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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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**MEMORANDUM**

February 2, 2000

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence M. Noble *L.M.N.*  
General Counsel

Kim Leslie Bright *KLB*  
Associate General Counsel

Lorenzo Holloway *L.H.*  
Assistant General Counsel

J. Duane Pugh Jr. *J.D.P.*  
Attorney

Jamila I. Wyatt *J.I.W.*  
Attorney

**AGENDA ITEM**  
For Meeting of: 2-3-00

**SUBMITTED LATE**

SUBJECT: 1996 Committee on Arrangements for the Republican National Convention's Response to the Proposed Statement of Reasons dated January 27, 2000

On June 25, 1998, the Commission approved the Report of the Audit Division on the 1996 Committee on Arrangements for the Republican National Convention (the "Convention Committee") and determined that the Convention Committee and the Republican National Committee ("RNC") must repay \$1,772,643 to the United States Treasury. On September 24, 1998, the Convention Committee submitted legal and factual materials pursuant to 11 C.F.R. § 9007.2(c)(2)(i) in an effort to demonstrate that no repayment or a lesser repayment is required to be paid to the United States Treasury.<sup>1</sup> On February 24, 1999, the Convention Committee addressed the Commission in an oral hearing.

<sup>1</sup> The repayment determination procedures for convention financing incorporates by reference the repayment determination procedures for general election financing found at 11 C.F.R. § 9007(c) through (h). 11 C.F.R. § 9008.12(c).

The draft Statement of Reasons supporting the Post-Administrative Review Repayment Determination was on the Commission's Open Session Agenda on January 27, 2000. On the same date, the Convention Committee submitted a letter to the Commission commenting on the findings and determinations in the proposed Statement of Reasons.<sup>2</sup> At the meeting, the Commission discussed the issue of whether the Convention Committee's letter should be considered by the Commission in making the Post-Administrative Review Repayment Determination. However, the Commission did not vote on whether the letter should be considered in making the repayment determination.<sup>3</sup>

The Office of General Counsel recommends that the Commission disregard the letter from the Convention Committee in its consideration of the proposed Statement of Reasons. The Commission's regulations do not provide that committees may file materials during the Commission's consideration of the proposed Statement of Reasons.<sup>4</sup> Courts have upheld Commission decisions not to consider documents that were submitted untimely. See *Carter/Mondale Presidential Committee v. FEC*, 775 F.2d 1182, 1184 (D.C. Cir. 1985)(upheld agency's refusal to reconsider a final repayment determination because the issue was not timely raised). Absent constitutional constraints or extremely compelling circumstances, administrative agencies are free to fashion their own procedures, and the court gives great deference to those procedures. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 435 U.S. 519, 520 (1978).

The Convention Committee waived any issue that was not raised in the factual and legal materials that were submitted in its administrative review request. 11 C.F.R. § 9007.2(c)(2)(i). Furthermore, in *Robertson*, the court held that if a committee does not raise issues in a timely

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<sup>2</sup> On January 24, 2000 the Office of General Counsel provided the Convention Committee with an advance copy of the draft Statement of Reasons. See 11 C.F.R. § 9007.1(e)(1).

<sup>3</sup> The proposed Statement of Reasons was held over for discussion and will be placed on the February 3, 2000 Open Session Agenda.

<sup>4</sup> At the Commission's meeting on January 27, 2000, a question was raised as to whether the Convention Committee's letter would be included in the administrative record of the Statement of Reasons. The convention financing repayment determination procedures do not incorporate the general election rules for the administrative record by reference. Compare 11 C.F.R. § 9008.12(c) (general election repayment procedures found at 11 C.F.R. § 9007.2(c) through (h)) with 11 C.F.R. § 9007.7 (general election administrative record). Even if the general election rules for the administrative record are incorporated by reference into the convention financing system, the administrative record is limited to documents and materials that were submitted in a timely fashion in accordance with, *inter alia*, 11 C.F.R. §§ 9007.1(c)(responses to exit conference memoranda) and 9007.2(c)(2)(administrative review requests). 11 C.F.R. § 9007.7(a).

