TAB A

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 4987
Date Complaint Filed: March 21, 2000
Date of Notification: March 28, 2000
Date Activated: June 6, 2000

Staff Member: Delbert K. Rigsby
Statute of Limitations: January 6, 2005

COMPLAINANTS:
The Reform Party of the United States of America
Patrick J. Buchanan
Pat Choate
Buchanan Reform Committee
Angela M. Buchanan

RESPONDENTS:
Commission on Presidential Debates
Paul G. Kirk, Jr., Co-Chairman of the Commission on Presidential Debates
Frank J. Fahrenkopf. Jr., Co-Chairman of the Commission on Presidential Debates
Democratic National Committee and Andrew Tobias, as treasurer
Republican National Committee and Alex Poitevint, as treasurer

RELEVANT STATUTES AND REGULATIONS:
2 U.S.C. § 431(4)
2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 431(9)(A)(i)
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 441a(f)
2 U.S.C. § 441b(a)
2 U.S.C. § 441b(b)(2)
11 C.F.R. § 100.7(b)(21)
11 C.F.R § 102.1(d)
11 C.F.R. § 104.1(a)
11 C.F.R. § 110.13
11 C.F.R. § 114.1(a)(2)(x)
11 C.F.R. § 114.2(b)
11 C.F.R. § 114.4(f)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

MUR 5004
Date Complaint Filed: April 24, 2000
Date of Notification: April 28, 2000
Date Activated: June 6, 2000

Staff Member: Delbert K. Rigsby
Statute of Limitations: January 6, 2005

COMPLAINANTS:
Natural Law Party
John Hagelin
John Moore

RESPONDENTS:
Commission on Presidential Debates
Paul G. Kirk, Jr., Co-Chairman of the Commission on Presidential Debates
Frank J. Fahrenkopf, Jr., Co-Chairman of the Commission on Presidential Debates
Democratic National Committee and Andrew Tobias, as treasurer
Republican National Committee and Alex Poitevint, as treasurer

RELEVANT STATUTES AND REGULATIONS:
2 U.S.C. § 431(4)
2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 431(9)(A)(i)
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 441a(f)
2 U.S.C. § 441b(a)
2 U.S.C. § 441b(b)(2)
11 C.F.R. § 100.7(b)(21)
11 C.F.R. § 102.1(d)
11 C.F.R. § 104.1(a)
11 C.F.R. § 110.13
11 C.F.R. § 114.1(a)(2)(x)
11 C.F.R. § 114.2(b)
11 C.F.R. § 114.4(f)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

MUR 5021
Date Complaint Filed: May 30, 2000
Date of Notification: June 2, 2000
Date Activated: June 21, 2000

Staff Member: Delbert K. Rigsby
Statute of Limitations: January 6, 2005

COMPLAINANTS: Mary Wolhford
Bill Wolhford

RESPONDENTS: Commission on Presidential Debates
Paul G. Kirk, Jr., Co-Chairman of the Commission on Presidential Debates
Frank J. Fahrenkopf, Jr., Co-Chairman of the Commission on Presidential Debates

RELEVANT STATUTES AND REGULATIONS:
2 U.S.C. § 431(4)
2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 431(9)(A)(i)
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 441b(a)
2 U.S.C. § 441b(b)(2)
11 C.F.R. § 100.7(b)(21)
11 C.F.R. § 102.1(d)
11 C.F.R. § 104.1(a)
11 C.F.R. § 110.13
11 C.F.R § 114.1(a)(2)(x)
11 C.F.R. § 114.2(b)
11 C.F.R. § 114.4(f)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTERS

These matters arose from three complaints filed with the Federal Election Commission (the "Commission"). The first complaint, MUR 4987, was submitted by the Reform Party of the United States of America; Patrick J. Buchanan, a candidate for the Reform Party nomination for President of the United States; Pat Choate, Chairman of the Reform Party; Buchanan Reform Committee, the principal campaign committee of Mr. Buchanan; and Angela M. Buchanan (collectively, the "Reform Party"). The second complaint, MUR 5004, was submitted by the Natural Law Party; John Hagelin, a candidate for the Natural Law Party nomination in 2000; and John Moore, a member of the Natural Law Party's Executive Committee (collectively, the "Natural Law Party"). The third complaint, MUR 5021, was submitted by Mary Wohlford and Bill Wohlford (collectively, "Wohlford").

The three complaints allege that the criteria the Commission on Presidential Debates (the "CPD") adopted for selecting candidates to be invited to participate in debates are subjective and thus, violate 11 C.F.R. § 110.13(c). Furthermore, the Reform Party and Natural Law Party complaints allege that as a result of the subjective criteria, the CPD has violated 2 U.S.C. § 441b(a) by making expenditures in connection with a federal election, 2 U.S.C. § 433 by failing to register the CPD as a political committee with the Commission, 2 U.S.C. § 441a(f) by accepting prohibited contributions as a political committee, and 2 U.S.C. § 434 by failing to file reports of receipts and disbursements with the Commission.

Additionally, the Reform Party and Natural Law Party complaints allege that the Democratic National Committee (the "DNC") and Andrew Tobias, as treasurer, and the Republican National Committee (the "RNC") and Alex Poitevint, as treasurer, have violated

2 U.S.C. § 441b(a) by accepting prohibited contributions from the CPD and 2 U.S.C. § 434 by failing to report contributions received from the CPD. The Wohlford complaint made no allegations against the DNC and the RNC.

All of the respondents in MURs 4987, 5004 and 5021 have responded to the complaints.[1] *See* Attachments 1 through 5.

II. FACTUAL AND LEGAL BACKGROUND

A. Law

The Federal Election Campaign Act of 1971, as amended, (the "Act") prohibits corporations from making contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b(a); *see also* 11 C.F.R. § 114.2(b). The Act defines a contribution to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); *see also* 2 U.S.C. § 441b(b)(2). A contribution is also defined in the Commission's regulations at 11 C.F.R. § 100.7(a)(1). "Anything of value" is defined to include all in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii)(A). The Act defines an expenditure to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i); *see also* 2 U.S.C. § 441b(b)(2).

The Commission's regulations at 11 C.F.R. § 100.7(b)(21) specifically exempt expenditures made for the purpose of staging candidate debates from the definition of contribution provided that the debates meet the requirements of 11 C.F.R. §§ 110.13 and

[1] In responding to MURs 5004 and 5021, the CPD submitted cover letters responding to the allegations and attached copies of the response that it submitted to MUR 4987.

114.4(f). Non-profit organizations described in 26 U.S.C. §§ 501(c)(3) or 501(c)(4) that do not endorse, support, or oppose political candidates or political parties may stage candidate debates. 11 C.F.R. § 110.13(a)(1). The debates must include at least two candidates, and not be structured to promote or advance one candidate over another. 11 C.F.R. §§ 110.13(b)(1) and (2). Organizations that stage presidential debates must use pre-established objective criteria to determine which candidates may participate in the debate. 11 C.F.R. § 110.13(c). With respect to general election debates, staging organizations shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate. *Id.*

If a corporation staged a debate in accordance with 11 C.F.R. § 100.13, the expenditures incurred by that sponsoring corporation would be exempt from the definition of contribution. *See* 11 C.F.R. §§ 100.7(b)(21), 114.1(a)(2)(x) and 114.4(f)(1). As long as the sponsoring corporation complied with 11 C.F.R. § 110.13, other corporations may provide funds to the sponsoring corporation to defray expenses incurred in staging the debate without being in violation of the Act. 11 C.F.R. § 114.4(f)(3).

The Act defines the term "political committee" to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5. Political committees are required to register with the Commission, and to report contributions received and expenditures made in accordance with the Act and the Commission's regulations. *See* 2 U.S.C. § 433 and 11 C.F.R. § 102.1(d); *see also* 2 U.S.C. § 434 and 11 C.F.R. § 104.1(a).

B. CPD's Criteria for Selecting Candidates to Participate in the 2000 General Election Debate

The CPD was incorporated in the District of Columbia on February 19, 1987, as a private, not-for-profit corporation to "organize, manage, produce, publicize and support debates for the candidates for President of the United States. *See* Attachment 1 at 5. The Co-Chairmen of the CPD are Paul G. Kirk, Jr., and Frank J. Fahrenkopf, Jr. The CPD sponsored two presidential debates during the 1988 general election, three presidential debates and one vice presidential debate in 1992, and two presidential debates and one vice presidential debate in 1996. *Id.* The CPD plans to sponsor three presidential and one vice presidential debate during the 2000 general election. The CPD accepts donations from corporations and other organizations to fund these debates.

On January 6, 2000, the CPD announced its candidate selection criteria for the 2000 general election debates. *Id.* at 2. It stated that "the purpose of the criteria is to identify those candidates who have achieved a level of electoral support such that they realistically are considered to be among the principal rivals for the Presidency." *Id.* The criteria are: (1) evidence of the candidate's constitutional eligibility to serve as President of the United States pursuant to Article II, Section 1 of the United States Constitution; (2) evidence of ballot access, such as the candidate appearing on a sufficient number of state ballots to have at least a mathematical chance of securing an Electoral College majority; and (3) indicators of electoral support by having a level of support of at least fifteen percent of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly-reported results at the time of the determination of

eligibility.[2] *Id.* at 9, 10. A candidate must meet all three criteria to participate in the debate. The CPD also stated that it will determine participation in the first scheduled debate after Labor Day 2000. *Id.* at 75. Furthermore, the CPD will extend invitations to participate in the vice presidential debate to the running mates of the presidential candidates qualifying for participation in the CPD's first presidential debate, and invitations to participate in the second and third debates will be based upon the same criteria prior to each debate. *Id.*

C. Complaints

1. Reform Party Complaint

The Reform Party alleges that the CPD was created to provide the Republican and Democratic Parties with control over the presidential and vice presidential candidate debates in the general election and to exclude third party candidates from those debates. The Reform Party also states that the Republican and Democratic Parties continue to control the presidential debates sponsored by the CPD. Thus, the Reform Party argues that the CPD does not satisfy the requirement that staging organizations not support or oppose political parties. 11 C.F.R. § 110.13(a). Furthermore, the complaint states that the CPD developed subjective criteria for selection of candidates to participate in the 2000 general election debate which does not satisfy 11 C.F.R. § 100.13(c) and thus, contributions made to the CPD and expenditures incurred by the CPD are prohibited contributions under 2 U.S.C. § 441b. The Reform Party also states that the CPD must register as a political committee and report its receipts and expenditures.

---

[2] Those five polling organizations are the ABC News/*Washington Post*; CBS News/*New York Times*; NBC News/*Wall Street Journal*; CNN/*USA Today*/Gallup; and Fox News/Opinion Dynamics. The CPD has also retained Frank Newport, Editor-in-Chief of the Gallup Poll, as a consultant in implementing the 2000 candidate selection criteria. *Id.* at 9, 10.

Specifically, the complaint challenges the third criterion, the level of electoral support, as subjective because it is based on the use of polls. The Reform Party criticizes the use of polling because they believe that polls have significant margins of error which make it difficult to determine the actual level of support. Furthermore, the Reform Party questions the CPD's polling methodology to take the average of five polls which may have different sample sizes, and target different populations, such as eligible voters versus eligible voters most likely to vote. The complaint also argues that in using polls, the CPD grants complete discretion to the polling organizations with respect to deciding the portion of the electorate polled, the wording of the questions, and the names of the candidates about which the polls inquire. Additionally, the Reform Party argues that the electoral support requirement of fifteen percent is three times the statutory requirement of five percent of the general election vote that presidential candidates of a political party must receive in order for the political party to receive federal funding in the next general election.

Furthermore, the complaint argues that participation in the debates provides extensive television exposure and media coverage, which increases the candidate's ability to communicate his or her message and obtain support of the voters. The Reform Party cites the example of Ross Perot, a third party candidate in 1992, who had support of 7% of the electorate in the polls prior to the debates, but received 19% of the vote in the 1992 general election.

The Reform Party complaint requests that the Commission find reason to believe that the CPD's current candidate selection criteria, particularly the level of electoral support in the national electorate criterion, violates the Act and Commission regulations because it is neither pre-existing nor objective, and direct the CPD to substitute the level of electoral support criterion

with the criterion of qualification for public funding in the general election. The complainants also request that the Commission find reason to believe that, as a result of the CPD's candidate selection criteria, the CPD is acting as an illegal, non-reporting political committee receiving and making illegal corporate contributions and expenditures in violation of the Act and the Commission's regulations. Finally, the complainants request that the Commission take action to correct and prevent continued illegal activities of the CPD.

