular item because it does not know which items are in question. Therefore, KFP asks that its submission be administratively reviewed and that it be informed of which items were not accepted and why so that it may then respond by agreeing or disagreeing. However, at this time, KFP believes that it submitted sufficient documentation to support a reduction of \$64,490 in the initial CTC figure. With this reduction, the CTC expenses paid between March 5, 2004 and July 29, 2004 would be \$1,870,824.

Second, KFP disputes the Division's failure to take into account in the repayment calculation private contributions raised after July 29, 2004 for CTC expenses. Because of continued fundraising after the Democratic Party Convention all CTC expenses were ultimately paid in full from private contributions. The end result is that any public funds that may have been initially used were replaced with private donations. The problem with the Audit Division's approach is that it creates an artificial carve out for CTC expenses by applying private contributions only up through the convention to CTC expenses. Further, Finding 2 cannot properly be considered in isolation from Finding 1. KFP disagrees with the Audit Division's failure to take into account that the two issues addressed by the two findings are intertwined when a candidate decides to continue to campaign after becoming ineligible for additional matching funds. They are intertwined because of the fungible nature of money and the seamless continuation of a campaign. A campaign does not stop and restart after the candidate becomes ineligible for additional matching funds. In Congressman Kucinich's case, he continued to campaign, as was his right, all the way to the convention. The failure to account for Finding 1 in Finding 2 has led to the incongruent result that on the one hand the Audit Division concludes that KFP does not owe back any of the matching funds that it received after the DOI (Finding 1), but on the other hand it does (Finding 2). Under Finding 1, the Committee is not required to pay back matching funds because its NOCO, minus the private contributions received after the convention, is more than the amount of matching funds received after the DOI. That being the case, such fact does not change simply because a candidate chooses to continue to campaign. Indeed, the inequity in failing to allow contributions received after March 29, 2004 to be applied toward the CTC expenses is demonstrated by the fact that Finding 1 uses these same contributions to reduce KFP's remaining entitlement to matching funds. Without doing so, the remaining entitlement to matching funds would be higher. Not allowing these contributions to be

applied toward the CTC expenses under Finding 2 effectively punishes a candidate for continuing to campaign. It puts the candidate in double jeopardy. However, allowing such contributions to be used to offset CTC expenses would reconcile the results of the two findings and be compatible with a candidate's right to chose to continue to campaign.

The February 1, 2007 Memorandum of the Office of General Counsel (OGC) concedes that KFP's above stated position is not specifically addressed in the law or the Commission's regulations and is not without merit. On page 4 of the Memorandum, the OGC states:

The regulations do not explicitly state how long a candidate may use those contributions to pay for continuing campaign expenses. One of the questions at issue in this audit is whether those contributions may be used indefinitely to pay for expenses and debt arising out of the candidate's efforts to continue to campaign, or if and when the candidate must redirect those contributions to pay the debt from the period when the candidate was eligible. In other words, the issue here is whether and when the continuing to campaign exception ends.

On page 6 of the Memorandum, the OGC further states:

This Office concurs that repayments are warranted on both bases. We recognize, however, that there are arguments on both sides of the issue. We begin with two points that suggest that KFP could continue to use contributions for continuing to campaign expenses indefinitely. First, the regulations do not explicitly provide any end date when contributions may no longer be used exclusively to pay continuing to campaign expenses. *See* 11 C.F.R. § 9034.4(a)(3)(ii)....

Second, the 1991 Explanation and Justification for section 9034.4(a)(3)(ii) stated that the "new provisions reflect the Commission's intention to treat candidates who continue to campaign as fairly as those who withdraw as of the date of ineligibility." Explanation & Justification for 11 C.F.R. § 9034.4(a)(3), 58 Fed. Reg. 35898, 35905 (Jul. 29, 1991). The Commission stated that it had revised the section "to allow a candidate to use post-ineligibility contributions to continue campaigning after the date of ineligibility without such activity resulting in a repayment of funds in excess of entitlement or a repayment of funds used for nonqualified campaign expenses." *Id.* This language, arguably, supports allowing a candidate to use contributions for continuing to campaign expenses indefinitely because allowing the candidate to use the contributions indefinitely would reduce the likelihood of potential repayment obligations for using matching funds to pay continuing to campaign debt or receiving funds in excess of entitlement.

Through these statements, the OGC recognizes that KFP raises a legitimate argument and that neither the law nor the regulations deal directly with this issue. If the Commission recognizes that there is vagueness in the law or a deficiency in its regulations, it may not and should not set policy and apply it during an audit against a candidate, who operated with the understanding that he and his committee were not violating any laws, regulations or procedures. Such would constitute a retroactive application of the law by enforcing a policy or regulation that

did not exist during the campaign. Rather, the Commission should adopt a policy or regulation that prospectively addresses this issue only after the opportunity for public comment and in accordance with proper procedure.

Recently, some Commissioners recognized that it is imprudent and unwise to adopt a new policy during the course of an audit. In Final Audit Report – Bush-Cheney '04, Inc. (General Committee) and the Bush-Cheney '04 Compliance Committee, Inc., the Audit Division analyzed the cost allocation of hybrid ads. In its discussion of Commission regulations and precedent on pages 10-11, the Audit Division evaluated an advisory opinion on allocation of costs for hybrid ads that was contrary to the position of Bush-Cheney '04. The Audit Division distinguished the advisory opinion because it “did not . . . involve a presidential candidate” and it “was issued after the 2004 election.” In other words, it would not apply the opinion retroactively to Bush-Cheney '04. KFP respectfully requests the same consideration given by the Commission to Bush-Cheney '04 by not making a policy determination in the course of an audit and applying it retroactively against KFP.

If the \$269,682 in private contributions received from July 30, 2004 to January 2, 2005 (page 9 of the February 28, 2007 Audit Report) is taken into consideration, the repayment figure would be \$55,021 ($1,901,309 - 1,447,294 - 269,682 \times 29.8488\%$). This amount should be further lowered by taking into consideration the non-public funds portion of cash on hand on March 4, 2004, as explained below.

