BEFORE THE FEDERAL ELECTION COMMISSION

DNC Services Corporation/ Democratic National Committee and Carol Pensky, as Treasurer	)	**MURs 4544 and 4407**

MOTION TO QUASH

Pursuant to section 111.15 of the Commission's rules, 11 C.F.R. § 111.15, respondent DNC Services Corporation/Democratic National Committee (the "DNC") hereby moves to quash the Subpoena to Produce Documents served on the DNC in the above-referenced MURs. The Subpoena should be quashed because (1) the only factual information relevant to the issues in these MURs is the content of, timing of and amounts of party disbursements for the issue advocacy advertisements that are the subject of these MURs and (2) the Commission already has in its possession all such information, or can readily obtain it from the FEC's own records, or from stipulations or materials the DNC could readily provide, without imposing on the DNC the enormous burden of complying with this Subpoena.

I. The Only Factual Information Relevant to the Issues in These MURs Is the Content of, Timing of and Amounts of Expenditures for the Party Advertisements

There are two issues presented by the Reason to Believe findings in these MURs. The first is whether the DNC's disbursements to two media firms for an issue advocacy advertising campaign in 1995 and 1996 were properly treated as administrative and/or generic voter drive expenses, which are not subject to limitation and which, under 11 C.F.R. § 106.5(b)(2), are subject to allocation between the DNC's federal and non-federal accounts; or, whether instead, these disbursements should have been treated as in-kind contributions to Clinton/Gore '96 Primary Committee, Inc., in violation of 2 U.S.C. § 441(a)(2)(A), and/or excessive expenditures in connection with the general election campaign of President Clinton and Vice President Gore, in

violation of 2 U.S.C. § 441a(d)(2). (Factual and Legal Analysis at 26-27). In the latter case, the Commission would also find the DNC to have violated the prohibition on using non-federal money for such contributions to and/or expenditures on behalf of a federal candidate, 2 U.S.C. § 441b(a). Id. at 28. The only factual information relevant to this issue is the content, timing and amount of expenditures by the DNC for these advertisements.

The second issue purportedly presented by the Factual and Legal Analysis is whether transfers made by the DNC to certain state Democratic Party committees should be treated as direct disbursements by the DNC for issue advertising paid for and sponsored by those state party committees. If so, the Factual and Legal Analysis suggests that the Commission could find the DNC to have violated the reporting provisions of the Act, 2 U.S.C. § 434(b)(4), and could treat the transfers as additional DNC disbursements for purposes of the first issue. Id. at 27-28. There is, however, no legal basis whatsoever for the Commission to treat the DNC's transfers to state parties as disbursements for advertising that was in fact paid for by those state parties, and, consequently, there is no factual investigation to be conducted with respect to this purported issue.

A. Only Content and Timing Are Relevant In Determining Whether the DNC Properly Treated the *Disbursements as Administrative and/or Generic Voter* Drive Expenses

1. Only Content and Timing Are Relevant Under the "Express Advocacy" Standard

It is the position of the DNC that a political party communication should be treated as an expenditure for a specific candidate--and thus as an in-kind contribution to or expenditure *on* behalf of the candidate--only when that communication expressly advocates the election or defeat of a clearly identified candidate. The reasons why "express advocacy" should be the standard are set forth in detail in the DNC's Response to the Complaint in MUR 4407, dated August 16, 1996, and will not be repeated here.

If "express advocacy" is the proper standard, it is clear that the Commission can take into account only the content and timing of the party communication. Under the Commission's own

regulation, 11 C.F.R. § 100.22(b), "express advocacy" is to be determined based solely on the wording of the communication, "with limited reference to external events, such as the proximity to the election." Further, it has been held that any reference to matters external to the wording of the communication cannot be considered in determining whether a communication "expressly advocates" the election or defeat of a specific candidate. E.g., Federal Election Commission v. Christian Action Network, No. 95-2600 (4th Cir. Aug. 2, 1996); Faucher v. Federal Election Commission, 928 F.2d 468 (1st Cir. 1991), cert. denied, 502 U.S. 87 (1991); Maine Right to Life Committee v. Federal Election Commission, 98 F.3d 1 (1st Cir. 1996), cert. denied, No. 96-1818 (Oct. 6, 1997).