2. Natural Law Party Complaint

The Natural Law Party argues that the CPD's sponsorship of candidate debates is intended to promote the candidates of the Democratic and Republican parties to the exclusion of the candidates of other parties, and thus, the CPD's expenditures in sponsoring the debates are expenditures by a corporation in connection with an election to public office in violation of 2 U.S.C. § 441b(a). Furthermore, the Natural Law Party complaint states that the CPD's sponsorship of the debates does not satisfy the requirement of 11 C.F.R. § 110.13(a) to be nonpartisan because the CPD was created by the Democratic and Republican parties and continues to serve their joint interest in limiting the participation of third party candidates. The complaint also argues that the CPD does not satisfy the requirement of 11 C.F.R. § 110.13(c) to use pre-established, objective criteria because the level of electoral support criterion depends upon polling results that are approximations with "substantial" margins of error and are influenced by the design of the polling questions. The Natural Law Party alleges that CPD's expenditures incurred in sponsoring the presidential debates are prohibited contributions to the DNC and RNC in violation of 2 U.S.C. § 441b(a), and any corporate contributions received by the CPD are prohibited contributions. Additionally, the complaint alleges that the CPD is a

political committee within the meaning of 2 U.S.C. § 431(4)(A), and has failed to report contributions as required by the Act. The Natural Law Party also argues that the DNC and the RNC have failed to report contributions from the CPD.

The Natural Law Party complaint requests that the Commission find reason to believe that the CPD, DNC, and RNC have violated or are about to violate 2 U.S.C. § 441b(a) by making and/or accepting prohibited contributions. The Natural Law Party also requests that the Commission find reason to believe that the CPD has violated or is about to violate 11 C.F.R. § 110.13 by staging candidate debates in a partisan manner and without pre-established, objective criteria. Additionally, the Natural Law Party requests that the Commission find reason to believe that the CPD has violated or are about to violate 2 U.S.C. § 433 by failing to register as a political committee, and the CPD, DNC, and RNC have violated or are about to violate 2 U.S.C. § 434 by failing to report contributions and expenditures. Finally, the Natural Law Party requests that the Commission enjoin the CDP's sponsorship of debates as presently proposed, require the CPD to register as a political committee, and require the CPD, DNC and RNC to make required reports.

3. Wohlford Complaint

The Wohlford complaint alleges that the CPD's criteria for selecting candidates to participate in the 2000 general election is subjective, specifically the criterion which requires a candidate to demonstrate electoral support by averaging 15% in five selected polls, because polling is neither fair nor objective. Furthermore, the Wohlford complaint states that instead of the electoral support criterion, an example of an objective criterion would be to require a candidate to have spent a certain monetary amount on his or her campaign by a specific time

prior to the first debate. Finally, the complaint states that the Commission has two choices to remedy the alleged violations, such as excluding the CPD as a sponsoring organization if they maintain the criteria now published or require that the CPD eliminate polling from its criteria and substitute "truly objective" criteria.

D. Responses

1. Responses from the CPD to the Reform Party, Natural Law Party and Wohlford Complaints

In response to the complaints, the CPD argues that no CPD Board member is an officer of either the Democratic National Committee or the Republican National Committee, and the CPD receives no funding from the government or any political party. Attachment 1 at 5. The CPD also argues that any references to its founding as a bipartisan effort was an effort to ensure that it was not controlled by any one party, not an effort by the two major parties to control CPD's operations or to exclude non-major party candidates in CPD-sponsored debates. *Id.*, footnote 6.

In regard to its candidate selection criteria, the CPD argues that the purpose of the candidate selection criteria is to identify those candidates, regardless of party, who realistically are considered to be among the principal rivals for the Presidency. Attachment 1 at 2. Moreover, in regard to the third criterion, the CPD states that it sets forth a bright line standard with respect to electoral support, which is at least 15% of the national electorate as determined by the average results of five selected national public opinion polling organizations at the time of the CPD's determination of eligibility before each debate. Attachment 1 at 3. The CPD argues that in promulgating the regulation, 11 C.F.R. § 110.13, the Commission permits the staging organization to determine the objective criteria. *Id.*

With respect to the issue of electoral support and polling, the CPD argues that the Commission has ruled in a previous matter regarding its 1996 candidate selection criteria that it is appropriate for the criteria to include a measure of candidate potential or electoral support and to use polls to measure that support. Attachment 1 at 3. Moreover, the CPD states that the five polling organizations that it will employ are well-known, well-regarded, and will poll frequently throughout the 2000 election. *Id.* at 16. The CPD also argues that because public opinion shifts, it will use the most recent poll data available before the debates. *Id.* In regard to any methodological differences among the polls, the CPD states that taking the average of five polls may reduce the random error that could come from using only one source, and averaging does not invalidate the results. *Id.* at 16. Furthermore, the CPD, citing the declaration of Dorothy Ridings, a CPD Board member, argues that requiring a level of electoral support of 15% of the national electorate is reasonable because the "fifteen percent threshold best balanced the goal of being sufficiently inclusive to invite those candidates considered to be among the leading candidates, without being so inclusive that invitations would be extended to candidates with only very modest levels of support."[3] *Id.* at 14.

In regard to the Reform Party's argument that a candidate's eligibility for public funding in the general election should be used instead of electoral support of 15 % of the national electorate, the CPD states that it is opposed to a candidate's eligibility for public funding as a criterion because it is premised on the results of the previous election and not at all on the level of present public interest in the candidates running for office. Attachment 1 at 3.

---

[3] The CPD also notes that John Anderson achieved this level of electoral support prior to the first presidential debate in 1980 and was invited by the League of Women Voters to participate in that debate. Furthermore, the CPD states that other presidential candidates, such as George Wallace in 1968 and Ross Perot in 1992, had high levels of support. *Id.* at 14.

2. Response from the DNC to Reform Party and Natural Law Party Complaints

In response to the complaints, the DNC urges the Commission to dismiss the complaints against them and find no reason to believe that the DNC has violated the Act or Commission regulations. Furthermore, the DNC argues that it is independent of the CPD and that Mr. Paul Kirk, CPD Co-Chairman, who also served as DNC Chairman from 1985-1989, has held no office and played no role in the DNC since 1989. Attachment 3. The DNC also states that no DNC member, officer or employee sits on the Board of the CPD, and the DNC does not now play, nor has it ever played, any role in determining CPD's criteria for candidate selection for the debates. Attachments 2 and 3. Additionally, the DNC argues that any violation by the CPD of the Commission's debate regulations would not constitute an in-kind contribution to the DNC, which is distinct from a presidential candidate. Attachment 2.

3. Response from the RNC to the Reform Party and Natural Law Party Complaints

The RNC requests that the Commission find no reason to believe that violations of the Act occurred.[4] Furthermore, the RNC states that the complaints should be dismissed against the RNC because the CPD is not an affiliated committee or "alter ego" of the RNC. Attachments 4 and 5. The RNC acknowledges that Mr. Frank Fahrenkopf, Co-Chairman of the CPD, was Chairman of the RNC during the founding of the CPD, but the CPD was never an official or

---

[4] The RNC was a respondent in MUR 4473 in which Perot '96, Inc. challenged the CPD's 1996 candidate selection criteria for participation in the debates. The RNC's response to MUR 4473 was attached to its response to MUR 4987 and incorporated by reference.

approved organization of the RNC. *Id.* Finally, the RNC states that no CPD Board Member is an officer of the RNC, and that the RNC neither organized nor controls the CPD. *Id.*

III. ANALYSIS

Based upon the available evidence, it appears that CPD has complied with the requirements of section 110.13 of the Commission's regulations governing sponsorship of candidate debates. While the Reform Party and the Natural Law Party argue that the CPD's Co-Chairmen, Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr., are former Chairmen of the Democratic and Republican Parties respectively, they have not provided evidence that the CPD is controlled by the DNC or the RNC. There is no evidence that any officer or member of the DNC or the RNC is involved in the operation of the CPD. Moreover, there does not appear to be any evidence that the DNC and the RNC had input into the development of the CPD's candidate selection criteria for the 2000 presidential election cycle. Thus, it appears that the CPD satisfies the requirement of a staging organization that it not endorse, support or oppose political candidates or political parties. 11 C.F.R. § 110.13(a).

Furthermore, CPD's criteria for participation in the candidate debates appear to be pre-established, objective criteria as required by 11 C.F.R. § 110.13(c), and not designed to result in the selection of certain pre-chosen participants. The CPD's criteria for determining who may participate in the 2000 general election presidential debates consist of constitutional eligibility, appearance on sufficient state ballots to achieve an Electoral College majority, and electoral support of 15% of the national electorate based upon an average of the most recent polls of five national public opinion polling organizations at the time of determination of eligibility. The complainants acknowledge that the first and second criteria, constitutional eligibility and ballot

access, are objective, but argue that the third criterion, level of electoral support, is subjective because it is based upon polling.

The Commission has accorded broad discretion to debate sponsors in determining the criteria for participant selection. In promulgating 11 C.F.R. § 110.13(c), the Commission stated:

> Given that the rules permit corporate funding of candidate debates, it is appropriate that staging organizations use pre-established criteria to avoid the real or apparent potential for a quid pro quo, and to ensure the integrity and fairness of the process. The choice of which objective criteria to use is largely left to the discretion of the staging organization. . . .
>
> . . . . Staging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants. The objective criteria may be set to control the number of candidates participating in a debate if the staging organization believes that there are too many candidates to conduct a meaningful debate.

60 Fed. Reg. 64,262 (December 14, 1995).

The CPD's candidate selection criteria have been challenged in the past. In MURs 4451 and 4473, the Natural Law Party and Perot '96, Inc. filed complaints with the Commission against the CPD regarding its 1996 candidate selection criteria. The Commission found no reason to believe that the CPD violated the law by sponsoring the presidential debates or by failing to register and report as a political committee.[5] The Commission noted that "the debate regulations sought to give debate sponsors wide leeway in deciding what specific criteria to use." Statement of Reasons in MURs 4451 and 4473 at 8 (April 6, 1998). With respect to polling and electoral support, the Commission noted in MURs 4451 and 4473 that it declined to preclude the use of polling or "other assessments of a candidate's chances of winning the nomination or election" when promulgating 11 C.F.R. § 110.13. Furthermore, the Commission stated that

[5] In those matters, the Commission rejected the Office of General Counsel's recommendations that the Commission find reason to believe that the CPD violated the law.

questions can be raised regarding any candidate assessment criterion and "absent specific evidence that a candidate assessment criterion was "fixed" or arranged in some manner so as to guarantee a preordained result, we are not prepared to look behind and investigate every application of a candidate assessment criterion." *Id.* at 9. Finally, in MURs 4451 and 4473, the Commission referred to the Explanation and Justification for 11 C.F.R. § 110.13 which states that reasonableness is implied when using objective criteria. *Id.* In view of the Commission's prior decisions, the CPD is not required to use qualification for public funding in the general election as a debate participant criterion as the Reform Party argues.

It should be noted that the CPD used a different set of candidate selection criteria for the 1996 debates than it has proposed for the 2000 debates. However, the CPD's candidate selection criteria for 2000 appear to be even more objective than the 1996 criteria. In 1996, the CPD's candidate selection criteria were: (1) evidence of national organization; (2) signs of national newsworthiness and competitiveness; and (3) indicators of national enthusiasm or concern. With respect to signs of national newsworthiness and competitiveness, the CPD listed factors, such as the professional opinions of Washington bureau chiefs of major newspapers, news magazines and broadcast networks; the opinions of professional campaign managers and pollsters not employed by the candidates; the opinions of representative political scientists specializing in electoral politics; a comparison of the level of coverage on front pages of newspapers and exposure on network telecasts; and published views of prominent political commentators. The CPD's candidate selection criteria for 2000, which consist of constitutional eligibility, ballot access, and a level of electoral support of 15% of the national electorate based upon the average of polls conducted by five major polling organizations, appear to be relatively

easier to determine which candidates will qualify, and appear to be even more objective than the 1996 candidate selection criteria. Given this, and the fact that the Commission did not find a problem with the 1996 criteria, it appears that the CPD's candidate selection criteria for participation in the 2000 general election debates are in accordance with the requirements of 11 C.F.R. § 110.13.

Based upon the available evidence, it appears that the CPD satisfies the requirements of 11 C.F.R. § 110.13 to stage the debates, the CPD's expenditures are not contributions or expenditures subject to the Act, and the CPD does not meet the definition of a political committee subject to the registration and reporting requirements of the Act.[6] Moreover, any contributions from corporations to the CPD would not be prohibited contributions in violation of 2 U.S.C. § 441b(a).

For the foregoing reasons, the Office of General Counsel recommends that the Commission find no reason to believe that the Commission on Presidential Debates and Paul G. Kirk, Jr., and Frank J. Fahrenkopf, Jr., as Co-Chairmen, violated 2 U.S.C. § 441b(a) by making expenditures in connection with a federal election, 2 U.S.C. § 441a(f) by accepting prohibited contributions from corporations or making contributions to the Democratic National Committee or the Republican National Committee, 2 U.S.C. § 433 by failing to register as a political committee, or 2 U.S.C. § 434 by failing to report contributions.

Furthermore, the Office of General Counsel recommends that the Commission find no reason to believe that the Democratic National Committee and Andrew Tobias, as treasurer,

---

[6] The Reform Party complaint also states generally that the CPD's expenditures will benefit the presidential candidates of the Republican and Democratic parties. Since the general election candidates for the Democratic and Republican parties have not been nominated, the complainants could not allege any violations against the committees of those candidates.

violated 2 U.S.C. § 441b(a) by accepting prohibited contributions from the Commission on Presidential Debates, or 2 U.S.C. § 434 by failing to report contributions from the Commission on Presidential Debates. The Office of General Counsel also recommends that the Commission find no reason to believe that the Republican National Committee and Alex Poitevint, as treasurer, violated 2 U.S.C. § 441b(a) by accepting prohibited contributions from the Commission on Presidential Debates, or 2 U.S.C. § 434 by failing to report contributions from the Commission on Presidential Debates.