Third, KFP disputes the Division's failure to include in the calculation of funds available for CTC expenditures during the period March 5, 2004 to July 29, 2004 the non-public portion, at a minimum, of KFP's cash on hand on March 4, 2004, that being \$256,330 ($\$365,397$ cash on hand per page 8 of the February 28, 2004 Audit Report $\times 70.1512\%$, the difference between 100% and 29.8488%). This amount was immediately available on March 5, 2004 and beyond to pay CTC expenses and should have been added to the \$1,447,294 deposited contributions during the CTC period for a total of \$1,703,624 private contributions during this period used to pay CTC expenses. If it had been, then the repayment amount would be zero ($1,901,309 - 1,973,306 [1,447,294 + 269,682 + 256,330] \times 29.8488\%$) if the reasoning of the preceding paragraph is also followed. Without the preceding paragraph, the repayment would be \$49,907 ($1,870,824 - 1,703,624 \times 29.8488\%$). If the full March 4, 2004 cash on balance is used, the repayment would be only \$17,353 ($1,870,827 - 1,812,691 \times 29.8488\%$). Commission regulations do not require a separate segregated fund for paying CTC expenses or for depositing additional contributions received after the DOI. There is also no regulation that prohibits the non-public funds portion of the cash on hand at the beginning of the CTC period from being used to pay such expenses. Therefore, logically it should be added to the private contributions used to pay for CTC expenses, especially given that such funds were used by KFP for such purpose. This treatment would be consistent with the treatment of such funds under Finding 1. Under Finding 1, the cash on hand is used to lower the entitlement to public funds and determine whether KFP must pay back part of the matching funds received. Because including it in the calculation lowers the entitlement, KFP must then either use the cash on hand to pay the net debt or raise additional private contributions if it uses the cash on hand for other expenses. By not taking into consideration at least the non-public funds portion of the cash on hand under Finding 2, the Commission effectively counts the funds twice against the Committee in determining whether a

repayment of public funds is required: first by using the cash on hand to reduce entitlement to matching funds and then by not considering it in the repayment calculation with respect to CTC expenses, thereby resulting in a higher repayment determination. This higher repayment determination would be on top of a possible repayment determination under the NOCO formula, effectively taking away matching funds twice and penalizing the candidate who continues to campaign. Such an outcome is inconsistent with the law that contemplates that a candidate may chose to continue to campaign.

FINDING 5. Receipts of Contributions in Excess of Limitations

In Finding 5, the Report of the Audit Division addressed anonymous cash contributions. The recommendation in the Audit Report is that the Commission determines that \$1,840 is repayable to the U.S. Treasury. In the PAR, the Audit Division calculated that KFP had \$41,410 in anonymous contributions that exceeded the \$50 limit. KFP reviewed the Audit Division's calculations and found that, in fact, there was only \$39,507 that could not be specifically associated with anonymous cash contributions subject to the limit. In its Response to the PAR, KFP submitted a detailed spreadsheet showing that \$39,507 was the correct amount.

Unfortunately, Finding 5 of the Audit Report is deficient in that it did not address why \$41,410 is the correct amount and not \$39,507, as determined by KFP. Instead, the Audit Division simply took \$41,410 and subtracted \$39,507, the amount donated to outside organizations by KFP, to come up with \$1,840. Without more information to verify the Audit Division's claimed amount, KFP believed that it would be inappropriate and legally questionable for KFP to make any further disbursements relating to anonymous cash contributions. KFP respectfully requests a review of its spreadsheet showing \$39,507 and information as to the deposit dates and amounts that make up the additional \$1,840. KFP will then be able to take the appropriate measures.

KFP further disputes the presumption that these cash contributions were in excess of \$50 per donor. Requiring documentation of cash contributions of \$50 or less is inconsistent with the right of donors under the law to make such contributions anonymously. Requiring the Committee to make payments for based on lack documentation creates an impermissible presumption that such contributions were above \$50.

CONCLUSION

For the above reasons, Kucinich for President respectfully urges that the Commission determine that no repayment is required or, alternatively, that the repayment determination be lowered to \$17,353.

Respectfully submitted,



Donald J. McTigue

ATTACHMENT 2
PAGE 5 OF 6

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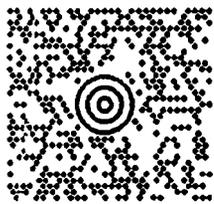
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WASHINGTON DC 20463-0001

Attention: Lorenzo Holloway

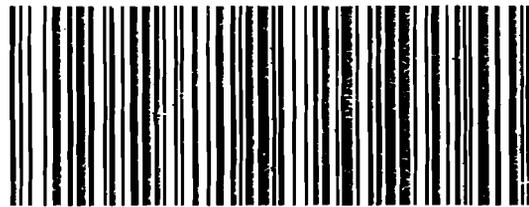


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PAGE 6 OF 6

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May 29, 2007

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2007 MAY 31 A 9:56

Federal Elections Commission
999 E Street, NW
Washington, D. C. 20463

Re: March 8, 2007 Repayment Determination

Dear Commissioners:

Thank you for the opportunity to supplement the May 7, 2007 request by Kucinich for President, Inc. (KFP) for an administrative review of the Commission's March 8, 2007 determination that KFP must repay to the U. S. Treasury \$137,358 of the public matching funds received in connection with Congressman Kucinich's 2004 campaign for the Democratic Party nomination for President. The following legal argument is in support of the Committee's request for administrative review of Finding 2.

FINDING 2. Costs Associated with Continuing to Campaign

The February 1, 2007 Memorandum of the Office of General Counsel (OGC) concedes that KFP's position is not specifically addressed in the law or the Commission's regulations and is not without merit. On page 4 of the Memorandum, the OGC states:

The regulations do not explicitly state how long a candidate may use those contributions to pay for continuing campaign expenses. One of the questions at issue in this audit is whether those contributions may be used indefinitely to pay for expenses and debt arising out of the candidate's efforts to continue to campaign, or if and when the candidate must redirect those contributions to pay the debt from the period when the candidate was eligible. In other words, the issue here is whether and when the continuing to campaign exception ends.

On page 6 of the Memorandum, the OGC further states:

This Office concurs that repayments are warranted on both bases. We recognize, however, that there are arguments on both sides of the issue. We begin with two points that suggest that KFP could continue to use contributions for continuing to campaign expenses indefinitely. First, the regulations do not explicitly provide any end date when contributions may no longer be used exclusively to pay continuing to campaign expenses. See 11 C.F.R. § 9034.4(a)(3)(ii)....