2. Only Content and Timing Are Relevant Under the "Electioneering Message" Standard

The Commission's current position is that a party communication should be attributable to a particular candidate, rather than treated as a generic voter drive expense, if the communication refers to a "clearly identified candidate" and contains an "electioneering message." Factual and Legal Analysis at 12-13; FEC Advisory Opinion 1995-25; Advisory Opinion 1985-14; Advisory Opinion 1984-15. Manifestly, in determining whether a party communication contains an "electioneering message," the Commission is not entitled to consider factors beyond the content and timing of the communication. In Advisory Opinions 1984-15 and 1985-14, the Commission considered nothing beyond the pure wording and timing of the proposed advertisements. Similarly, in Advisory Opinion 1995-25, the Commission considered specific proposed advertisements submitted by the Republican National Committee, as follows:

> [Y]ou have provided the texts for three such ads--one urging support for the Balanced Budget Amendment and the other two urging that the Medicare program be saved and restructured. Two ads do not mention a Federal candidate, and all three urge support for the Republican position on the issues discussed. The third advertisement (titled "Too Young to Die") mentions President Clinton's name six times, although only in the context of Medicare policy; there is no reference to any election.

2 CCH Fed. Elec. Camp. Fin. Guide ¶ 6162 at 12,108. The Commission ruled, solely on the basis of this content analysis, that the costs of these advertisements should be treated as an administrative or generic voter drive expense under 11 C.F.R. § 106.5(b), and should be paid for by the RNC 65% from its federal account and 35% from its non-federal account.

That the Commission is not permitted to consider factors beyond content and timing was made explicit in the Commission's defense of the "electioneering message" standard against a claim of unconstitutional vagueness in the case of Colorado Republican Campaign Committee v. FEC, 116 S. Ct. 2309 (1996). There, petitioners argued that the "electioneering message" standard is unconstitutionally vague because, among other things, it "invites intrusive and unjustified government investigation of a political party's conduct and motive" and thus "boils down to a classic 'totality of the circumstances' test in which the answer can never be known in advance." Brief for Petitioners at 39-40.

The Commission replied that the "statutory provisions. . . as construed by the Commission's advisory opinions, provide fully adequate warning as to the nature of the prohibited conduct" because "[p]eople of 'common intelligence,' . . . would have no difficulty understanding that an advertisement explicitly linking an attack on the record of an opposing candidate with his ongoing Senate campaign contained an 'electioneering message.'" Brief for the Respondent at 44 (citations omitted). The Commission explicitly relied on the lower court's finding, as to the advertisements at issue in that case, that "'any reasonable reader'" of the advertisement "'would leave the reader (or listener) with the impression that the Republican Party sought to 'diminish' public support for'" the candidate. Id. at 19 (citations omitted, emphasis added).[1] Clearly, if it is possible to apply the "electioneering message" standard solely by reading or listening to or watching the party communication--as the Commission itself has told the U.S. Supreme Court--then it cannot be permissible for the Commission to consider, in applying that standard, any factors other than the content of the communication, and its timing.

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[1] The question of whether the "electioneering message" standard is unconstitutionally vague remains unresolved and very much alive, since the Supreme Court declined to address it in Colorado Republican. "[W]e need not consider the Party's further claim that the statute's 'in connection with' language, and the FEC's interpretation of that language, are unconstitutionally vague." 116 S. Ct. at 2317.

3. Facts Relating to Coordination Are Irrelevant In Any Event

The Factual and Legal Analysis confuses the issue by suggesting that a party communication which does not constitute an independent expenditure, but rather is coordinated with a candidate, is an in-kind contribution to that candidate regardless of the content of the advertisement. "[T]hese matters involve expenditures for advertisements which appear to have been made with the cooperation of, or in consultation with, the candidate or his campaign staff, and which therefore appear to have been contributions regardless of whether advertisements contained an electioneering message or included reference to a clearly identified candidate." Factual and Legal Analysis at 23-24 (emphasis added). That is not, and never has been, the law with respect to party communications.