IV. RECOMMENDATIONS

1. Find no reason to believe that the Commission on Presidential Debates and Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr., as Co-Chairmen, violated 2 U.S.C. § 433, 2 U.S.C. § 434, 2 U.S.C. § 441a(f), and 2 U.S.C. § 441b(a) in MUR 4987.

2. Find no reason to believe that the Democratic National Committee and Andrew Tobias, as treasurer, violated 2 U.S.C. § 434, and 2 U.S.C. § 441b(a) in MUR 4987.

3. Find no reason to believe that the Republican National Committee and Alex Poitevint, as treasurer, violated 2 U.S.C. § 434, and 2 U.S.C. § 441b(a) in MUR 4987.

4. Find no reason to believe that the Commission on Presidential Debates and Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr., as Co-Chairmen, violated 2 U.S.C. § 433, 2 U.S.C. § 434, 2 U.S.C. § 441a(f), and 2 U.S.C. § 441b(a) in MUR 5004.

5. Find no reason to believe that the Democratic National Committee and Andrew Tobias, as treasurer, violated 2 U.S.C. § 434, and 2 U.S.C. § 441b(a) in MUR 5004.

6. Find no reason to believe that the Republican National Committee and Alex Poitevint, as treasurer, violated 2 U.S.C. § 434, and 2 U.S.C. § 441b(a) in MUR 5004.

7. Find no reason to believe that the Commission on Presidential Debates and Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr., as Co-Chairmen, violated 2 U.S.C. § 433, 2 U.S.C. § 434, 2 U.S.C. § 441a(f), and 2 U.S.C. § 441b(a) in MUR 5021.

8. Approve the appropriate letters.

9. Close the files in MUR 4987, MUR 5004, and MUR 5021.

7/13/00
Date

Lawrence M. Noble
General Counsel

Attachments

1. Response from the Commission on Presidential Debates to MURs 4987, 5004 and 5021.
2. Response from the Democratic National Committee to MUR 4987.
3. Response from the Democratic National Committee to MUR 5004.
4. Response from the Republican National Committee to MUR 4987.
5. Response from the Republican National Committee to MUR 5004.

TAB B

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Commission on Presidential Debates; Paul G. Kirk, Jr., Co-Chairman of the Commission on Presidential Debates; Frank J. Fahrenkopf, Jr., Co-Chairman of the Commission on Presidential Debates; Democratic National Committee and Andrews Tobias, as treasurer; Republican National Committee and Alex Poitevint, as treasurer.	)	MUR 4987
	)	
Commission on Presidential Debates; Paul G. Kirk, Jr., Co-Chairman of the Commission on Presidential Debates; Frank J. Fahrenkopf, Jr., Co-Chairman of the Commission on Presidential Debates; Democratic National Committee and Andrew Tobias, as treasurer; Republican National Committee and Alex Poitevint, as treasurer.	)	MUR 5004
	)	
Commission on Presidential Debates; Paul G. Kirk, Jr., Co-Chairman of the Commission on Presidential Debates; Frank J. Fahrenkopf, Jr., Co-Chairman of the Commission on Presidential Debates	)	MUR 5021

(Continued)

CORRECTED CERTIFICATION

I, Mary W. Dove, Acting Secretary of the Federal Election Commission, do hereby certify that on July 19, 2000 the Commission decided by a vote of 6-0 to take the following actions in MURs 4987, 5004, and 5021:

1. Find no reason to believe that the Commission on Presidential Debates and Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr., as Co-Chairmen, violated 2 U.S.C. § 433, 2 U.S.C. § 434, 2 U.S.C. § 441a(f), and 2 U.S.C. § 441b(a) in MUR 4987.

2. Find no reason to believe that the Democratic National Committee and Andrew Tobias, as treasurer, violated 2 U.S.C. § 434, and 2 U.S.C. § 441b(a) in MUR 4987.

3. Find no reason to believe that the Republican National Committee and Alex Poitevint, as treasurer, violated 2 U.S.C. § 434, and 2 U.S.C. § 441b(a) in MUR 4987.

4. Find no reason to believe that the Commission on Presidential Debates and Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr., as Co-Chairmen, violated 2 U.S.C. § 433, 2 U.S.C. § 434, 2 U.S.C. § 441a(f), and 2 U.S.C. § 441b(a) in MUR 5004.

(Continued)

5. Find no reason to believe that the Democratic National Committee and Andrew Tobias, as treasurer, violated 2 U.S.C. § 434, and 2 U.S.C. § 441b(a) in MUR 5004.

6. Find no reason to believe that the Republican National Committee and Alex Poitevint, as treasurer, violated 2 U.S.C. § 434, and 2 U.S.C. § 441b(a) in MUR 5004.

7. Find no reason to believe that the Commission on Presidential Debates and Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr., as Co-Chairmen, violated 2 U.S.C. § 433, 2 U.S.C. § 434, 2 U.S.C. § 441a(f), and 2 U.S.C. § 441b(a) in MUR 5021.

8. Close the files in MUR 4987, MUR 5004, and MUR 5021.

Commissioners Mason, McDonald, Sandstrom, Smith, Thomas, and Wold voted affirmatively for the decision.

July 20, 2000
Date

Attest:
Mary W. Dove
Acting Secretary of the Commission

Received in the Secretariat: Thurs., July 13, 2000 4:30 p.m.
Circulated to the Commission: Thurs., July 13, 2000 12:00 p.m.
Deadline for vote: Wed., July 19, 2000 4:00 p.m.

lrd

TAB C

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20461

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Commission on Presidential Debates	)	
	)	
Clinton/Gore '96 General Committee, Inc., and Joan C. Pollitt, as Treasurer	)	
	)	**MURs 4451 and 4473**
Dole/Kemp '96, Inc., and Robert E. Lighthizer, as Treasurer	)	
	)	
DNC Services Corporation/Democratic National Committee and Carol Pensky, as Treasurer	)	
	)	
Republican National Committee and Alec Poitevint, as Treasurer	)	

STATEMENT OF REASONS

Chairman Joan Aikens
Vice Chairman Scott E. Thomas
Commissioner Lee Ann Elliott
Commissioner Danny Lee McDonald
Commissioner John Warren McGarry

I. INTRODUCTION

On February 24, 1998, the Commission found no reason to believe that the Commission on Presidential Debates ("CPD") violated the law by sponsoring the 1996 presidential debates or by failing to register and report as a political committee. The Commission also found no reason to believe that Clinton/Gore '96 General Committee, Inc., Dole/Kemp '96, and their treasurers (collectively, the "Committees"), violated the law by accepting and failing to report any contributions from CPD. The Commission

closed the file with respect to all of the respondents. The reasons for the Commission's findings are set forth in this statement.

II. SELECTION OF PARTICIPANTS FOR CANDIDATE DEBATES

A. Legal Framework

Under the Federal Election Campaign Act of 1971, as amended ("FECA"), corporations are prohibited from making contributions[1] or expenditures[2] in connection with federal elections. 2 U.S.C. § 441b(a); *see also* 11 C.F.R. § 114.2(b).[3] The Commission has promulgated a regulation that defines the term "contribution" to include: "A gift, subscription, loan . . ., advance or deposit of money or anything of value made... for the purpose of influencing any election for Federal office." 11 C.F.R. § 100.7(a)(1). *See also* 11 C.F.R. § 114.1(a). "Anything of value" is defined to include all in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii)(A). The regulatory definition of contribution also provides: "[u]nless specifically exempted under 11 C.F.R. § 100.7(b), the provision of any goods or services without charge . . . is a contribution." *Id.*

Section 100.7(b) of the Commission's regulations specifically exempts expenditures made for the purpose of staging debates from the definition of contribution. 11 C.F.R. § 100.7(b)(21). This exemption requires that such debates meet the requirements of 11 C.F.R. § 110.13,[4] which establishes parameters within which staging organizations must conduct such debates. The parameters address: (1) the types of organizations that may stage such debates, (2) the structure of debates, and (3) the criteria that debate staging organizations may use to select debate participants. With respect to participant selection criteria, 11 C.F.R. § 110.13(c) provides, in relevant part:

---

[1] FECA defines contribution to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); *see also* 2 U.S.C. § 441b(b)(2).

[2] FECA defines expenditure to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i); *see also* 2 U.S.C. § 441b(b)(2).

[3] The presidential candidates of the major parties who accept public funds cannot accept contributions from any source, except in limited circumstances that are not raised herein. 26 U.S.C. § 9003(b)(2); *see also* 11 C.F.R. § 9012.2(a).

[4] The exemption also requires that such debates meet the requirements of 11 C.F.R. § 114.4, which permits certain nonprofit corporations to stage candidate debates and other corporations and labor organizations to donate funds to organizations that are staging such debates. 11 C.F.R. §§ 114.4(f)(1) and (3). This section also requires the debates to be staged in accordance with the standards in 11 C.F.R. § 110.13. *Id.*

> *Criteria for candidate selection.* For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.

11 C.F.R. § 110.13. When promulgating this regulation, the Commission explained its purpose and operation as follows:

> Given that the rules permit corporate funding of candidate debates, it is appropriate that staging organizations use pre-established objective criteria to avoid the real or apparent potential for a *quid pro quo*, and to ensure the integrity and fairness of the process. The choice of which objective criteria to use is largely left to the discretion of the staging organization. . . .
>
> . . . Staging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants. The objective criteria may be set to control the number of candidates participating in a debate if the staging organization believes there are too many candidates to conduct a meaningful debate.
>
> Under the new rules, nomination by a particular political party, such as a major party, may not be the sole criterion used to bar a candidate from participating in a general election debate. But, in situations where, for example, candidates must satisfy three of five objective criteria, nomination by a major party may be one of the criteria. This is a change from the Explanation and Justification for the previous rules, which had expressly allowed staging organizations to restrict general election debates to major party candidates. *See* Explanation and Justification, 44 FR 76735 (December 27, 1979). In contrast, the new rules do not allow a staging organization to bar minor party candidates or independent candidates from participating simply because they have not been nominated by a major party.

60 *Fed. Reg.* 64,260, 64,262 (Dec. 14, 1995).

Thus, if an appropriate corporation staged a debate among candidates for federal office and that debate was staged in accordance with all of the requirements of 11 C.F.R. § 110.13, then the costs incurred by the sponsoring corporation would be exempt from the definition of contribution pursuant to the operation of 11 C.F.R. § 100.7(b)(21). *See also* 11 C.F.R. §§ 114.1(a)(2)(x) and 114.4(f)(1). Similarly, other corporations legally could provide funds to the sponsoring corporation to defray expenses incurred in staging the debate pursuant to the operation of 11 C.F.R. §§ 114.1(a)(2)(x) and 114.4(f)(3). On the other hand, if a corporation staged a debate that was not in accordance with 11 C.F.R. § 110.13, then staging the debate would not be an activity "specifically permitted" by 11 C.F.R. § 100.7(b), but instead would constitute a contribution to any participating candidate under the Commission's regulations. *See* 11 C.F.R. § 100.7(a)(1)(iii)(A) (noting "unless specifically exempted" anything of value provided to the candidate constitutes a contribution). The participating candidates would be required to report receipt of the in-kind contribution as both a contribution and an expenditure pursuant to 11 C.F.R. § 104.13(a)(1) and (2). *See* 2 U.S.C. § 434(b)(2)(C) and (4).

B. Commission on Presidential Debates Selection Criteria

CPD was incorporated in the District of Columbia on February 19, 1987, as a private, not-for-profit corporation designed to organize, manage, produce, publicize and support debates for the candidates for President of the United States. Prior to the 1992 campaign, CPD sponsored six debates, five between candidates for President, and one between candidates for Vice President. In the 1996 campaign, CPD sponsored two Presidential debates and one Vice Presidential debate. Only the candidates of the Democratic and Republican parties were invited to participate in the 1996 debates. CPD produced written candidate selection criteria for the 1996 general election debate participation. Relying on these criteria and the recommendation of an advisory committee consisting of a broad array of independent professionals and experts, the CPD determined that only the Democratic and Republican candidates had a "realistic chance of winning" the 1996 election.

The introduction to the candidate selection criteria explains, in pertinent part:

> In light of the large number of declared candidates in any given presidential election, [CPD] has determined that its voter education goal is best achieved by limiting debate participation to the next President and his or her principal rival(s).
>
> A Democratic or Republican nominee has been elected to the Presidency for more than a century. Such historical prominence and sustained voter interest warrants the extension of an invitation

> to the respective nominees of the two major parties to participate in [CPD's] 1996 debates.
>
> In order to further the educational purposes of its debates, [CPD] has developed nonpartisan criteria upon which it will base its decisions regarding selection of nonmajor party candidates to participate in its 1996 debates. The purpose of the criteria is to identify nonmajor party candidates, if any, who have a realistic (i.e., more than theoretical) chance of being elected the next President of the United States and who properly are considered to be among the principal rivals for the Presidency.
>
> The criteria contemplate no quantitative threshold that triggers automatic inclusion in a [CPD]-sponsored debate. Rather, [CPD] will employ a multifaceted analysis of potential electoral success, including a review of (1) evidence of national organization, (2) signs of national newsworthiness and competitiveness, and (3) indicators of national enthusiasm or concern, to determine whether a candidate has a sufficient chance of election to warrant inclusion in one or more of its debates.