ATTACHMENT 3
PAGE 1 OF 4

Second, the 1991 Explanation and Justification for section 9034.4(a)(3)(ii) stated that the “new provisions reflect the Commission’s intention to treat candidates who continue to campaign as fairly as those who withdraw as of the date of ineligibility.” Explanation & Justification for 11 C.F.R. § 9034.4(a)(3), 58 Fed. Reg. 35898, 35905 (Jul. 29, 1991). The Commission stated that it had revised the section “to allow a candidate to use post-ineligibility contributions to continue campaigning after the date of ineligibility without such activity resulting in a repayment of funds in excess of entitlement or a repayment of funds used for nonqualified campaign expenses.” *Id.* This language, arguably, supports allowing a candidate to use contributions for continuing to campaign expenses indefinitely because allowing the candidate to use the contributions indefinitely would reduce the likelihood of potential repayment obligations for using matching funds to pay continuing to campaign debt or receiving funds in excess of entitlement.

Through these statements, the OGC recognizes that KFP raises a legitimate argument and that neither the law nor the regulations deal directly with this issue. If the Commission recognizes that there is vagueness in the law or a deficiency in its regulations, it may not and should not set policy and apply it during an audit against a candidate, who operated with the understanding that he and his committee were not violating any laws, regulations or procedures. Such would constitute a retroactive application of the law by enforcing a policy or regulation that did not exist during the campaign. Rather, the Commission should adopt a policy or regulation that prospectively addresses this issue only after the opportunity for public comment and in accordance with proper procedure.

Both the agency’s choice between rulemaking and adjudication are subject to an “abuse of discretion” standard of review. However, the courts have repeatedly recognized that rulemaking is the preferred option when establishing a policy. In *Chenery II*, the United States Supreme Court emphasized:

Since the Commission, unlike a court, does have the ability to make law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct The function of filling in the interstices of the [a]ct should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.

SEC v. Chenery Corp., 332 U.S. 194, 202.

The D.C. Circuit has similarly recognized that rulemaking is “especially suited to determining legislative facts and policy of general, prospective applicability.” *Nat’l Small Shipments Traffic Conference v. ICC* (D.C. Cir. 1984), 725 F.2d 1442, 1448; see also *Am. Airlines v. CAB* (D.C. Cir. 1966), 359 F.2d 624, 629 (“[R]ule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest.”). It is recognized that rulemaking, not case-by-case adjudication, is the preferable route for the creation of policies by an agency. *Trans-Pac Freight Conference of*

Japan/Korea v. Fed. Mar. Comm'n (D.C. Cir 1980), 650 F.2d 1235, 1244-45. ("Rulemaking . . . is often the preferred procedure for the evolution of agency policies," as it "permits more precise definition of statutory standards than would otherwise arise through protracted, piecemeal litigation of particular issues."). Such is precisely the case here, where the Commission needs to establish which of the "arguments on both sides of the issue" it is going to adopt.

Indeed, on multiple occasions in the past, the Commission itself has asserted that a rulemaking to establish general policies is not only preferable, but is a necessary precondition for any subsequent case-by-case adjudication. In fact, the very absence of a pre-existing regulation setting forth clear standards has caused the Commissioners to decline to proceed in previous enforcement matters.

For example, following the 1996 presidential election, the Commission investigated complaints about whether both presidential candidates and their parties exceeded the party spending limits for coordinated activities. In considering whether to order the committees to repay public funds for exceeding the party spending limits, a majority of the Commissioners declined to adopt the "electioneering message" test as a basis for requiring repayment precisely because the Commission had not formally established that test through a rulemaking:

[T]he Commission may employ rules of law that are not set forth in the FECA only if it complies with the procedures set forth in 2 U.S.C. § 438(d) in promulgating them Rulemaking is not simply the preferred method for filling in the gaps in the FECA. It is the required method.

Statement of Reasons of Vice Chairman Wold, and Commissioners Elliott, Mason, and Sandstrom on the Audits of Dole for President Committee, at 2.

The same issue arose in the 2000 senate elections, when the Commission again dismissed a complaint that senate candidates had illegally spent soft money for coordinated electioneering ads run by the parties. Even though Commissioner Thomas said that he believed the ads in question violated the law, he voted not to pursue an enforcement action: "In view of the inconsistent decision-making and the absence of regulations, it would have been inappropriate to investigate and pursue a civil penalty against any of the respondents in this matter." Statement of Reasons of Commissioner Scott E. Thomas in MUR 4994 (Dec. 19, 2001).

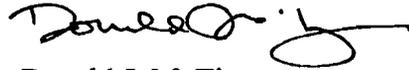
"The Commission has an obligation to promulgate clear and unambiguous rules, particularly those that touch upon activities protected by the First Amendment." Statement of Reasons of Karl J. Sandstrom in MURs 4553 et al. (Jun. 20, 2000), at 2. Without a rule, there "appears to be no discernable standard on which to base a finding." Statement of Reasons of Vice Chairman McDonald in MURs 4553 et al. (Jun. 21, 2000), at 4. In one matter where the issue was whether a group that was not a political committee could be held to the rules applicable to a political committee, three Commissioners held, "[i]f the Commission did wish to apply similar restrictions to loan by non-federal committees, due process would at least require us to do so by explicit regulation." Statement of Reasons of Vice Chairman Wold, and Commissioners Elliott, Mason in MUR 4250, at 5. Worse yet, "the regulated community is left

with little, if any, idea as to what standard the Commission will apply in reviewing their activity.” Statement of Reasons of Vice Chairman McDonald in MURs 4553 et al. (Jun. 21, 2000), at 4.

CONCLUSION

For the above reasons and those submitted May 7, 2007, Kucinich for President respectfully urges that the Commission determine that no repayment is required or, alternatively, that the repayment determination be lowered to \$17,353.

Respectfully submitted,



Donald J. McTigue

ATTACHMENT 3
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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 4, 2007

Memorandum

To: Thomasenia Duncan
General Counsel

Through: Patrina M. Clark *J.P. Clark*
Staff Director

From: John D. Gibson *J.D. Gibson*
Chief Compliance Officer

Joe Stoltz *J. Stoltz*
Assistant Staff Director
Audit Division

By: Wanda J. Thomas *W.J. Thomas*
Deputy Assistant Staff Director (PECF)

Subject: Audit Comments Regarding Kucinich for President, Inc.'s Response to Repayment Determination

The Audit Division reviewed Kucinich for President, Inc.'s (the Committee) response to the Commission's March 8, 2007 repayment determination and offers the following comments.