To the contrary, the Commission's rules and rulings presume that party communications are coordinated with the party's candidates. The "electioneering message" standard was precisely designed to be used to determine when a party communication that is coordinated with a candidate should be attributed to that candidate, and therefore should be treated as an in-kind contribution to or expenditure on behalf of that candidate. This was explained very clearly by the Commission in its brief to the Supreme Court in the Colorado Republican case:

> First a party expenditure is coordinated [for purposes of section 441a(d)] only if it is attributable to a particular candidate (as distinct from "generic" appeals for support for the party's candidates as a group). That determination is made on a case-by-case basis and depends upon whether the communication "(1) depict[s] a clearly identified candidate and (2) convey[s] an electioneering message." Advisory Opinion 1985-14 at 11, 185; . . . If the expenditure is attributable to a particular candidate, it is then conclusively deemed to be coordinated with that candidate, based on the categorical determination that "[p]arty committees are considered incapable of making independent expenditures in connection with the campaigns of their party's candidates." Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 28-29 n. 1. See 11 C.F.R. § 110.7(b)(4)("party committees shall not make independent expenditures in connection with the general election campaign of candidates for Federal office"); FEC Advisory Opinion 1988-22, . . . (with respect to the campaign expenditures of political party committees, "coordination with candidates is presumed and 'independence' precluded"). . . .

> The FEC's determination that political parties are "incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates," DSCC, 454 U.S. at 28-29 n. 1, is entitled to substantial deference. That determination rests in part on the empirical judgment that party officials will of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election.
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> Brief for Respondent, Colorado Republican, at 23-24, 27 (emphasis added).

In its decision in Colorado Republican, the Court held that section 441a(d) cannot constitutionally be applied to limit party committee expenditures on behalf of congressional candidates if those expenditures are in fact independent. 116 S. Ct. at 2317. Thus the Court struck down the Commission's presumption that party committees cannot make independent expenditures. Id. at 2318-2319. The Court specifically did not address, however, the questions of (1) whether section 441a(d) can constitutionally be applied to limit party expenditures which are in fact coordinated with candidates, or (2) if so, what is the proper test for determining when party expenditures count towards the section 441a(d) limits: "[W]e need not consider the Party's further claim that the statute's 'in connection with' language, and the FEC's interpretation of that language, are unconstitutionally vague." Id. at 2317, see also id. at 2319-2320.

The Factual and Legal Analysis in the instant MURs suggests, at 11-12, that the Colorado Republican decision was somehow intended to narrow the rights of political parties, by allowing the Commission to treat every in-fact coordinated party communication as an in-kind contribution regardless of content. That suggestion is absolutely absurd, given that the Court specifically declined to address the standard for determining when coordinated party expenditures are attributable to a particular candidate and therefore trigger the Act's contribution and expenditure limits:

> [T]he opinions of the lower courts, and the parties' briefs in this case, did not squarely isolate, and address, party expenditures that in fact are coordinated. . . This issue is complex. . . .[P]arty coordinated expenditures do share some of the constitutionally relevant features of independent expenditures. But many such expenditures are also virtually indistinguishable from simple contributions. . . . Thus, a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of

party contribution limits. . . .

> While [the parties' litigation] strategies do not deprive the parties of a right to adjudicate the counterclaim, they do provide a reason for this Court to defer consideration of the broader issues until the lower courts have reconsidered the question in light of our current opinion.

116 S. Ct. at 2320 (emphasis in original and added).

Thus, the current law, at least as interpreted by the Commission, remains that party expenditures which are in fact coordinated with a candidate are subject to limitation only if they contain an "electioneering" message.[2] The contrary proposition in the Factual and Legal Analysis is not only contrary to the law, as represented by the Commission itself to the U.S. Supreme Court, but would produce absurd results. If mere coordination, without more, results in an "in-kind" contribution, then, for example, the fact that a candidate suggested that a party committee undertake a generic voter registration drive--in which no candidate is even mentioned--would make the costs of that registration drive an in-kind contribution to the candidate. That is not and never has been the Commission's view, let alone a constitutionally sustainable legal position.

For these reasons, in determining whether the DNC's disbursements for issue advertising were administrative/generic voter drive expenses or were, instead, attributable to a specific candidate (President Clinton), the only relevant factors are the content and timing of the advertising.