February 6, 1998 General Counsel's Report ("G.C. Report") at Attachment 4, at 57.

Thus, CPD identified its objective of determining which candidates have a realistic chance of being elected the next President, and it specified three primary criteria for determining which "nonmajor" party candidates to invite to participate in its debates. CPD further enumerated specific factors under each of the three primary criteria that it would consider in reaching its conclusion.

For its first criterion, "evidence of national organization," CPD explained that this criterion "encompasses objective considerations pertaining to [Constitutional] eligibility requirements . . . [and] also encompasses more subjective indicators of a national campaign with a more than theoretical prospect of electoral success." *Id.* The factors to be considered include:

> a. Satisfaction of the eligibility requirements for Article II, Section 1 of the Constitution of the United States.
>
> b. Placement on the ballot in enough states to have a mathematical chance of obtaining an electoral college majority.

> c. Organization in a majority of congressional districts in those states.
>
> d. Eligibility for matching funds from the Federal Election Commission or other demonstration of the ability to fund a national campaign, and endorsement by federal and state officeholders.

Id.

CPD's second criterion, "signs of national newsworthiness and competitiveness," focuses "both on the news coverage afforded the candidacy over time and the opinions of electoral experts, media and non-media, regarding the newsworthiness and competitiveness of the candidacy at the time [CPD] makes its invitation decisions." *Id.* Five factors are listed as examples of "signs of national newsworthiness and competitiveness":

> a. The professional opinions of the Washington bureau chiefs of major newspapers, news magazines, and broadcast networks.
>
> b. The opinions of a comparable group of professional campaign managers and pollsters not then employed by the candidates under consideration.
>
> c. The opinions of representative political scientists specializing in electoral politics at major universities and research centers.
>
> d. Column inches on newspaper front pages and exposure on network telecasts in comparison with the major party candidates.
>
> e. Published views of prominent political commentators.

Id. at 58.

Finally, CPD's third selection criterion states that the factors to be considered as "indicators of national public enthusiasm" are intended to assess public support for a candidate, which bears directly on the candidate's prospects for electoral success. The listed factors include:

> a. The findings of significant public opinion polls conducted by national polling and news organizations.

b. Reported attendance at meetings and rallies across the country (locations as well as numbers) in comparison with the two major party candidates.

Id.

C. Discussion

After a thorough and careful examination of the factual record, the undersigned commissioners unanimously concluded the Commission on Presidential Debates used "pre-established objective criteria" to determine who may participate in the 1996 Presidential and Vice-Presidential debates. 11 C.F.R. §110.13.[5] As a result, CPD did not make, and the candidate committees did not receive, a corporate contribution.

The CPD was set up and structured so that the individuals who made the ultimate decision on eligibility for the 1996 debates relied upon the independent, professional judgment of a broad array of experts. The CPD used multifaceted selection criteria that included: (1) evidence of a national organization; (2) signs of national newsworthiness and competitiveness; and (3) indicators of national enthusiasm or concern. We studied these criteria carefully and concluded that they are objective. Moreover, we could find no indication or evidence in the factual record to conclude that the criteria "were designed to result in the selection of certain pre-chosen participants." Explanation and Justification of 11 C.F.R. §110.13(c), 60 *Fed. Reg.* at 64262.

The CPD debate criteria contain exactly the sort of structure and objectivity the Commission had in mind when it approved the debate regulations in 1995. Through those regulations, the Commission sought to reduce a debate sponsor's use of its own personal opinions in selecting candidates. It was essential, in the Commission's view, that this selection process be neutral. It is consistent with the 1995 regulations for a debate sponsor to consider whether a candidate might have a reasonable chance of winning through the use of outside professional judgment. Indeed, if anything, the use of a broad array of independent professionals and experts is a way of ensuring the *decision makers* are objective in assessing the "realistic chances" of a candidate.

[5] Although not required to do so under the Commission's regulation, CPD reduced its candidate selection criteria to writing. *See* Explanation and Justification of 11 C.F.R. §110.13, 60 *Fed. Reg.* at 64262.

The pool of experts used by CPD consisted of top level academics and other professionals experienced in evaluating and assessing political candidates. By basing its evaluation of candidates upon the judgment of these experts, CPD took an objective approach in determining candidate viability.[6]

Significantly, the debate regulations sought to give debate sponsors wide leeway in deciding what specific criteria to use. During the Commission's promulgation of §110.13, the Commission considered the staff's recommendation to specify certain ostensibly objective selection criteria in the regulations and to expressly preclude the use of "[p]olls or other assessments of a candidate's chances of winning the nomination or election." *See* Agenda Document #94-11 at 74 (February 8, 1994) and Explanation and Justification of 11 C.F.R. §110.13, 60 *Fed. Reg.* at 64262. The Commission unanimously rejected this approach.[7] *Id.* Instead, the Commission decided the selection criteria choice is at the discretion of the staging organization and indicated that the use of outside professional judgment in considering candidate potential is permissible. Accordingly, the Commission cannot now tell the CPD that its employment of such an approach is unacceptable and a violation of law.

The Office of General Counsel, in effect, seemed to want to apply its own debate regulation proposal from several years ago in the instant matters. It argued the use of candidate assessments, such as CPD's "signs of newsworthiness and competitiveness," are "problematic" for many of the same reasons it argued in 1994. G.C. Report at 17. Specifically, the Office of General Counsel contended the CPD criteria contain "two levels of subjectivity: first, identifying the pool of sources involves numerous subjective judgments, and second, once the pool is identified, the subjective judgments of its members is considered." *Id.* at 18. The staff further insisted that there also is "reason to believe that the other selection criteria appear to be similarly insufficiently defined to comply with §110.13(c)'s objectivity requirement." *Id.*

---

[6] That one reference in CPD's materials states that the criterion for evidence of national organization "encompasses more *subjective* indicators of a national campaign with a more than theoretical prospect of electoral success", *see* G.C. Report at 11(emphasis added), is not dispositive. Indeed, the factors referred to appear to be *objective* on their face and not subjective:

a. Satisfaction of the eligibility requirements of Article II, Section I of the Constitution of the United States.
b. Placement on the ballot in enough states to have a mathematical chance of obtaining an electoral college majority.
c. Organization in a majority of congressional districts in those states.
d. Eligibility for matching funds from the Federal Election Commission or other demonstration of the ability to fund a national campaign. and endorsements by federal and state officeholders.

Id. at Attachment 4, at 57.

[7] Under the staff's proposed regulation, a debate sponsor could not look at the latest poll results even though the rest of the nation could look at this as an indicator of a candidate's popularity. This made little sense to us.

The questions raised in the General Counsel's Report are questions which can be raised regarding *any* candidate assessment criterion. To ask these questions each and every time a candidate assessment criterion is used, however, would render the use of that criterion unworkable, contrary to the direction given by the Commission at the regulatory stage. Absent specific evidence that a candidate assessment criterion was "fixed" or arranged in some manner so as to guarantee a preordained result, we are not prepared to look behind and investigate every application of a candidate assessment criterion. This approach is consistent with the Commission's Explanation and Justification which states "reasonableness is implied" when using objective criteria. Explanation and Justification of 11 C.F.R. §110.13(c), 60 *Fed. Reg.* at 64262. We are satisfied with the affidavits presented by the CPD that its "criteria were not designed to result in the selection of certain pre-chosen participants." *Id.* *See* G.C. Report at Attachment 4, at 121-126 (affidavit of professor Richard E. Neustadt); Attachment 4 at 43-56 (affidavit of Janet H. Brown). Significantly, we have been presented with no evidence in the factual record which threatens the veracity of these sworn affidavits.

The General Counsel's Report contains several other points which must be addressed. First, the Report's suggestion that CPD misapplied Mr. Perot's qualification for public funding reflects a misunderstanding of CPD's reasoning. *See* G.C. Report at 19-20. While qualification for public funding is significant, the CPB observed that as a practical matter Mr. Perot's hands would be tied since he could not contribute his own money. Thus, compared to 1992, his "realistic" chances of winning in 1996 were greatly reduced:

> [In 1992], we concluded that his prospect of election was unlikely but not unrealistic. With the 1992 results and the circumstances of the current campaign before us, including Mr. Perot's funding limited by his acceptance of *a federal subsidy*, we see no similar circumstances at the present time. Nor do any of the academic or journalistic individuals we have consulted.

G.C. Report at Attachment 4, at 128 (Letter of Professor Richard E. Neustadt) (emphasis added). A limit on the amount of funds which can be spent by a candidate is certainly an objective factor which can be legitimately used by a sponsoring organization.

The General Counsel's Report also asserts the Democratic and Republican party nominees were issued "automatic" invitations to the debates as a result of their party nominations in violation of §110.13. *See* February 6, 1998 G.C. Report at 21-22. We find persuasive the specific denials by the CPD on this point. The CPD flatly denies it based its decision on this factor alone:

> [I]n 1996, the CPD Board asked me to act as chairman of the advisory committee that applied the 1996 candidate selection criteria. The advisory committee convened on September 16, 1996 for the purpose of applying CPD's nonpartisan candidate selection criteria to more than 130 candidates running for the Presidency and Vice-Presidency in the 1996 general election campaign. ***Although the candidate selection criteria do not require it to do so, the advisory committee independently applied the criteria to the*** Democratic and Republican party candidates. After reviewing and discussing the facts and circumstances of the 1996 general election campaign, it was the unanimous conclusion of the advisory committee that, as of September 16, 1996, only President Clinton and Senator Dole have a realistic chance in 1996 of being elected President, and only Vice President Gore and Congressman Kemp have a realistic chance of being elected Vice President.

G.C. Report at Attachment 4, at 124-125 (Affidavit of Professor Richard E. Neustadt)(emphasis added). *See also id.* at 53-54 (Affidavit of Janet H. Brown)("After receipt of the data provided to the 1996 Advisory Committee and its own deliberation and discussion, ***the CPD Board unanimously accepted the 1996 Advisory Committee's recommendation*** that only President Clinton and Senator Dole be invited to participate in CPD's 1996 Presidential debate and only Vice President Gore and Congressman Kemp be invited to participate in CPD's 1996 vice presidential debate.")(emphasis added).

Additionally, we do not fully agree with the staff's conclusion that "'automatic' invitations are in direct violation of 11 C.F.R. §110.13(c)." G.C. Report at 21. Section 110.13(c) provides, in pertinent part, that "[f]or general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." The phrase "whether to include" was intended to prevent a debate sponsor from *excluding* a candidate from a debate solely because the candidate was not a major party nominee. For example, a debate sponsor could not use the following as its "objective" criterion: "Only major party candidates are eligible to participate in the debate." The regulation's purpose was not to prevent a debate sponsor from issuing debate invitations to major party nominees.

The Explanation and Justification of §110.13(c) confirms this understanding of the regulation: "Under the new rules, nomination by a particular party, such as a major party, may not be the sole criterion used *to bar a candidate from participating* in a general election debate." Explanation and Justification of 11 C.F.R. §110.13(c), 60 *Fed. Reg.* at 64262 (emphasis added). Indeed, the entire paragraph explaining this new regulatory language focuses on the fact that "the new rules do not allow a staging organization to bar minor party candidates or independent candidates from participating

simply because they have not been nominated by a major party." *Id.* Conversely, no mention is made in the Explanation and Justification that the new rules were somehow intended to prevent the issuance of invitations to major party nominees. We believe it is consistent with the purpose of the regulation for the CPD to issue an invitation to the major party candidates in view of the "historical prominence" of, and "sustained voter interest" in, the Republican and Democratic parties. G.C. Report at Attachment 4, at 57.

Finally, the General Counsel's Report suggests the Clinton/Gore Committee and the Dole/Kemp Committee expressed an interest to either include or exclude Mr. Perot and that, as a result, the two candidate committees somehow tainted the debate selection process. G.C. Report at 20-21. Absent specific evidence of a controlling role in excluding Mr. Perot, the fact the Committees may have discussed the effect of Mr. Perot's participation on their campaigns is without legal consequence. There certainly is no credible evidence to suggest the CPD acted upon the instructions of the two campaigns to exclude Mr. Perot. To the contrary, it appears one of the campaigns wanted *to include* Mr. Perot in the debate. *See* G.C. Report at Attachment 6, at 7 ("since the start of the general election, the [Clinton/Gore] Committee fully supported the wishes of Ross Perot to be included in the CPD-sponsored presidential debates and had hoped that the CPD would make a determination to include him.") (response of Clinton/Gore '96). In fact, CPD's ultimate decision to exclude Mr. Perot (and others) only corroborates the absence of any plot to equally benefit the Republican and Democratic nominees to the exclusion of all others.