The Committee argues that no or a lesser repayment amount is due to the U.S. Treasury. The Committee presents three arguments that are essentially the same arguments presented in response to the preliminary audit report:

First, regarding the expenses associated with the candidate's continuing to campaign (CTC) effort that exceed the amount of private contributions available for such expenses, the Committee asserted that expenses identified by the Audit staff as CTC expenses should be reduced by \$64,490. However, the Committee provided documentation that supports a reduction of only \$34,005. The documentation included invoices for expenses that the Committee stated were for services provided before DOI but billed after. The Committee calculated the amount that related to continuing to campaign. The Audit staff's review of the invoices produced different amounts than those calculated by the Committee. In addition, for some expenses, no documentation was provided to support the Committee's calculations. In other cases the invoice indicated that the expense was

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incurred and paid during the CTC period. Based on the documentation provided, the Audit staff calculated a reduction of \$34,005 and concludes that expenses associated with continuing to campaign total \$1,901,309 and not \$1,870,824 as the Committee contends. A schedule of the expenses showing the Audit staff's calculations has been provided to the Committee.

Second, the Committee disagrees with the Audit staff's handling of private contributions raised after July 29, 2004 (date of nomination). The Audit staff applied them to outstanding campaign debts incurred through DOI and qualified winding down expenses. The Committee offers four scenarios for calculating a repayment that result in amounts due, ranging from \$55,021 to \$ 0. A chart illustrating the scenarios appears at Exhibit 1. Each scenario relies on the application of private contributions raised after DOI to pay for continuing to campaign expenses.

Scenarios 1 and 2 recognize the Audit Staff's calculation of expenses associated with continuing to campaign (\$1,901,309) and private contributions received during the continuing to campaign period (\$1,447,294). Each of these scenarios also include as offsets to the expenses, private contributions raised after 7/29/04 (\$269,682). In addition, Scenario 2 includes the non-public portion of the Committee's cash-on-hand at 3/4/07 (70.1512%¹ of the cash-on-hand balance \$365,397). The Committee stated that:

“...this amount was immediately available on March 5, 2004 and beyond to pay CTC expenses and should have been added to the \$1,447,294 deposited contributions...to pay CTC expenses.”

Scenario 3 does not recognize the Audit staff's calculation of expenses incurred during the CTC period but recognizes a lesser amount (\$1,870,824) based on a \$64,490 reduction to the amount. As offsets to expenses, this scenario includes private contributions received during the continuing to campaign period *and* the non-public portion of the Committee's cash-on-hand at 3/4/07, but does not include private contributions raised after 7/29/04. Finally, the 4th scenario is similar to scenario 3 except it includes all of the cash-on-hand at 3/4/04 rather than only the non-public part. Under these scenarios, the resulting repayments are:

Scenario 1 — \$55,021;

Scenario 2 — \$0;

Scenario 3 — \$49,907;

Scenario 4 — \$17,352.

The Audit staff contends that none of the four scenarios is relevant. Contributions received after July 29, 2004 must be applied to outstanding campaign debts incurred through DOI and winding down expenses. The regulations at 11 CFR §9034.4(a)(1) state that all contributions and all matching payments received must be used to defray qualified campaign expenses. The exception to this is provided for under 11 CFR

¹ The repayment ratio, 29.8488%, as calculated pursuant to 11 CFR §9038.2(b)(2)(iii) represents the portion of public funds contained in the balance. The non-public portion then is calculated as 100% - 29.8488% or 70.1512%.

§ 9034.4(a)(3)(ii) which, allows contributions received in the period during which the candidate continues to campaign to be used for expenses associated with that effort. This exception ends when the candidate discontinues the campaign and all funds must again be applied to qualified campaign expenses. Expenses incurred in connection with continuing to campaign are not qualified campaign expenses as defined at 11 CFR § 9034.4 and therefore, contributions and matching funds cannot be used to defray these expenses. This is also why the cash-on-hand balance at DOI cannot be used to offset the CTC expenses. The cash-on-hand at DOI is comprised of contributions and matching funds dated prior to DOI. These pre-DOI contributions cannot be used for CTC expenses because the regulation allows only those contributions received during the period to be used for continuing to campaign. Furthermore, the Commission's regulations at §9034.5 define Net Outstanding Campaign Obligations (NOCO) as including cash on hand as of the close of business on the last day of eligibility. Thus, the cash on hand balance *must* be included in the calculation of the Committee's NOCO as of the date of ineligibility and is therefore, not available for paying CTC expenses. The Audit staff's position regarding the amount of expenses associated with CTC is discussed above. The Audit staff affirms its position that \$135,518² is repayable to the U.S. Treasury.

Third is the Committee's argument regarding receipt of currency in excess of the \$50 limitation for anonymous cash. The Audit staff notes that this is not a repayment issue and therefore is not subject to the administrative review process. Nonetheless, the Audit staff offers these comments: At the end of audit fieldwork the Committee was presented with a schedule of the currency deposits at issue. Of the \$41,410 identified by the Audit staff, the Committee agreed that \$39,570 exceeded the limit and presented evidence of contributions in that amount to entities not related to federal elections. However, concerning the remaining \$1,840, the Committee simply did not address this amount. The Committee's response to the PAR consisted of photocopies of negotiated checks for donations made to charities. Therefore, without evidence to the contrary, the Audit staff maintains that \$1,840 is payable to the U. S. Treasury.

In addition to the arguments presented above, the Committee presents a number of legal arguments to support its conclusions. The Audit staff has no comment with respect to these.

The Committee's response concludes by urging the Commission to determine that no repayment is required or, alternatively, that the repayment be lowered to \$17,353. In the Audit staff's opinion, there is no justification for either amount. As explained above, these amounts are derived by erroneously including in their calculation private contributions and cash-on-hand that are not available for paying CTC expenses.

Summary of Amounts Owed to the U.S. Treasury

Costs Associated with Continuing to Campaign	\$135,518
Receipt of Currency in Excess of Limitations	<u>\$ 1,840</u>
Total Due U.S. Treasury	\$137,358

² See Exhibit 1, column "Audit."