B. There Is No Factual Investigation to be Conducted With Respect to the DNC's Transfers to State Party Committees

The second issue the Factual and Legal Analysis purports to raise in these MURs is whether the DNC's transfers to certain state party committees should be treated as direct disbursements for the DNC for issue advocacy advertising, i.e.,whether the state parties'

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[2] The concept that the "electioneering message" test is to be applied to communications which are coordinated with candidates is further reinforced in the Commission's regulations applicable to issue advocacy generally, which distinguish between voter guides prepared without any consultation with candidates, to which the "express advocacy" standard applies, and voter guides which are prepared using materials from candidates, to which the "electioneering message" standard applies. Compare 11 C.F.R. §§ 114.4(c)(5)(i) and 114.4(c)(5)(ii)(E).

disbursements for the issue advertising should be treated as DNC disbursements instead. If so, the Factual and Legal Analysis suggests that the state party's disbursements could somehow be attributed to the DNC for purposes of the first issue, i.e., be treated as additional DNC disbursements for issue advertising; and that the DNC could be found to have violated the reporting provisions of the Act. (Factual and Legal Analysis at 25-26). The Factual and Legal Analysis suggests that, in deciding this issue, in addition to the "timing and amounts of the transfers," relevant facts would also include "the reported purpose of the disbursements and the statements of state committee officials." Id at 25.

If the Commission wishes to challenge disbursements by state parties for issue advertising as impermissible in-kind contributions or coordinated expenditures in excess of the section 441a(d) limits, it is of course free to do so by following the proper procedures. The Commission cannot, however, treat the DNC's transfers to state parties as DNC contributions or expenditures--and restrict them, or hold them impermissible or unlawful for any reason-- on the theory that the "intent" or "purpose" of such transfers somehow transforms them into something they were not, i.e., additional direct disbursements by the DNC for advertising. The theory of the Factual and Legal Analysis is that the "intent" or "purpose" of national party transfers to state parties can somehow convert the transfers to national party disbursements for activities which were actually paid for by the state parties. That theory has no basis whatsoever in the law.

Nothing in the Act or the Commission's regulations authorizes the Commission to treat any transfer of non-federal funds from a national party to a state party as a potentially unlawful national party disbursement, based on the purpose of the transfer. And nothing in the Act or the Commission's regulations authorizes the Commission to restrict or deem illegal any transfer of federal funds from a national party to a state party, based on the purpose of the transfer or anything else, with the sole exception of transfers for exempt activities.

Indeed, the Act explicitly provides that such transfers may be made without restriction, as to amount or purpose, except in the case of exempt activities. The Act, 2 U.S.C. § 441a(a)(4), provides that:

> The limitations on contributions contained in paragraphs (1) and (2) [of section 441a(a)] do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate

committee thereof) of the same political party.

It is highly significant that the Act imposes no restriction on the earmarking by national parties of transfers of federal funds to state parties, except in the case of exempt activities. In the 1979 amendments, the Congress indicated that campaign materials advocating the election of a federal candidate but purchased with national party funds should not qualify for the exemption from the definitions of "contribution" and "expenditure" that allows state party volunteers to distribute such materials. H. Rep. 96-422, 96th Cong., 1st Sess. 9 (1979). Based on this specific expression of congressional intent, the Commission adopted regulations providing that the exemptions for state party volunteer distribution of campaign materials and for state party voter registration and get out the vote activities are not available for activities funded by national party committees. See Amendments to Federal Election Campaign Act of 1971; Regulations Transmitted to Congress, Explanation and Justification, 45 Fed. Reg. 15080, 15082 (March 7, 1980); 11 C.F.R. §§ 100.7(b)(15)(vii), 100.7(b)(17)(vii), 100.8(b)(16)(vii), 100.8(b)(18)(vii). Thus, when the Congress desired to restrict a national party's ability to transfer funds to a state party based on the state party's use of those funds, it said so clearly and unequivocally. Except in the case of funds transferred for exempt activities, however, nothing in the Act, its legislative history or the Commission's regulations in any way imposes or authorizes any restriction on the ability of a national party to transfer funds to a state party for any particular purpose, or with any particular "intent."