III. STATUS AS A POLITICAL COMMITTEE

The FECA defines "political committee" as, in part: "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5. Political committees are required to register with the Commission, and to report contributions received and expenditures made in accordance with the FECA and the Commission's regulations. *See* 2 U.S.C. § 433 and 11 C.F.R. § 102.1(d) (requiring political committees to register with the Commission); *see also* 2 U.S.C. § 434 and 11 C.F.R. § 104.1(a) (requiring political committees to file specified reports with the Commission). Since CPD did not make a contribution to or an expenditure on behalf of the Committees, it was not a political committee within the meaning of 2 U.S.C. § 431(4). Accordingly, CPD was not required to register and report with the Commission.

IV. CONCLUSION

For all the reasons set forth above, the Commission did not approve the General Counsel's recommendations with regard to alleged violations of the FECA by the Commission on Presidential Debates, Clinton/Gore '96 General Committee and the Dole/Kemp '96 Committee and their treasurers.

4/16/98
Date

Joan D. Aikens
Chairman

4/6/98
Date

Scott E. Thomas
Vice Chairman

Date

Lee Ann Elliott
Commissioner

4/6/98
Date

Danny L. McDonald
Commissioner

Date

John Warren McGarry
Commissioner

TAB D

C

United States District Court,
District of Columbia.

Patrick J. BUCHANAN et al., Plaintiffs,
v.
FEDERAL ELECTION COMMISSION, Defendant.

No. Civ.A. 00-1775(RWR).

Sept. 14, 2000.

Third-party presidential candidate brought action challenging Federal Election Commission (FEC) decision dismissing his allegation that debate-staging organization violated FEC regulations by excluding him from participating in national debates. On cross-motions for summary judgment, the District Court, Roberts, J., held that: (1) candidate had standing to challenge decision; (2) FEC finding that organization did not endorse, support or oppose political candidates or political parties, and thus was exempted from Federal Election Campaign Act (FECA) restrictions, was supported by evidence; and (3) organization's requirement that candidate could participate only if he had 15% level of support of national electorate was sufficiently objective to qualify for FECA exception.

FEC's motion granted.

West Headnotes

[1] Federal Civil Procedure ⇐103.2
170Ak103.2 Most Cited Cases

[1] Federal Civil Procedure ⇐103.3
170Ak103.3 Most Cited Cases

To satisfy Article III's standing requirements, plaintiffs bear burden of establishing: (1) injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) causal connection between alleged injury and conduct that is fairly traceable to defendant; and (3) that it is likely, and not merely speculative, that injury will be redressed by favorable decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[2] Federal Civil Procedure ⇐103.2
170Ak103.2 Most Cited Cases

Economic actor may have competitor standing to challenge government's bestowal of economic benefit on competitor. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[3] Federal Civil Procedure ⇐103.2
170Ak103.2 Most Cited Cases

Political actors have standing to bring suit when they are competitively disadvantaged by government action. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[4] Elections ⇐311.1
144k311.1 Most Cited Cases

Debate-staging organization's decision to exclude third party presidential candidate from national debates with major party candidates deprived candidate of opportunity to compete equally for votes in election, and thus candidate suffered competitive injury sufficient to confer standing to challenge Federal Election Commission (FEC) decision dismissing his allegation that organization violated FEC regulations by excluding him from debates, even though candidate was not in competition with organization. U.S.C.A. Const. Art. 3, § 2, cl. 1; Federal Election Campaign Act of 1971, § 301(9)(B)(ii), 2 U.S.C.A. § 431(9)(B)(ii); 11 C.F.R. § 110.13(c).

[5] Elections ⇐311.1
144k311.1 Most Cited Cases

Third party presidential candidate suffered informational injury sufficient to confer standing to challenge Federal Election Commission (FEC) decision dismissing his allegation that debate-staging organization violated federal registration and reporting regulations, even if organization would not be able to provide requested information if candidate prevailed; candidate's complaint set forth detailed theory as to how organization violated federal election laws, and requested that FEC correct and prevent any of organization's continued illegal activities, including debate that excluded third party candidates. U.S.C.A. Const. Art. 3, § 2, cl. 1; Federal Election Campaign Act of 1971, § 301(9)(B)(ii), 2 U.S.C.A. § 431(9)(B)(ii); 11 C.F.R. § 110.13(c).

[6] Elections ⚖311.1
144k311.1 Most Cited Cases

Organization that staged debates between major party presidential candidates and candidates themselves were not intervening causal agents sufficient to break chain of causation between third party candidate's alleged competitive and informational harm and Federal Election Commission (FEC) decision dismissing his allegation that debate-staging organization violated FEC regulation by improperly applying subjective debate criteria to exclude him from debates. U.S.C.A. Const. Art. 3, § 2, cl. 1; Federal Election Campaign Act of 1971, § 301(9)(B)(ii), 2 U.S.C.A. § 431(9)(B)(ii); 11 C.F.R. § 110.13(c).

[7] Elections ⚖311.1
144k311.1 Most Cited Cases

Fact that organization that allegedly violated Federal Election Commission (FEC) regulation by improperly applying subjective debate criteria to exclude third party presidential candidate from debates between major party presidential candidates would not be required to include third party candidate if FEC found that its selection criteria were improper did not destroy third party candidate's standing to challenge FEC decision dismissing his allegations; FEC was authorized to take enforcement action to stop or correct organization's violations, and there was enough time for FEC to act on issue before election. U.S.C.A. Const. Art. 3, § 2, cl. 1; Federal Election Campaign Act of 1971, § 301(9)(B)(ii), 2 U.S.C.A. § 431(9)(B)(ii); 11 C.F.R. § 110.13(c).

[8] Administrative Law and Procedure ⚖665.1
15Ak665.1 Most Cited Cases

Fact that agency might not ultimately find in plaintiffs' favor on remand does not destroy plaintiff's standing to challenge agency's decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[9] Administrative Law and Procedure ⚖413
15Ak413 Most Cited Cases

Agency's construction of its own regulations is entitled to exceedingly deferential standard of review, such that court is not to decide which among several competing interpretations best serves regulatory purpose.

[10] Elections ⚖311.1
144k311.1 Most Cited Cases

Federal Election Commission (FEC) decision finding that debate-staging organization did not endorse, support or oppose political candidates or political parties, and thus was exempted from Federal Election Campaign Act (FECA) restrictions, despite evidence that organization had been created by major political parties and that parties had exerted control and influence over organization during prior presidential debates, was supported by evidence that none of organization's board members were currently officers of either major party, and that organization had included third party candidates in past presidential debates. Federal Election Campaign Act of 1971, § 301(9)(B)(ii), 2 U.S.C.A. § 431(9)(B)(ii); 11 C.F.R. § 110.13(a)(1).

[11] Elections ⚖311.1
144k311.1 Most Cited Cases

Debate-staging organization's requirement that presidential candidate could participate in presidential debate only if he or she had "a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly reported results at the time of the determination" was sufficiently "objective" to qualify organization as nonpartisan, and thus exempt from Federal Election Campaign Act (FECA) restrictions, even though candidate who received 5% of popular vote in general election would qualify his or her party to receive federal funding for next election; 15% support level was sufficiently measurable and verifiable, despite polls' margins of error, and third party candidates had achieved requisite level of support in prior elections. 11 C.F.R. § 110.13(c).

***60** Dale Andrew Cooter, Cooter, Mangold, Tompert, Wayson, P.L.L.C., Washington, DC, for plaintiffs Reform Party, Pat Choate.

John J. Duffy, Cynthia L. Taub, Steptoe & Johnson, L.L.P., Washington, DC, for plaintiffs Patrick Buchanan, Angela Buchanan, Buchanan Reform.

Lawrence Mark Noble, Richard B. Bader, Stephen E. Hershkowitz, Erin K. Monaghan, Federal

Election Commission, Washington, D.C., for defendants.

MEMORANDUM OPINION

ROBERTS, District Judge.

Plaintiffs bring this action challenging the decision of the Federal Election Commission ("FEC") to dismiss plaintiffs' administrative complaint which alleged that the Commission on Presidential Debates ("CPD") is violating FEC regulations governing debate-staging organizations. The parties have cross-moved for summary judgment. The FEC contends (1) that plaintiffs lack standing to bring this suit, and (2) even if plaintiffs do have standing, the FEC's dismissal of their complaint was not contrary to law. Plaintiffs counter that the FEC's dismissal has caused them concrete injuries which this Court can redress, and that the dismissal was contrary to law. Because I find that the plaintiffs have standing to bring their claims, but that those claims fail on the merits, defendant's motion for summary judgment will be granted and plaintiffs' motion for summary judgment will be denied.

BACKGROUND

Patrick J. Buchanan is running for President on the ticket of the Reform Party of the United States of America (the "Reform Party"). He hopes to be a participant in the upcoming presidential debates being sponsored by the Committee on Presidential Debates ("CPD"). However, as things now stand, Buchanan will not be eligible to participate because he is unlikely to meet the CPD's criteria for participation which require, among other things, that the candidate have the support of at least 15% of the electorate as measured by the average of five national polls on a certain date. Buchanan and four other plaintiffs [FN1] therefore filed a complaint with the FEC alleging that the CPD was in violation of FEC regulations which require, in relevant part, that debate-staging organizations be nonpartisan groups using "pre-established objective criteria" to select debate participants. 11 C.F.R. § 110.13(c). The FEC subsequently dismissed the complaint, finding that there was "no reason to believe" that the CPD was violating the law. Plaintiffs now seek judicial review of the FEC's dismissal, arguing that it must be overturned as arbitrary and capricious and contrary to law.

FN1. The four are Buchanan's campaign committee, the Reform Party, a political supporter and registered voter, and another registered voter.

I. *Statutory and Regulatory Framework*

The Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 431 *et seq.* (1994), generally prohibits corporations and labor unions from making "contributions" or "expenditures" [FN2] in connection with federal elections. *See* 2 U.S.C. § 441b(a). Political committees [FN3] may accept contributions or make expenditures in connection with federal elections, but must first register with the FEC, and then report contributions, receipts and disbursements ***61** in accordance with the FECA and the FEC's implementing regulations. *See id.* at §§ 433-34; 11 C.F.R. § 102.1(d) (1999).

FN2. FECA defines a contribution as "any gift, subscription, loan, advance, or deposit of money or anything of value made by a person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). An expenditure is in turn defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office." *Id.* at § 431(9)(A)(i).

FN3. "Political committees" include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4).

The FECA contains a "safe harbor" provision which makes exceptions to the Act's restrictions on contributions and expenditures. For instance, an "expenditure" does not include "nonpartisan activity

designed to encourage individuals to vote or register to vote." 2 U.S.C. § 431(9)(B)(ii). FEC regulations that became effective in 1996 construe the safe harbor provision as excluding from the definitions of "contribution" and "expenditure" certain funds raised or spent for the purpose of staging presidential debates. *See* 11 C.F.R. §§ 100.7(b)(21), 100.8(b)(23). However, this exception applies only if the following two conditions are met: (1) the debate sponsoring organization must be a non-profit organization that does not "endorse, support, or oppose political candidates or political parties"; and (2) the debates themselves must meet certain requirements set forth in section 110.13 of the FEC's regulations. *Id.* at §§ 110.13(a)(1), 114.4(f). One of Section 110.13's requirements mandates that debate staging organizations use "pre-established objective criteria" to determine which candidates will be eligible to participate in the debate. *Id.* at § 110.13(c). [FN4] In sum, the FEC regulations at issue allow non-profit organizations to accept contributions and make expenditures to stage a presidential debate so long as the staging entity is nonpartisan and employs objective criteria to choose the participants.

FN4. Debates must also "include at least two candidates[,]" and the sponsor may not "structure the debates to promote or advance one candidate over another." 11 C.F.R. § 110.13(b). In addition, the staging organization "shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." *Id.* at § 110.13(c).

II. *The CPD's Debate Criteria*

The CPD is a private, non-profit corporation formed by the two major parties in 1987 for the purpose of sponsoring presidential debates. It has staged presidential debates leading up to the 1988, 1992, and 1996 elections.

In January of 2000, the CPD announced that it would sponsor three presidential debates and one vice-presidential debate in October of 2000 in anticipation of the 2000 presidential election. (Pls.' Admin.Compl.Ex. 1, Administrative Record ("AR") Tab 1.) The CPD listed the following three criteria it would use to select the debates' participants: (1) evidence of Constitutional eligibility to become President; (2) evidence of ballot access which indicated that the candidate had qualified to have his or her name appear on enough state ballots to have a mathematical possibility of winning a majority of the Electoral College; and (3) evidence of electoral support which required "a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly reported results at the time of the determination." (*Id.* at 2.) [FN5] Only the third criterion is at issue here.

FN5. The five polling organizations are: ABC News/*Washington Post;* CBS News/*New York Times;* NBC News/*Wall Street Journal;* CNN/*USA Today* /Gallup; and Fox News/Opinion Dynamics.

III. *Plaintiffs' Administrative Complaint*

On March 20, 2000, plaintiffs filed their administrative complaint (designated MUR 4987) with the FEC pursuant to section 437g(a)(1) of the FECA which provides that "any person who believes a violation of this Act ... has occurred, may file a complaint with the [FEC]." In their complaint, plaintiffs alleged that the CPD could not qualify as a debate-staging organization***62** because (1) the CPD is not a nonpartisan organization, but rather a bipartisan organization supporting the Democratic and Republican parties while opposing third parties such as the Reform Party, and (2) the CPD's 15% threshold of voter support as measured by averaging five national polls is not an "objective" criterion, but rather a subjective criterion designed to eliminate third parties from the debates. Plaintiffs therefore claimed that the CPD's proposed debates do not qualify under the FECA's safe harbor and, as a consequence, funds raised or spent in connection with those debates would constitute illegal contributions and expenditures in violation of 2 U.S.C. § 441b(a).