**Repayment Amounts as Calculated by Kucinich for President, Inc.
Under 4 Different Scenarios**

	Audit	KFP Scenario 1	KFP Scenario 2	KFP Scenario 3	KFP Scenario 4
Continuing to Campaign Expenses	<u>1,901,309.00</u>	<u>1,901,309.00</u>	<u>1,901,309.00</u>	<u>1,870,824.00</u>	<u>1,870,824.00</u>
Private Contributions received 3/5/04 - 7/29/04	1,447,294.00	1,447,294.00	1,447,294.00	1,447,294.00	1,447,294.00
Private Contributions received 7/30/04 - 1/2/05		269,682.00	269,682.00		
Non public portion of cash-on-hand at 3/4/04 70.1512% * \$365,397			256,330.38	256,330.38	
Full cash-on hand at 3/4/04					<u>365,397.00</u>
Contributions available to pay CTC expenses	1,447,294.00	1,716,976.00	1,973,306.38	1,703,624.38	1,812,691.00
CTC expenses in excess of CTC contributions	454,015.00	184,333.00	(71,997.38)	167,199.62	58,133.00
Repayment Ratio	0.298488	0.298488	0.298488	0.298488	0.298488
Repayment Amount	\$ 135,518.03	\$ 55,021.19	\$ -	\$ 49,907.08	\$ 17,352.00

Henry Miller/FEC/US

08/13/2007 01:43 PM

To Mctiguelaw@rrohio.com

cc Wanda Thomas/FEC/US@FEC

Subject Continuing to Campaign Reduction
ct

Dear Mr. McTigue,

This is regarding a matter discussed in your request for an administrative review.

In response to the Preliminary Audit Report you proposed a \$64,490 decrease in the amount of expenditures considered to be for continuing to campaign. We reviewed the supporting documentation you provided and revised that amount to \$34,005. The attached schedule supports our reduction. I apologize for not sending this earlier. If you have any questions please do not hesitate to call.



KFP Review of Response to CTC Calculation.xls

Henry Miller
FEC Audit Division
(202) 694-1198

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Review of Continuing to Campaign (CTC) Expense Documentation Submitted in Response to the PAR
See Column P for Reduction in CTC Expenses

Date	Acct.	#	Name	Purpose	Post DOI - CTC		Days in Period	Days after 3/4	or itemized \$ Amt	pro-rata	Revised amount	Date of Expense	Not CTC Expense	Reduction	Comments	Availability
03/05/04	Main	9112	Guardian Alarm	Security Contract	(\$106.92)	(106.92)			0	0.00	0.00		(106.92)	4.65	service for 3/1/04 through 5/31/04	4 days pre DOI @ \$1,622 per day
03/08/04	Main	BANK FEE	Fifth Third Bank	WIRE TRANSFER FEE	(\$38.00)	(38.00)	2	1	0.5	(19.00)	(19.00)		(19.00)		look at wire payee & purpose	
03/16/04	Main	9313	Edith Billups Paul's Market &	Consulting Contract	(\$1,250.00)	(1,250.00)	15	11	0.73333333	(916.67)	(916.67)		(333.33)	178.57	service for 3/3/04 through 3/17/04 MN rally event	2 days pre DOI @ \$89,285 per day
03/18/04	Main	9334	Catering	Catering	(\$400.00)	(400.00)	1	0	0	0.00	0.00	2/20/2004	(400.00)	400.00	invoice 2/20/04	
03/19/04	Main	9351	Rev. Geraldine Solomon	Fuel/ Office Supplies/ Copying/ Travel/ Telephone Service	(\$1,061.85)	(1,061.85)			135.42	(926.43)	(926.43)	2/24/4, 2/28/2004, 1/25/4, 2/28/04	(135.42)	135.42	dates on expense reimbursement form	
03/19/04	Main	BANK FEE	Fifth Third Bank	WIRE TRANSFER FEE	(\$38.00)	(38.00)	2	0	0	0.00	0.00		(38.00)		look at wire payee & purpose	
03/23/04	Main	9360	Brenda Johnson	Stipend	(\$800.00)	(800.00)	31	26	0.83870968	(670.97)	(670.97)		(129.03)	103.22	monthly stipend/31 days* 4 days	103.2258065
03/23/04	Main	9360	Brenda Johnson	Stipend	(\$800.00)	(800.00)	31	26	0.83870968	(670.97)	(670.97)		(129.03)	103.22	monthly stipend/31 days* 4 days	103.2258065
03/23/04	Main	9377	Qwest	Telephone Service	(\$274.52)	(274.52)			99.78	0	(174.74)	Feb	(99.78)	99.78	Feb long distance charges	
03/23/04	Main	9378	Qwest(WA)	Telephone Service	(\$241.55)	(241.55)	31	0	0	0.00	0.00		(241.55)	43.56	Mar service chg & Feb long distance	43.5616129
03/24/04	Main	9410	Tad Daley	Travel/ Parking/ Fuel	(\$534.42)	(534.42)			37.15	0	(497.27)	2/17/2004	(37.15)	37.15	no support documentation	
03/24/04	Main	9423	Morris Pettus	Meal/ Travel/ Fuel/	(\$264.84)	(264.84)			1.15	0	(263.69)		(1.15)	1.15	3/4 date on expense reimbursement form	
03/24/04	Main	9431	Rev. Geraldine Solomon (POB)	Stipends/ Rent/ Meal/ Fuel	(\$2,541.45)	(2,541.45)			2,037.10	0	(504.35)		(2,037.10)	1,072.77	Illinois Pri 3/16, 2 reimb prior to 3/4	1072.77
03/26/04	Main	9450	UPS	Delivery Service	(\$1,240.88)	(1,240.88)			41.20	0	(1,199.68)		(41.20)	41.20	pick up prior to 3/4	
03/29/04	Main	9463	Camny Challenger	Intern Stipend - March 2004	(\$400.00)	(400.00)	31	26	0.83870968	(335.48)	(335.48)		(64.52)	51.61	monthly stipend/31 days* 4 days	51.61290323