Further, even in the case of exempt activities, where the national party is restricted by law from transferring funds for use by a state party, the Commission has specifically ruled that the subjective intent of the national party is irrelevant. In MUR 3204, the Commission failed to find probable cause to believe that the Montana Republican Party violated the Act by using national party funds for volunteer-distributed campaign materials. Commissioners Aikens and Elliott, whose opinion was controlling in the case, insisted that an objective accounting analysis be used to determine the amount of national party funds actually used for this purpose, and rejected proof of the national party's subjective intent. These Commissioners believed that such an objective approach was necessary "to relieve[] the Commission from retroactively divining the purpose or

designation behind a certain transfer." (Statement of Reasons by Commissioners Elliott and Aikens in MUR 3204 at 8 n. 14 (Sept. 14, 1994)). Thus, in MUR 3204 the Commission held that intent should not be relevant. The Factual and Legal Analysis in the instant MURs, suggesting that the subjective intent behind the transfers be investigated, simply flies in the face of Commission precedent.

Finally, there is no authority whatsoever, in the Act or the Commission's rules, for the Commission to restrict or hold unlawful, for any reason, any transfer of non-federal funds by a national party to a state party's non-federal account. The mere transfer of non-federal funds from a national party to a state party's non-federal account is governed solely by state law. Thus, the Commission has no jurisdiction at all to regulate such a transfer, or to treat it, together with federal transfers, as part of a single "disbursement" subject to Commission regulation, contribution limits and prohibitions, or anything else.

There is simply no basis, anywhere in the Act or the Commission's rules, for the newly-invented theory in the Factual and Legal Analysis that separate national party transfers of funds from a federal account to a state party account, and from a non-federal account to a state party non-federal account, are part of a single national party disbursement subject to the contribution or expenditure limits or prohibitions. Consequently, there is simply no factual investigation that can legitimately be conducted, in these MURs, of the "purpose" or "intent" of DNC transfers to state party committees.

II. The Commission Already Has, or Can Readily Obtain, Complete Information About the Content, Timing and Amount of Disbursements for the DNC's Issue Advocacy Advertising

For the reasons stated above, the only factual information relevant in these MURs is the content, timing and amount of disbursements for the DNC's issue advertisements. The content of the advertising is, of course, readily available from the scripts of the advertisements and video tape recordings of the advertisements. It is our understanding that the Commission already has complete scripts and tapes of all of the DNC's issue advertisements, as well as the issue advertisements run by the state party committees. If that is not the case, the DNC would be

pleased to provide, on a voluntary basis, complete copies of all scripts and tapes of all of the advertisements at issue in these MURs.

Second, it appears from the Factual and Legal Analysis that the Commission already has information concerning the timing of these advertisements. If that is not the case, the DNC would again be pleased to provide, in the form of a stipulation and/or sworn declaration, a complete listing of the flight dates for all the advertisements, i.e., the dates on which each advertisement was run.

Finally, it is understood that, in the event the General Counsel ultimately recommended that the Commission find a violation of the Act or Commission's regulations, the amount expended for these advertisements by the DNC would be relevant in determining the amount of the alleged violation. The amounts disbursed by the DNC to Squier Knapp Ochs and the November 5 Group for the DNC's issue advertising are readily available from the DNC's reports filed with the Commission, see Factual and Legal Analysis at 24, as are amounts disbursed by state parties to those entities. If there is some question or confusion about these amounts, the DNC would again be pleased to provide, in a stipulation or sworn declaration, the amounts disbursed by the DNC, and by state parties, to these media firms specifically for the running of the issue advocacy advertisements identified in the Factual and Legal Analysis.

The Subpoena served on the DNC would require the DNC to review or re-review millions of pages of its documents, in paper or computerized form, at a time when the DNC is already responding to more than 30 subpoenas, from federal grand juries, congressional committees and the FEC itself, all of which subpoenas were received prior to the Subpoena in these MURs. Given that the only factual information relevant to the issues in these MURs can be readily developed and provided to the Commission without the need for the enormous document production called for by this Subpoena, the Subpoena should be quashed forthwith.

CONCLUSION

For the reasons stated above, the Subpoena to Produce Documents served on the DNC in these MURs should be quashed.

Respectfully submitted,

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