IV. *The FEC's Dismissal of Plaintiffs' Administrative Complaint*

When a complaint is filed with the FEC, a three-step process is triggered. First, the FEC reviews the complaint and any response to it and then votes on whether there is "reason to believe" that a FECA violation occurred. 2 U.S.C. § 437g(a)(2). If four members of the FEC vote that there is "reason to believe" that a violation occurred, then the FEC must conduct an investigation. *Id.* After the investigation is completed, the FEC then takes a second vote to determine whether there is "probable cause" to believe that a violation has occurred. *See id.* at § 437g(a)(4)(A)(i). If four members of the FEC vote in the affirmative, the FEC must attempt to reach a conciliation agreement with the alleged violator. *See id.* If conciliation fails, the FEC then takes a third vote to determine whether the FEC will institute a civil action. *See id.* at § 437g(a)(6)(A). If at any point in this process four FEC members do not affirmatively vote to proceed to the next stage, the FEC will dismiss the complaint. The complainant may then file a petition for review of that dismissal in this Court. *See id.* at § 437g(a)(8)(A).

On July 19, 2000, the FEC dismissed the plaintiffs' administrative complaint at the first stage, finding that there was "no reason to believe" that a violation of FECA had occurred. The justification for the dismissal is contained in a report issued by the FEC's General Counsel. (AR Tab 14.) The General Counsel's report found that (1) there was no evidence suggesting that the CPD was either "controlled by" the two major political parties or that they influenced the CPD's 2000 debate criteria, and (2) the CPD's criteria were objective, noting that FEC had upheld less objective criteria in the past. (*Id.* at 15-19.) Thus, the FEC voted to dismiss the plaintiffs' complaint without conducting any further investigation.

Plaintiffs now seek judicial review of that dismissal on the ground that the agency's decision was arbitrary, capricious, and contrary to law. They allege, as they did in the administrative complaint, that the CPD does not qualify for safe harbor protection because the CPD is bipartisan, not nonpartisan, and its selection criteria are not objective. Therefore, plaintiffs claim that the CPD will be in violation of 2 U.S.C. § 441b(a) by making illegal corporate contributions to the Bush/Cheney and Gore/Lieberman campaigns. Plaintiffs also assert "informational injuries" based on the CPD's failure to register as a "political committee" and to report its contributions and expenditures.

DISCUSSION

I. *Standing*

[1] The FEC contends that this action should be dismissed at the outset because plaintiffs do not have constitutional standing to bring their claims. To satisfy Article III's standing requirements, plaintiffs bear the burden of establishing: (1) an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) a causal connection between the alleged injury and conduct that is "fairly traceable" to the defendant; and (3) that it is "likely," and not merely "speculative," that the injury ***63** will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotations and citations omitted). On a motion for summary judgment, that burden can be met by submitting affidavits or other evidence of specific facts which, for the purpose of the motion, will be taken as true. *See id.* at 561, 112 S.Ct. 2130.

The FEC contends that both of the plaintiffs' standing theories fail. Specifically, it argues first that plaintiffs' have failed to allege a legally sufficient injury, and second, that any potentially cognizable injury cannot be fairly traced to the FEC nor redressed by this Court because any such injury was caused by the independent action of the CPD. I disagree with the FEC on both scores.

A. *Injury In Fact*

To have standing, plaintiffs' suit must be based on "an injury stemming from the FEC's dismissal of [their] administrative complaint." *Judicial Watch, Inc. v. FEC,* 180 F.3d 277, 277 (D.C.Cir.1999) (*per curiam*). Plaintiffs claim that the dismissal of their complaint has caused them both a "competitive" and an "informational" injury. First, plaintiffs contend that they will be injured if Buchanan is excluded from the debates because they will be denied a crucial platform for expressing their ideas, Buchanan's chances of winning the election will be reduced, and, in turn, the Reform Party's chances of qualifying for federal funding for the 2004 elections will be diminished. Conversely, the two major parties would be at a competitive advantage in the election if Buchanan is not allowed to debate.

Plaintiffs also claim that they will suffer an informational injury caused by the CPD's failure to register as a political committee and report its contributions and expenditures.

a. *Competitive Injury*

[2][3] The doctrine of "competitor standing" had been "recognized in circumstances where a defendant's actions benefitted a plaintiff's competitors, and thereby caused the plaintiff's subsequent disadvantage." *Fulani v. Brady,* 935 F.2d 1324, 1327 (D.C.Cir.1991) (citing cases), *cert. denied,* 502 U.S. 1048, 112 S.Ct. 912, 116 L.Ed.2d 812 (1992). Thus, it is well-settled that an economic actor may challenge the government's bestowal of an economic benefit on a competitor. *See, e.g., Northeastern Florida Chapter of Associated Gen. Contractors of Am. v. Jacksonville,* 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (holding that general contractors had standing to challenge city ordinance giving preferential treatment in the award of city contracts to minority-owned businesses); *Clarke v. Securities Indus. Ass'n,* 479 U.S. 388, 403, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (holding that securities brokers had standing to challenge ruling that national banks could act as discount brokers); *Investment Co. Inst. v. Camp,* 401 U.S. 617, 620, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971) (granting investment companies standing to challenge ruling that banks could deal in collective investment funds); *Association of Data Processing Serv. Orgs., Inc., v. Camp,* 397 U.S. 150, 152-53, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (finding that data processing company had standing to challenge rulings by Comptroller of the Currency allowing national banks to compete in data processing). Courts within this Circuit and elsewhere have expanded the competitor standing doctrine to the political arena, recognizing that political actors may bring suit when they are competitively disadvantaged by government action. *See, e.g., International Ass'n of Machinists and Aerospace Workers v. FEC,* 678 F.2d 1092, 1098 (D.C.Cir.1982) (*en banc*) (finding that the "relative diminution in [plaintiffs'] political voices--their influence in federal elections--" qualified as a sufficiently concrete and particularized injury for standing purposes); *Common Cause v. Bolger,* 512 F.Supp. 26, 32 (D.D.C.1980) (three- judge panel) (ruling that candidate had ***64** standing to challenge incumbents' abuse of the franking privilege); *Schulz v. Williams,* 44 F.3d 48, 53, (2d Cir.1994) (holding that New York State Conservative Party candidate for governor had standing to challenge allegedly improper placement of the Libertarian Party candidate on the state-wide ballot); *Fulani v. Hogsett,* 917 F.2d 1028, 1030 (7th Cir.1990) (holding that New Alliance Party candidates had standing to challenge Indiana state electoral officials' untimely certification of Republican and Democratic presidential candidates to be on state ballot); *Owen v. Mulligan,* 640 F.2d 1130, 1133 (9th Cir.1981) (same as *Bolger*). However, the D.C. Circuit has "never completely resolved [the] thorny issue" of how far the doctrine of political competitor standing can be stretched. *Gottlieb v. FEC,* 143 F.3d 618, 620 (D.C.Cir.1998) (internal quotations omitted).

In attacking plaintiffs' claim of competitive injury, the FEC relies chiefly the D.C. Circuit's rulings in *Gottlieb* and *Fulani v. Brady.* In the latter case, Dr. Lenora Fulani, a minor party presidential candidate in the 1988 election, sued the Internal Revenue Service challenging the CPD's tax- exempt status on the ground that the CPD's tax-exempt status contributed to her exclusion from the 1988 presidential debates. The D.C. Circuit rejected Fulani's contention that she had "competitor standing" because Fulani was not eligible to receive tax-exempt status herself. *See Fulani v. Brady,* 935 F.2d at 1328. Fulani might have had a chance "if the IRS were depriving [her] of a benefit that it afforded to others similarly placed...." *Id.* However, that was not the case. *See also Fulani v. Bentsen,* 35 F.3d 49 (2d Cir.1994) (holding that Fulani lacked standing to challenge a debate sponsor's tax-exempt status which she alleged contributed to her competitive disadvantage in the election).

In *Gottlieb,* the D.C. Circuit relied on *Fulani v. Brady* to hold that the citizen-plaintiffs, who opposed then-Governor Bill Clinton in the 1992 presidential election, did not have competitor standing to challenge the FEC's dismissal of their claim that the Clinton campaign had mishandled federal matching funds. The panel reasoned that the plaintiffs were "never in a position to receive the matching funds.... Only another candidate could make such a claim." *Gottlieb,* 143 F.3d at 621.

The FEC assumes that the same logic must apply here because none of the plaintiffs are actually in competition with the CPD, whom the FEC

characterizes as the actual recipient of the benefit of the FEC's allegedly erroneous dismissal of plaintiffs' administrative complaint. However, this argument misconstrues the nature of plaintiffs' claim and in turn the applicability of *Fulani v. Brady* and *Gottlieb*.

In *Fulani v. Brady*, the fact that the plaintiffs' did not sue under FECA, but rather under the Internal Revenue Code, proved dispositive. The Court of Appeals noted the judicial recognition of "the special problems attendant upon the establishment of standing in tax ... cases, when a litigant seeks to attack the tax exemption of a third party." *Fulani v. Brady*, 935 F.2d at 1327 (internal quotations and citation omitted). Moreover, the panel found that "the statutory scheme created by Congress is inconsistent with, if not preclusive of, third party litigation of tax-exempt status." *Id.* Thus, it asserted that "Fulani's claims would be addressed more appropriately under the FEC's regulation than through the Internal Revenue Code." *Id.* at 1329 (citation omitted).

In this case, plaintiffs have proceeded under the FEC's regulations. The FECA, unlike the Internal Revenue Code, confers a broad grant of standing. As the Supreme Court has recognized:

> Congress has specifically provided in FECA that "[a]ny person who believes a violation of this Act ... has occurred, may file a complaint with the Commission." § 437g(a)(1). It has added that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party ... may file a petition" ***65** in district court seeking review of that dismissal. § 437g(a)(8)(A). History associates the word "aggrieved" with a congressional intent to cast the standing net broadly--beyond the common-law interest and substantive statutory rights upon which "prudential" standing traditionally rested.

FEC v. Akins, 524 U.S. 11, 19, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (citations omitted). Thus, FECA's statutory scheme was specifically designed to accommodate suits such as plaintiffs' which challenge the FEC's dismissal of an administrative complaint.

Of course, in the passage excerpted above, the Supreme Court was referring to the doctrine of "prudential" standing rather than constitutional standing. [FN6] FECA does not alter the constitutional requirement that the plaintiffs suffer an injury in fact. *See Common Cause v. FEC*, 108 F.3d 413, 419 (D.C.Cir.1997) (*per curiam*) (holding that "[s]ection 437g(a)(8)(A) does not confer standing; it confers a right to sue upon parties who otherwise already have standing.") However, plaintiffs will suffer such an injury--the loss of an opportunity to participate in the presidential debates which few would doubt can be instrumental to a candidate's success in the general election. The Second Circuit recognized this fundamental, and rather obvious, point in another case brought by Dr. Fulani:

> FN6. The FEC does not challenge plaintiffs' prudential standing to bring this case because it is clear that candidates, political parties, and voters are within the "zone of interests" protected by FECA. *See Akins*, 524 U.S. at 20, 118 S.Ct. 1777.

> In this era of modern telecommunications, who could doubt the powerful beneficial effect that mass media exposure can have today on the candidacy of a significant aspirant seeking national political office. The debates sponsored by the League were broadcast on national television, watched by millions of Americans, and widely covered by the media. It is beyond dispute that participation in these debates bestowed on the candidates who appeared in them some competitive advantage over their non-participating peers.... In our view, the loss of competitive advantage flowing from the League's exclusion of Fulani from the national debates constitutes sufficient "injury" for standing purposes, because such loss palpably impaired Fulani's ability to compete on an equal footing with other significant presidential candidates. To hold otherwise would tend to diminish the import of depriving a serious candidate for public office of the opportunity to compete equally for votes in an election, and would imply that such a candidate could never challenge the conduct of the offending agency or party.

Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 626 (2d Cir.1989) (citations omitted). [FN7]

> FN7. It is true, as plaintiffs have properly conceded, that the D.C. Circuit in *Fulani v. Brady* criticized the Second Circuit's

> opinion in *Fulani v. League of Women Voters*. However, that criticism was leveled chiefly at the Second Circuit's analysis of the causation and redressability prongs of the standing test, not the injury in fact prong. The D.C. Circuit, while not indicating any explicit agreement with the portion of the Second Circuit's opinion excerpted above, did not state any explicit disagreement either.