Date	Acct.	#	Name	Purpose	Post DOI - CTC	Days in Period	Days after 3/4	or Itemized \$ Amt	pro-rata	Revised amount	Date of Expense	Not CTC Expense	Unit Reporting Expense	Amount
03/29/04	Main	9465	Danielle Feris	Intern Stipend - March 2004	(\$400.00) (400.00)	31	26		0.83870968	(335.48)		(64.52)	51.61	monthly stipend/31 days* 4 days 51.61290323
03/29/04	Main	9465	Danielle Feris	Intern Stipend - March 2004	(\$400.00) (400.00)	31	26		0.83870968	(335.48)		(64.52)	51.61	monthly stipend/31 days* 4 days 51.61290323
03/29/04	Main	9466	Jessica Flagg	Intern Stipend - March 2004	(\$400.00) (400.00)	31	26		0.83870968	(335.48)		(64.52)	51.61	monthly stipend/31 days* 4 days 51.61290323
03/29/04	Main	9466	Jessica Flagg	Intern Stipend - March 2004	(\$400.00) (400.00)	31	26		0.83870968	(335.48)		(64.52)	51.61	monthly stipend/31 days* 4 days 51.61290323
03/29/04	Main	9467	Scott Hinchee	Intern Stipend - March 2004	(\$400.00) (400.00)	31	26		0.83870968	(335.48)		(64.52)	51.61	monthly stipend/31 days* 4 days 51.61290323
03/29/04	Main	9467	Scott Hinchee	Intern Stipend - March 2004	(\$400.00) (400.00)	31	26		0.83870968	(335.48)		(64.52)	51.61	monthly stipend/31 days* 4 days 51.61290323
03/29/04	Main	9475	Michelle Vaught	Intern Stipend - March 2004	(\$400.00) (400.00)	31	26		0.83870968	(335.48)		(64.52)	51.61	monthly stipend/31 days* 4 days 51.61290323
03/29/04	Main	9479	Brian Alberty	Rent - Campaign Staff Housing, Cleveland, OH (March & April)	(\$2,780.00) (2,780.00)				1	(2,780.00)		(2,780.00)	0.00	chk date 3/29/04 post DOI rent
03/31/04	Main	9483	Lynne Hardin	Fundraising Consulting - March	(\$2,500.00) (2,500.00)			2,500.00		(2,500.00)		(2,500.00)	322.58	consulting fee/31 days*4 days 322.580652
03/31/04	Main	9484	Juniewicz PR, Inc.	Communications Consulting	(\$3,500.00) (3,500.00)			3,500.00		(3,500.00)		(3,500.00)	451.61	consulting fee/31 days*4 days 451.6129032
03/31/04	Main	9489	Joe Quirino	3/04 Contractual	(\$889.20) (889.20)				0	0.00		(889.20)	114.74	consulting fee/31 days*4 days 114.7354839
04/01/04	Main	9493	Nicodemus & Associates	Consulting Contract	(\$3,500.00) (3,500.00)				0	0.00		(3,500.00)	1,153.33	consulting fee/15 days*4 days plus \$300 rent 1153.333333
04/01/04	Main	9494	Mary Alice O'Connor	Consulting Contract	(\$1,500.00) (1,500.00)				0	0.00		(1,500.00)	400.00	consulting fee/15 days*4 days 400
04/02/04	Main	9517	Diadra Decker	Ad	(\$715.50) (715.50)	1	0		0	0.00	2/11/4-2/23/4	(715.50)	715.50	Feb dates on expense reimbursement form
04/02/04	Main	9536	Dominion East Ohio	Utilities	(\$238.83) (238.83)	28	18		0.64285714	(153.53)		(85.30)	85.30	month use/28 days*10 85.29642857
04/02/04	Main	9537	Dominion East Ohio	Utilities	(\$105.76) (105.76)	31	17		0.5483871	(58.00)		(47.76)	44.35	month use/31 days*13 44.35098774
04/02/04	Main	9538	Kintera, Inc.	Internet Service	(\$7,481.60) (7,481.60)			661.76	0	(6,819.84)		(661.76)	661.76	processing fee/15 days*4 days 661.76

Date	Acct.	#	Name	Purpose	Post DOI - CTC	Days in Period	Days after 3/4	or Itemized \$ Amt	pro- rata	Revised amount	Date of Expense	Not CTC Expense	And (a) Review of Response	Comments	Calculation
04/02/04	Main	9539	Verizon Wireless (CA)	Telephone Service	(\$167.15)	(167.15)		1.17	0	(165.98)		(1.17)	5.96	current chg/28 days*2 days	5.955
04/05/04	Main	9562	Nate Wilkes	Travel/ Storage/ Meal	(\$149.10)	(149.10)		75.20	0	(73.90)	2/11/2004,3/4/ 4,2/29/4	(75.20)	75.20	dates pre doi on expense reimbursement form	
04/05/04	Main	9566	Ken Jerome-Stem	Postage/ Fax	(\$8.32)	(8.32)		4.22	0	(4.10)		(4.22)	4.22	dates pre doi on expense reimbursement form	
04/05/04	Main	9568	Chris Ortman	Transportation/ Meal/ Copies	(\$110.17)	(110.17)		34.67	0	(75.50)	2/18/2004	(34.67)	34.67	dates pre doi on expense reimbursement form	
04/05/04	Main	9571	Edith Billups	Meal Expense	(\$124.75)	(124.75)		67.52	0	(57.23)		(67.52)	77.19	dates pre doi on expense reimbursement form	
04/05/04	Main	9573	Paul Costanzo Turtle Island Web	Meal/ Transport/ Repair	(\$1,000.09)	(1,000.09)		5.36	0	(994.73)	2/10/2004	(5.36)	5.36	dates pre doi on expense reimbursement form	
04/09/04	Main	9587	Design	Web Maintenance	(\$898.15)	(898.15)		90.21	0	(807.94)		(90.21)	90.21	Mar expense/31 days*4 days	90.21290323
04/09/04	Main	9589	Tanvir Mahr	Transportation	(\$802.50)	(802.50)		400.00	0	(402.50)		(400.00)	0.00	no documentation	
04/09/04	Main	9597	Verizon Wireless	Telephone Service	(\$200.19)	(200.19)		16.42	0	(183.77)		(16.42)	16.42	long distance pre DOI calc @ K191 dates on phone bill verified	
04/09/04	Main	9602	First Communications	Telephone Service	(\$139.92)	(139.92)		6.02	0	(133.90)		(6.02)	6.02	long distance pre DOI calc @ K195 dates on phone bill verified	
04/09/04	Main	9603	First Communications	Telephone Service	(\$2,128.62)	(2,128.62)	29	21		0.72413793	(1,541.41)	(587.21)	428.84	current chg-apr/29 days*7 days Mar2 - Mar30 expense/29 days*3 days	428.8393103
04/09/04	Main	9606	The Illuminating Company	Utilities	(\$59.25)	(59.25)	29	25		0.86206897	(51.08)	(8.17)	6.13	Mar2 - Mar30 expense/29 days*3 days	6.129310345
04/09/04	Main	9607	The Illuminating Company	Utilities	(\$32.85)	(32.85)	29	25		0.86206897	(28.32)	(4.53)	3.40	Mar2 - Mar30 expense/29 days*3 days	3.398273862
04/09/04	Main	9608	The Illuminating Company	Utilities	(\$68.21)	(68.21)	29	25		0.86206897	(58.80)	(9.41)	7.06	Mar2 - Mar30 expense/29 days*3 days Feb27 - Mar27 expense/30 days*6 days	7.056286897
04/09/04	Main	9609	The Illuminating Company	Utilities	(\$20.56)	(20.56)	30	26		0.86666667	(17.82)	(2.74)	4.11	Mar expense/31 days	4.112
04/09/04	Main	9611	Donunion East Ohio	Utilities Travel/ Telephone Expense/ Postage/ Event Supplies	(\$114.96)	(114.96)	29	25		0.86206897	(99.10)	(15.86)	14.83	days*4 days Feb20 - Mar22 expense/29 days*13days	14.8355839
04/09/04	Main	9624	Danielle Feris	Event Supplies	(\$559.96)	(559.96)		34.35	1	(525.61)		(34.35)	30.80		30.79655172