fashion, those issues are waived.<sup>5</sup> *Robertson v. FEC*, 45 F.3d 486, 490 (D.C. Cir 1995)(court held that petitioner had waived his right to address an issue because he had not raised it until his oral hearing); *see also Fulani v. FEC*, 147 F.3d 924 (D.C. Cir. 1998)(court ruled that an untimely appeal of a repayment determination constitutes a waiver). The Convention Committee was afforded opportunities to submit documents related to the issues raised in the proposed Statement of Reasons. The Convention Committee submitted a substantial response to the Exit Conference Memorandum and a six volume administrative review request. In fact, included in the Convention Committee's administrative review request were three letters the Convention Committee attempted to submit in response to the draft Audit Report while it was pending before the Commission. *See* Convention Committee's Administrative Review Request, A645 - A654 and A748-750. The Commission voted to disregard each such attempted submission. The Convention Committee's letter dated January 27, 2000 was submitted outside the procedure and time frames established in the Commission's regulations, and should not be considered by the Commission.<sup>6</sup>

In the past, the Commission has chosen not to consider similar submissions from committees. In the case of Fulani for President, the Commission denied the Fulani Committee's attempt to have additional documentation considered relating to the committee's initial repayment determination. However, with respect to the Pete Wilson for President Committee, the Commission chose to consider a letter submitted by the committee in response to its proposed Statement of Reasons. The Wilson Committee had failed to meet a deadline for document submission imposed by the Office of General Counsel, yet the Commission included the letter in its consideration of its proposed Statement of Reasons.<sup>7</sup>

The Convention Committee submitted factual and legal materials in response to the repayment determination, as permitted by 11 C.F.R. § 9007.2(c)(2)(i). Thus, the Convention Committee had an opportunity to respond in writing to the issues in the Audit Report. Once the

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<sup>5</sup> In addition, courts have held that parties adversely affected by agency action must only be afforded notice, an opportunity for comment, and an explanation of the agency's action. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). The Commission's procedures more than provide for a committee's right to be heard by allowing it an opportunity to respond to the Exit Conference Memorandum, the Repayment Determination, as well as provisions whereby the committee may file a petition for rehearing or seek judicial review. Therefore, the Commission is not required to consider the Convention Committee's letter in response to the proposed Statement of Reasons.

<sup>6</sup> The Convention Committee filed similar responses earlier in the process where there was no procedure for considering its response, and in every instance the Commission refused to consider the documents. For example, on December 19, 1997, the Convention Committee submitted a letter to the Commissioners commenting on the findings in its proposed Audit Report although there is no procedure in place for such a submission. The Commission did not consider the Convention Committee's letter in that context.

<sup>7</sup> The Office of General Counsel acknowledges that there may be earlier matters where the Commission addressed whether or not to consider committee submissions that were submitted outside of the Commission's established regulatory procedures. However, since some past proceedings are not in the Case Management System, access to some information was not attainable.

Commission issues its Statement of Reasons for the Repayment Determination following the administrative review, committees are permitted to file a petition for rehearing in some instances and to seek judicial review of the repayment determination. See 26 U.S.C. § 9011(a) and 11 C.F.R. §§ 9007.5 and 9008.14. Delay will be the inevitable result if the Commission considers responses in addition to those permitted by its regulations, particularly if other committees seek an opportunity to file similar responses. Therefore, this Office recommends that the Commission disregard the Convention Committee's January 27, 2000 letter when it considers the proposed Statement of Reasons on the Convention Committee and exclude it from the administrative record of this proceeding.

### **RECOMMENDATION**

The Office of General Counsel recommends that the Commission:

Disregard the January 27, 2000 letter from the counsel for the 1996 Committee on Arrangements for the Republican National Convention when the Commission considers the proposed Statement of Reasons for the 1996 Committee on Arrangements for the Republican National Convention and exclude it from the administrative record of this proceeding.