The end of this quoted excerpt is worth emphasizing. Precluding candidates from challenging the CPD's debate rules under the FECA would leave few others to do so. Perhaps other prospective debate sponsors might, but it is relatively self-evident that the people who have the most to gain and lose from the criteria governing the debate participation are the candidates themselves. When a debate sponsor uses subjective criteria for choosing the participants, the candidates are the ones who suffer a "concrete and particularized" injury that would imminently deprive them of a fair opportunity to compete on equal footing with their rivals. ***66***Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. The harm to other debate sponsors from the use of selective criteria is comparatively minute. Thus, if I were to accept the FEC's argument, the FEC's decisions regarding the legality of debate criteria would be rendered largely unreviewable despite the fact that minor party candidates such as Buchanan would likely suffer substantial harm to their electoral prospects. This cannot be.

Gottlieb is also inapposite. There, the plaintiffs claimed that the Clinton campaign had misused federal matching funds. The D.C. Circuit held, relying on *Fulani v. Brady*, that to assert competitor standing successfully, "the plaintiff [must] show that he personally competes in the same arena with the same party to whom the government has bestowed the assertedly illegal benefit." *Gottlieb*, 143 F.3d at 621 (internal quotations and citation omitted). The citizen-plaintiffs lacked standing because they were not themselves eligible to receive matching funds.

[4] In this case, by contrast, plaintiffs can fairly claim to be in the same "arena" with the CPD. Although the CPD is a debate staging organization and not a candidate or political party, plaintiffs allege that the CPD is controlled by, and operates for the benefit of, the two major parties and their candidates. Assuming, based on the evidence they have submitted, the truth of plaintiffs' assertion that the CPD is nothing but an alter-ego for the Democratic and Republican parties, then the benefit being conferred upon the CPD as a debate-staging organization is being conferred upon the plaintiffs' direct competitors. If the FEC were to allow the debates to proceed using subjective criteria designed to eliminate third party competition, then the plaintiffs would plainly be "personally disadvantaged." *Id.* That injury would be direct, substantial, and certainly one that FECA and its implementing regulations seek to prevent. Accordingly, I find that the plaintiffs have satisfied the injury in fact element of standing under the political competitor theory.

b. *Informational Injury*

Aside from claiming that the CPD's debate criteria put them at a competitive disadvantage to the two major parties, plaintiffs also claim that they have suffered an "informational injury" based on their allegation that the CPD is a "political committee" required to register with the FEC and report its receipts and disbursements. Plaintiffs allege that the CPD's subsequent failure to register and report has deprived plaintiffs of information to which they are entitled under FECA.

Plaintiffs argue that this case is on all fours with *Akins*. The plaintiffs in *Akins* challenged the FEC's decision that the American Israel Public Affairs Committee ("AIPAC") was not a "political committee" and thus was not required to disclose its disbursements and receipts. *See Akins*, 524 U.S. at 21, 118 S.Ct. 1777. Recognizing that a plaintiff does suffer an injury in fact "when the plaintiff fails to obtain information which must be publicly disclosed pursuant to statute," the Supreme Court stated that "[t]here is no reason to doubt [plaintiffs'] claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office ... and to evaluate the role that AIPAC's financial assistance might play in a specific election." *Id.* Accordingly, the Supreme Court found that the plaintiffs had stated an injury in fact. *See id.*

The FEC argues that the plaintiffs cannot assert any informational injury because if the plaintiffs win on

the merits, CPD would be unable to finance candidate debates and would disband leaving no receipts or disbursements to report. Further, the FEC claims that the plaintiffs are not really after a list of the CPD's expenditures and receipts, but simply want to know whether a violation of the law occurred. The D.C. Circuit has held that when a plaintiff merely wants the FEC to ***67** "get the bad guys" rather than force disclosure of information, the plaintiffs do not state a concrete and particularized injury. *Common Cause v. FEC,* 108 F.3d at 418; *see also Judicial Watch, Inc. v. FEC,* 180 F.3d at 278.

I find *Akins* to be on point but *Common Cause v. FEC* and *Judicial Watch* to be distinguishable. In the latter two cases, the D.C. Circuit noted that the analysis of informational injury "must turn on the nature of the information allegedly denied." *Judicial Watch,* 180 F.3d at 278 (citing *Common Cause v. FEC,* 108 F.3d at 108). The respective plaintiffs in those cases could not allege an informational injury because they had both failed to state clearly in their administrative complaints what information they were seeking. *See Judicial Watch,* 180 F.3d at 278 ("Judicial Watch has not even made a nominal allegation of reporting violations"); *Common Cause v. FEC,* 108 F.3d at 418 (Common Cause's allegation of reporting violations was "nominal at best" and the relief requested "consisted entirely of the investigation and imposition of monetary penalties against" the alleged violators). By contrast, the plaintiffs in *Akins* had explicitly asked the FEC "to order AIPAC to make public the information that FECA demands of a 'political committee.' " *Akins,* 524 U.S. at 16, 118 S.Ct. 1777.

Here, plaintiffs' administrative complaint not only alleged more than a "nominal" violation of the FECA's registration and reporting requirements, but also requested that the FEC take action to correct that violation. Plaintiffs' administrative complaint set forth in detail their theory that the CPD is a "political committee" that has failed to comply with the FECA's registration and reporting requirements. Moreover, in their demand for relief, plaintiffs requested that the FEC "take any and all action in within its power to correct and prevent the continued illegal activities of the CPD." (Admin.Compl. at 32.) If the FEC had agreed that the CPD is a "political committee" as defined in FECA, then any order "correcting" the CPD's "illegal activities" presumably would require it to register and report. Thus, *Akins* controls here.

[5] Defendant's claim that the CPD would disband before it agreed to register and report is speculative. The fact that AIPAC might have disbanded if they were ordered to register and report presumably would have had no effect on the Supreme Court's decision in *Akins.* Indeed, the *Akins* Court recognized that the plaintiffs had standing despite the fact that the they might not ultimately obtain the relief they sought. *See Akins,* 524 U.S. at 25, 118 S.Ct. 1777. Thus, I find that plaintiffs have made a sufficient showing of informational injury.

2. *Causation*

The FEC argues that plaintiffs have failed to show that any purported harm they will suffer is fairly traceable to the FEC's dismissal of their administrative complaint. It cites the general proposition that, in cases where the "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else," standing is often difficult to establish because "one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the court whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.' " *Lujan,* 504 U.S. at 562, 112 S.Ct. 2130 (quoting *ASARCO Inc. v. Kadish,* 490 U.S. 605, 615, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989)).

In support of their argument, the FEC again places heavy reliance on *Fulani v. Brady* which held that the alleged harm Fulani faced by being excluded from the debates could not fairly be traced back to IRS's decision to grant the CPD tax-exempt status. The Court of Appeals reasoned that the FEC's regulations were an intervening causal agent because "were it not for the [FEC] regulation, the CPD's ***68** tax status would be relevant to its sponsorship of the debates only insofar as it facilitated the CPD's funding through tax-exempt funds." *Fulani v. Brady,* 935 F.2d at 1329. Further, the panel opined that "even assuming the FEC continues to adhere to its present regulations, the CPD remains an intervening causal agent." *Id.* It reasoned that if the CPD were threatened with revocation of its tax-exempt status, the CPD could either decline to sponsor the debates or could choose to include Fulani, in which case the two major-party candidates might decline to participate.

Id. Thus, the FEC's regulations, the CPD, and the major-party candidates were all intervening causal agents beyond the court's control.

The FEC's reliance on *Fulani v. Brady* is again misplaced. The causal nexus in that case was far more attenuated than it is here. Although it is true that the D.C. Circuit suggested in dicta that the CPD and the candidates were intervening causal agents, the fact that Fulani sued the IRS rather than the FEC proved dispositive. Here, by contrast, plaintiffs have sued the FEC which, unlike the IRS, is charged with enforcing the regulations governing presidential debates. By eliminating the IRS as a link in the chain of causation, plaintiffs take a giant leap closer to the actual source of their harm. As the Supreme Court has more recently noted, "if the reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case--even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *Akins,* 524 U.S. at 25, 118 S.Ct. 1777. Thus, the mere fact that Buchanan may ultimately be thwarted in his attempts to get into the debates is insufficient to deprive him of standing to challenge the CPD's debate criteria. He and the other plaintiffs are harmed simply by the FEC's purportedly unlawful failure to require that the CPD report its receipts and expenditures and use objective criteria.

[6] The CPD and the major-party candidates are not intervening causal agents sufficient to break the chain of causation. If, on remand, the FEC were to find that the CPD was not in compliance with the debate-staging regulations, then the CPD would have two choices. It could either (1) refrain from putting on its debates (in which case the competitive harm to the plaintiffs from the CPD's purportedly subjective debate criteria would be ceased), or (2) change its participation criteria so that they were objective. Similarly, if the candidates decided not to participate in the CPD's debates, they either could elect not to debate, which would again eliminate the competitive harm to the plaintiffs, or they could select another debate sponsor that did comply with the FEC's regulations. In all of these circumstances, the "independent actors" are not in a position to make "unfettered choices" completely beyond the court's or the FEC's control. *Lujan,* 504 U.S. at 562, 112 S.Ct. 2130 (internal quotations and citation omitted). They are constrained by the FEC's regulatory framework which requires that debate-staging organizations use objective criteria and not endorse, support, or oppose any candidate or party. Accordingly, I find that the plaintiffs' injuries are "fairly traceable" to the FEC's conclusion that the CPD's debate criteria were objective.

3. *Redressability*

Lastly, plaintiffs must prove that it is likely, as opposed to merely speculative, that the injury will be redressed by a ruling in its favor. As the D.C. Circuit has noted, "[w]hen plaintiffs' claim hinges on the failure of the government to prevent another party's injurious behavior, the 'fairly traceable' and redressability inquiries appear to merge." *Freedom Republicans, Inc. v. FEC,* 13 F.3d 412, 418 (D.C.Cir.1994) (citing *Competitive Enter. Inst. v. NHTSA,* 901 F.2d 107, 113 (D.C.Cir.1990)). Although causation focuses on the past and redressability focuses ***69** on the future, "both prongs ... can be said to focus on principles of causation: fair traceability turns on the causal nexus between the agency action and the asserted injury, while redressability centers on the causal connection between the asserted injury and judicial relief." *Id.* (citing *Allen v. Wright,* 468 U.S. 737, 753 n. 19, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). Plaintiffs "need not prove that granting the requested relief is certain to redress their injury, especially where some uncertainty is inevitable." *Competitive Enter. Inst.,* 901 F.2d at 118 (citations omitted).

[7] The FEC argues that plaintiffs' alleged injury cannot be redressed if this case is remanded to the FEC because nothing this Court does is "binding on CPD, which is not even a party before this Court." (Def.'s Mem.Supp.Summ.J. at 19.) It also argues that there is no way to guarantee that, on remand, the CPD would ultimately be required to change its debate criteria before the debates because it might take months for the FEC go through the three-step process for bringing an enforcement action against the CPD. I reject both of these arguments for essentially the same reason that I rejected the FEC's causation argument.

[8] As previously discussed, the Supreme Court made clear in *Akins* that the fact that an agency might not ultimately find in the plaintiffs' favor on remand does not destroy the plaintiff's standing to

challenge the agency's decision. *See Akins,* 524 U.S. at 25, 118 S.Ct. 1777. It is enough that a remand "would leave the agency free to exercise its discretion in a proper manner [which] *could* lead to agency action that would redress [plaintiffs'] injury...." *Competitive Enter. Inst.,* 901 F.2d at 118 (emphasis added). Here, the FEC could ultimately find that the CPD is a "political committee" and that its debate criteria are subjective. As a consequence, the FEC could take enforcement action, either via conciliation or a civil action, to stop and correct the CPD's violations of the law.

I also am unconvinced that there is not enough time as a practical matter for the plaintiffs to obtain the relief they seek from the FEC. The FEC's argument assumes that it would take the maximum amount of time allowed under the FECA to process plaintiffs' claim. *See* 2 U.S.C.A. § 437g (West Supp.2000) (giving the FEC thirty days to respond to the court order, the CPD fifteen days to respond to the FEC's decision, and the FEC another thirty to ninety days to attempt to address any violation through conciliation before voting to bring a civil action). However, there is nothing to prevent the FEC from expediting its review. More fundamentally, if the FEC's own enforcement procedures could frustrate the plaintiffs from challenging the agency's decision, then the FEC's decisions regarding the propriety of debate criteria or other election-related matters often would be unreviewable. *See Akins v. FEC,* 101 F.3d 731, 738 n. 7 (D.C.Cir.1996) (*en banc*) (noting that political action committee's alleged failure to disclose past contributions and expenditures would affect future voters and that "[i]f such injury were not redressable, once an election ended virtually all electoral conduct would be beyond review"), *vacated and remanded on other grounds, FEC v. Akins,* 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998). Such a result would read FECA's judicial review provision out of the statute without any constitutionally sound rationale.

Because I find that a remand to the agency would require the FEC to reassess whether the CPD is a nonpartisan organization utilizing objective selection criteria, plaintiffs have satisfied the all three elements of constitutional standing. I therefore will address their claim on the merits.