Date	Acct.	#	Name	Purpose	Post DOI - CTC	Days In Period	Days after 3/4	or Itemized \$ Amt	pro-rata	Revised amount	Date of Expense	Not CTC Expense	And (Review) Response	Comments	Conclusion
04/09/04	Main	9628	Heather Miller	Office Supplies/ Travel/ Fuel	(\$185.05)			164.88	1	(20.17)	2/20/4, 2/20/4, 2/20/4, 2/19/4, 2/14/4	164.88		dates pre doi on expense reimbursement form no support documentation	
04/09/04	Main	9631	Morris Pettus	Fuel/ Telephone Service	(\$158.44)			16.38	1	(142.06)		16.38			
04/09/04	Main	9634	Renee Whiteside	Meal/ Fuel/ Telephone Service	(\$108.59)			5.42	1	(103.17)		5.42		dates pre doi on expense reimbursement form Feb20 to Mar31 stipend/40 days* 13 days	
04/12/04	Main	9639	Catherine Veith	Intern Stipend 2/20/04 - 3/31/04	(\$538.00)	40	27		0.675	(363.15)		174.85			174.85
04/14/04	Main	9643	Tim Carpenter	Consulting Contract	(\$1,000.00)				0	0.00		266.67		consulting fee/15 days*4 days	266.67
04/15/04	Main	9652	Dominion East Ohio	Utilities Intern Stipend - March 2004	(\$165.17)	29	14		0.48275862	(79.74)		85.43		month use/29 days*15 Mar stipend/31 days* 4 days	85.43
04/15/04	Main	9657	Janice Raviv		(\$400.00)				0	0.00		51.61			51.61
04/20/04	Main	9660	Hudson Bay Company	Fundraiser Consulting	(\$61,708.17)			20,058.17	1	(41,650.00)		20,058.17		pre doi expense and fee invoice for 3/7 through 4/7 (store tally) Mar billing/31 days*4 days	20,058.17
04/22/04	Main	9679	The Progressive Store	Fundraising	(\$8,096.76)	29	0		0	0.00		0.00			
04/22/04	Main	9693	Cingular Interactive	Interactive Messaging	(\$480.90)	31	27		0.87096774	(418.85)		62.05			62.05
04/22/04	Main	9695	Lake Business Products	Copier Rental	(\$739.44)				0	0.00		80.64		Mar billing - dup/31 days*4 days no support documentation	80.64
04/22/04	Main	9696	Cingular Wireless	Telephone Service	(\$402.91)	28	18		0.64285714	(259.01)		51.99			51.99
04/22/04	Main	9697	AT & T (10)	Telephone Service	(\$57.93)			22.77	1	(35.16)		22.77		long distance pre DOI calc @ K046 dates on phone bill verified	22.77
04/22/04	Main	9699	Dominion East Ohio	Utilities	(\$117.92)	28	18		0.64285714	(75.81)		42.11		month use/28 days*10	42.11
04/22/04	Main	9704	Bay Ring Communications	Telephone Service	(\$661.15)			199.63	1	(461.52)		81.72		Mar billing - pre DOI/31 days*4 days	81.72
04/22/04	Main	9707	SBC	Telephone Service # 4159272004	(\$8.79)			6.55	1	(2.24)		6.55		long distance pre DOI calc @ K356 dates on phone bill verified	6.55
04/22/04	Main	9711	Metro Business Machines	Copier Maintenance Monthly Min.	(\$35.00)				0	0.00		4.52		Mar billing/31 days*4 days no support documentation	4.52
04/22/04	Main	9712	Cindy Davis	Temporary Labor	(\$75.00)	31	27		0.87096774	(65.32)		9.68		documentation	9.68
04/22/04	Main	9713	Collective Copies	Copies	(\$25.20)			15.75		(15.75)		15.75		3/2 amount	15.75
04/22/04	Main	9717	Kevin Spidel	Telephone Expense	(\$209.49)			1.25	1	(208.24)		1.25		long distance pre DOI dates on phone bill	1.25

Date	Acct.	#	Name	Purpose	Post DOI - CTC	Days in Period	Days after 3/4	or Itemized \$ Amt	pro-rata	Revised amount	Date of Expense	Not CTC Expense	Additional Review of Response	Comments	Calculation
04/22/04	Main	9720	Suzanne Pardee	Postage/ Office supplies	(\$224.07) (224.07)			50.17	1	(173.90)	12/13/3,3/1/4	(50.17)		dates pre doi on expense reimbursement form	50.17
04/22/04	Main	9724	Osagyefo Sekou	Transportation/ Meal/ Parking/ Postage/ Travel/ Copies	(\$428.53) (428.53)			155.24	1	(273.29)	11/20/3,10/9/3, 11/18/3,3/4/4,3 /3/4,2/20/4,8/5/ 3,3/3/4,3/3/4,3/ 3/4,2/27/4	(155.24)		dates pre doi on expense reimbursement form no support documentation	calc @ K 19 verified
04/22/04	Main	9726	Faith Kidder	Telephone Expense	(\$60.00) (60.00)			51.50		(51.50)		(51.50)		no support documentation	
04/22/04	Main	9727	Danielle Ozymandias	Telephone Expense Delivery Service/ Voter List	(\$60.00) (60.00)	31	27		0.87096774	(52.26)		(7.74)		no support documentation	
04/22/04	Main	9729	Patrick West		(\$198.49) (198.49)			111.06	1	(87.43)	2/29/4,3/2/4,2/ 11/4	(111.06)		documentation	
04/22/04	Main	9730	Charles Lenchner	Parking/ Meal Expense/ Telephone Expense/ Travel/ Lodging	(\$397.00) (397.00)			90.00		(90.00)		(90.00)		dates pre doi on expense reimbursement form	calc @ K 17 verified
01/00/00	Main	9732	Lydia Caballero	Lodging/ Telephone Expense/ Fuel/ Meal Expense	(\$2,707.22) (2,707.22)			1,051.28	1	(1,655.94)	2/23-2/4/1004	(1,051.28)		dates pre doi on expense reimbursement form	calc of pre doi amount
05/06/04	Main	9795	SBC (MI)	Telephone Service	(\$202.70) (202.70)			4.98	1	(197.72)	3/2/2004	(4.98)		long distance pre DOI dates on phone bill	calc @ K 21 verified
05/06/04	Main	9796	SBC (MI)	Telephone Service	(\$48.58) (48.58)	29	28		0.96551724	(46.90)		(1.68)		no documentation	
05/06/04	Main	9821	Alison Hirsch	Printing/ Office Supplies/ Parking/ Meal	(\$253.57) (253.57)			275.77	1	22.20		(275.77)		pre doi amt on exp reimb forms exceed payment	275.77
05/06/04	Main	9823	Ida Rukavina	Telephone Expense	(\$19.00) (19.00)	1	0		1	0.00		(19.00)		long distance pre DOI dates on phone bill	
05/06/04	Main	9829	Mari Englehardt	Fuel/ Meal/ Staff House Bedding/ Parking/ Office Supplies	(\$538.39) (538.39)			34.00	1	(504.39)	2/29/2004	(34.00)		dates pre doi on expense reimbursement form	calc @ K 848 verified
05/06/04	Main	9834	Eleanor Reed	Delivery Service/ Office supplies & furniture/ Fuel/ Meal	(\$464.24) (464.24)			46.00	1	(418.24)	2/22/4,2/24/4,3 /4/4	(46.00)		no documentation	
05/06/04	Main	9835	Matt Harris	Travel/ Event supplies/ Fuel/ Telephone equipment	(\$234.09) (234.09)			170.49	1	(63.60)		(170.49)		no documentation	
05/06/04	Main	9852	Cleveland I Limited Partnership	March & April Lease/ Lighting	(\$2,816.00) (2,816.00)			1,435.00	1	(1,381.00)	2/3/4,2/6/4	(1,435.00)		(total-Apr) billing/31 days*4 days	180.65 613

Date	Acct.	#	Name	Purpose	Post DOI - CTC	Days in Period	Days after 3/4	or itemized \$ Amt	pro-rata	Revised amount	Date of Expense	Not CTC Expense	Response	Comment	Calculation
05/11/04	Main	9882	Darlene White	Fuel/ Meal/ Lodging	(\$274.05) (274.05)			3.25	1	(270.80)	2/11/2004	(3.25)	3.25	dates pre doi on expense reimbursement form	calc @ K 1401 verified
05/24/04	Main	9932	BC Robert Chaney	Meal/ Copies/ Telephone Expense/ Travel/ Postage	(\$358.69) (358.69)			10.00	1	(348.69)	11/20/2003	(10.00)	10.00	dates pre doi on expense reimbursement form	calc @ K 1402 verified
05/27/04	Main	9967	Sandie Cloud	Postage/ Office Supplies	(\$172.06) (172.06)			107.23	1	(64.83)	2/19/2004, 1/9/4, 2/18/4, 2/13/4	(107.23)	107.23	dates pre doi on expense reimbursement form	calc @ K 1403 verified
06/02/04	Main	10001	Steve Cobble	Consulting	(\$2,000.00) (2,000.00)			2000		(2,000.00)	debt payoff (email attached)	(2,000.00)	0.00	no documentation	
06/02/04	Main	10002	Labor & Industries	Workers Compensation Premium Rental Car/ Fuel/ Printing/ Telephone Service	(\$228.14) (228.14)	91	28		0.30769231	(70.20)		(157.94)	160.45	quarterly expense/91 * 64 pre doi days	160.401499
06/04/04	Main	10039	Susan Reed	Service	(\$355.37) (355.37)			12.31	1	(343.06)	10/29/3, 11/21/3	(12.31)	12.31	no support documentation	
06/04/04	Main	10041	Darlene White	Travel	(\$749.08) (749.08)			26.97	1	(722.11)	2/7/2004	(26.97)	26.97	dates pre doi on expense reimbursement form	calc @ K 1407 verified
06/16/04	Main	10065	Steve Cobble	Consulting	(\$2,000.00) (2,000.00)			2000		(2,000.00)	debt payoff	(2,000.00)	0.00	no documentation 3 month exp/120days*32 pre doi days	31.94666667
06/18/04	Main	10107	Carlton Jackson	Telephone Expense/ Cable/ DSL Internet	(\$351.05) (351.05)			32.67	1	(318.38)		(32.67)	31.95	dates pre doi on expense reimbursement form	calc @ K 1410 verified
06/18/04	Main	10108	Alison Hirsch	Travel/ Internet	(\$795.21) (795.21)			127.54	1	(667.67)	2/16/2004	(127.54)	127.54	invoice with reimbursement form	
06/18/04	Main	10110	Lu Bauer	Travel/ Copies/ Postage/ E-mail newsletter/ Telephone Repair	(\$597.71) (597.71)			80.06	1	(517.65)	Feb. 2004	(80.06)	118.00	dates pre doi on expense reimbursement form	calc @ K 1412 verified
06/18/04	Main	10112	Leatrice Tolls	Travel/ Event Supplies	(\$455.64) (455.64)			362.90	1	(92.74)		(362.90)	362.90	dates pre doi on expense reimbursement form	calc @ K 1413 verified
06/25/04	Main	10124	Melissa Adams	Travel/ Auto Rental	(\$1,951.68) (1,951.68)			765.69	1	(1,185.99)		(765.69)	765.69	invoice with reimbursement form	
07/07/04	Main	10162	Kathleen Lane	Utilities Deposit	(\$50.00) (50.00)	1	0		0	0.00	8/8/2003	(50.00)	50.00	pre doi expense and fee	
07/20/04	Main	10207	Elizabeth Whitney	Printing/ Consulting	(\$664.56) (664.56)	1	0		0	0.00	Feb. 2004	(664.56)	664.56		

Date	Acct.	#	Name	Purpose	Post DOI - CTC	Days in Period	Days after 3/4	or Itemized \$ Amt	pro- rata	Revised amount	Date of Expense	Not CTC Expense	Audit Review of #3 Response	Comment	Calculation	Con-
08/31/04	Main	10356	Ohio Bureau Of Workers' Compensation Insurance		(\$4,259.76) (4,259.76)	182	118		0.64835165	(2,761.82)		(1,497.94) (64,490.37)	1,219.41 34,005.26	6 month exp/181 days*63 pre doi days	1219.41	1683
												Auditor Review Difference	34,005.26 (30,485.11)			