II. *The Merits*

A. *Standard of Review*

FECA provides that the reviewing court must determine whether the FEC's dismissal of the administrative complaint ***70** is "contrary to law." 2 U.S.C. § 437g(8)(C). It is well-settled that "[a] court may not disturb a [FEC] decision to dismiss a complaint unless the dismissal was based on 'an impermissible interpretation of the [FECA] ... or was arbitrary or capricious, or an abuse of discretion.' " *Common Cause v. FEC,* 108 F.3d at 415 (quoting *Orloski v. FEC,* 795 F.2d 156, 161 (D.C.Cir.1986)). The Supreme Court has noted that the FEC "is precisely the type of agency to which deference should presumptively be afforded" because "Congress has vested the [FEC] with the 'primary and substantial responsibility for administering and enforcing [FECA].' " *FEC v. Democratic Senatorial Campaign Comm. ("DSCC"),* 454 U.S. 27, 37, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981) (quoting *Buckley v. Valeo,* 424 U.S. 1, 109, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)).

[9] Deference is particularly appropriate in this case because it involves the FEC's interpretation of its own regulations. An agency's construction of its own regulations is entitled to an "exceedingly deferential standard of review" such that the court " 'is not to decide which among several competing interpretations best serves the regulatory purpose.' " *Trinity Broadcasting of Florida, Inc. v. FCC,* 211 F.3d 618, 625 (D.C.Cir.2000) (quoting *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994)); *see also Wyoming Outdoor Council v. United States Forest Serv.,* 165 F.3d 43, 52 (D.C.Cir.1999) (according "substantial deference" to agency's interpretation of its own regulations). Thus, "the agency's construction of its own regulation is controlling 'unless it is plainly erroneous or inconsistent with the regulation.' " *Wyoming Outdoor Council,* 165 F.3d at 52 (quoting *United States v. Larionoff,* 431 U.S. 864, 872, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977)). As the D.C. Circuit has stated, when a plaintiff is not alleging that the regulation itself violates the statute or the Constitution, "the only circumstance in which we do not defer is where 'an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.' " *S.G. Loewendick & Sons, Inc. v. Reich,* 70 F.3d 1291, 1294 (D.C.Cir.1995) (quoting *Thomas Jefferson,* 512 U.S. at 512, 114 S.Ct. 2381) (second

internal quotations and citation omitted).

Similarly, a court will find an abuse of discretion only when the agency cannot meet "its minimal burden of showing a 'coherent and reasonable explanation for its exercise of discretion.' " *Carter/Mondale Presidential Comm., Inc. v. FEC,* 775 F.2d 1182, 1185 (D.C.Cir.1985) (quoting *MCI Telecom. Corp. v. FCC,* 675 F.2d 408, 413 (D.C.Cir.1982)). When the FEC's rationale for dismissing the plaintiffs' complaint is included in the General Counsel's Report, the court may rely upon it in the absence of a statement of reasons from the FEC itself. *See Carter/Mondale,* 775 F.2d at 1187 ("[T]hough helpful to a court on review, a statement of reasons by FEC itself is not required, and absence of an express statement does not render its action unlawful where reasons for that action may be gleaned from its staff's reports.") In this case, I glean from the General Counsel's report a reasonable basis for its rejection of plaintiffs' allegations which was based on a reasonable interpretation of 11 C.F.R. § 110.13.

B. *CPD's Status As A Debate Sponsoring Organization*

The General Counsel found, and the FEC agreed, that plaintiffs failed to provide enough evidence to establish a reason to believe that the CPD is a partisan organization unable to qualify under the safe harbor as an organization that does not "endorse, support, or oppose political candidates or political parties." 11 C.F.R. § 110.13(a)(1). The General Counsel determined that plaintiffs' evidence failed to show: (1) that "the CPD is controlled by" ***71** the two major parties; [FN8] (2) that "any officer or member of the DNC or RNC is involved in the operation of the CPD"; and (3) that "the DNC and RNC had input into the development of the CPD's candidate selection criteria for the 2000 presidential election cycle." (AR Tab 14 at 15.)

> FN8. Plaintiffs argue that the FEC applied the wrong standard, that of "control" over the CPD, rather than whether the CPD simply "endorse[s], support[s], or oppose[s]" political candidates or parties. 11 C.F.R. § 110.13(a)(1). I read the General Counsel's statement as geared toward refuting the specific contention made in plaintiffs' administrative complaint that the CPD was created to give the two major parties "control over" the presidential debates. (Admin.Compl. at 14.)

The evidence submitted by the plaintiff in support of its contention that the CPD operates for the benefit of the two major parties consisted of three primary elements. First, plaintiffs emphasized the circumstances surrounding the CPD's formation. The CPD was formed in 1985 by Frank J. Fahrenkopf, Jr. and Paul G. Kirk, Jr. when they were the respective Chairmen of the Republican National Committee ("RNC") and Democratic National Committee ("DNC"). Although Messrs. Fahrenkopf and Kirk are no longer party chairmen, they are still the co-chairmen of the CPD. Moreover, since the CPD's inception, the members of the its Board of Directors have consisted largely of current and former elected officials from both parties as well as party activists.

Second, plaintiffs cited two written statements issued in the mid-1980s when the CPD was formed. The first was a "Memorandum of Agreement on Presidential Candidate Joint Appearances" dated November 26, 1985, and the second was a joint news release entitled "RNC and DNC Establish Commission on Presidential Debates" dated February 18, 1987. (Admin.Compl.Exs.7, 8.) Both documents were issued jointly by the two major parties and described the CPD as a "bipartisan" organization designed to sponsor nationally televised debates between the two major parties' nominees.

Finally, plaintiffs provided evidence which they contend indicates that the two major parties exerted control and influence over the CPD during the past three sets of presidential debates. In particular, they cited the congressional testimony of an official of President Bush's 1992 campaign which suggested that the two major parties, as opposed to the CPD's pre-established criteria, determined whether third-party presidential candidate Ross Perot would be allowed to participate in the debates. [FN9] Plaintiffs also cited a 1998 FEC General Counsel's Report addressing complaints similar to plaintiffs' that were brought by the Natural Law Party and Perot '96. In that report, the General Counsel found that there was evidence that the two parties had an influence on the CPD's selection criteria for

the 1996 presidential debates. (AdminCompl.Ex.19.) The General Counsel cited a conference entitled "Campaign Decision Makers" which was held after the 1996 election and included representatives of the Clinton/Gore, Dole/Kemp, and Perot campaigns as well as one of the CPD's co-chairmen and the chairman of the CPD's Advisory Committee. (*Id.* at 20.) A transcript of that conference revealed that the two major parties may have played a role in the decision to exclude Perot from the debates. (*Id.*) In that transcript, George Stephanopoulos, then-Senior Advisor to President Clinton, was quoted as saying with respect to Dole/Kemp:

> FN9. According to the Bush campaign's General Counsel, the CPD did not want to invite Mr. Perot, but "the Bush campaign insisted, and the Clinton campaign agreed, that Mr. Perot and Admiral Stockdale be invited to the debates." *Presidential Debates: Hearing Before Subcomm. on Elections of the Comm. on House Admin.*, 103d Cong., 1st Sess. 44, 50-51 (June 17, 1993) (testimony of Bobby R. Burchfield).

> They didn't have leverage going into the negotiations. They were behind, they needed to make sure Perot wasn't in it. ***72** As long as we could agree to Perot not being in it we would get everything else we wanted going in. We got our time frame, we got our length, we got our moderator.

(*Id.*) (quoting *Campaign for President: The Managers Look at '96,* 170 (Harvard Univ. Inst. of Pol., ed.1997)). Plaintiffs argue that this evidence of a pattern of influence during the past three sets of debates should have created at least a "reason to believe" that the CPD has favored the two major parties during this 2000 election cycle. They do concede, though, that there is no hard contemporaneous evidence that the CPD is being influenced by the two major parties now.

Balanced against this evidence of past favoritism and influence were the responses to the plaintiffs' complaint from the CPD, RNC, and DNC. In a sworn declaration, Janet H. Brown, the CPD's Executive Director, stated that the CPD received no funding from any political party, that not every member of the twelve-member Board of Directors identified with the Democratic or Republican parties, [FN10] and that "[n]o CPD board member is an officer of either the [DNC] or [RNC]." (AR Tab 13, Brown Decl. at ¶¶ 5-6, 11.) The CPD's response also noted that one of the three sets of debates it has sponsored since 1988 did include three candidates. Brown said that in 1992, because Ross Perot and his running mate, Admiral James B. Stockdale, satisfied the CPD's then-existing selection criteria, they participated in three presidential debates and one vice-presidential debate. (*Id.* at ¶ 22.) Brown also stated that "[t]he CPD's 2000 Criteria were not adopted with any partisan (or bipartisan) purpose" nor were they "adopted with the intent to keep any party or candidate from participating in the CPD's debates or to bring about a preordained result." (*Id.* at ¶ 33.)

> FN10. Ms. Brown stated that she was "not aware of what party, if any, Board members Dorothy Ridings or Howard Buffett would identify with if asked." (Brown Decl. at ¶ 11.)

The DNC and RNC also disclaimed any involvement with the CPD. In its response, the DNC stated that it "has no connection or relationship whatsoever with the ... [CPD]" and that "[t]he DNC does not now play, nor has it ever played, any role in determining the criteria for inclusion of candidates in any debates sponsored by the CPD...." (AR Tab 11.) Likewise, the RNC disavowed any affiliation with the CPD or influence on the CPD's debate criteria. (AR Tab 12.)

Plaintiffs' argument makes sense, and the evidence they have marshaled in support of it is not insubstantial. An ordinary citizen might easily view the circumstances surrounding the creation of the CPD along with the evidence of major-party influence over the past three debates as giving some "reason to believe" that the CPD always has supported, and still does support, the two major parties to the detriment of all others. But, for better or worse, that is not the standard I must apply here.

As the D.C. Circuit has noted, "[t]he 'reason to believe' standard ... itself suggests that the FEC is entitled, and indeed required, to make subjective evaluation of claims." *Orloski,* 795 F.2d at 168. Thus, the FEC is expected to weigh the evidence before it and make credibility determinations in

reaching its ultimate decision. *See id.* As long as the FEC presents a coherent and reasonable explanation of that decision, it must be upheld. *See Carter/Mondale,* 775 F.2d at 1185.

[10] Here, the General Counsel's terse explanation could have been more clear and thorough. However, it is apparent from the report that in the absence of any contemporaneous evidence of influence by the major parties over the 2000 debate criteria, the FEC found evidence of possible past influence simply insufficient to justify disbelieving the CPD's sworn statement, corroborated by the DNC and RNC, that the CPD's 2000 debate criteria were neither influenced by the two major parties nor designed to keep minor parties out ***73** of the debates. While reasonable people could certainly disagree about whether the CPD's credibility determination was correct, under the extremely deferential standard of review that I must apply, the FEC is entitled to the benefit of the doubt even if the unfortunate by-product of the FEC's decision is increased public cynicism about the integrity of our electoral system. Based on the factual record that was before it, the FEC did not abuse its discretion in finding that there was "no reason to believe" that the CPD currently "do[es] not endorse, support, or oppose political candidates or political parties." 11 C.F.R. § 110.13(a)(1).

C. *The CPD's Selection Criteria*

For the CPD to be found in compliance with the FEC's debate regulations, the FEC was required to find not only that the CPD does not support, endorse, or oppose political candidates, but also that it is basing its selection of participants on "pre-established and objective criteria." 11 C.F.R. § 110.13(c). The dispute here centers on whether it was unreasonable for the FEC to conclude that the CPD employed an "objective" criterion when it required that participants have "a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly reported results at the time of the determination." (AR Tab 1 Ex. 1 at 2.)

As the D.C. Circuit has noted, 11 C.F.R. § 110.13(a) "does not spell out precisely what the phrase 'objective criteria' means...." *Perot v. FEC,* 97 F.3d 553, 560 (D.C.Cir.1996), *cert. denied,* 520 U.S. 1210, 117 S.Ct. 1692, 137 L.Ed.2d 819 (1997) . The regulation therefore does not "mandat[e] a single set of 'objective criteria' all staging organizations must follow" but rather "[gives] the individual organizations leeway to decide what specific criteria to use." *Id.* at 559 (citing 60 Fed.Reg. 64,262 (1995)). As a result, "[t]he authority to determine what the term 'objective criteria' means rests with the agency ... and to a lesser extent with the courts that review agency action." *Id.* at 560.

Although the term "objective" is not defined in the regulation, its has generally been described by courts as referring to evidence of "the sort that can be supplied by disinterested third parties," *Bourke v. Dun & Bradstreet Corp.,* 159 F.3d 1032, 1037 (7th Cir.1998) (internal quotation and citation omitted), "that can be discovered and substantiated by external testing," *Thompson v. Sullivan,* 987 F.2d 1482, 1488-89 (10th Cir.1993), or evidence that is undistorted "by personal feelings or prejudices and that are publicly or intersubjectively observable or verifiable, especially by scientific methods." *Association of the Bar of the City of New York v. Commissioner of Internal Revenue,* 858 F.2d 876, 880 (2d Cir.1988) (citation omitted). Objective representations have also been described "as 'representations of previous and present conditions and past events, which are susceptible of exact knowledge and correct statement.' " *Id.* (quoting *United Ben. Life Ins. Co. v. Knapp,* 175 Okla. 25, 51 P.2d 963, 964 (1935)).

Plaintiffs contend that the CPD's selection criteria do not qualify as objective under any of these definitions. First, they argue that "[t]he choice of fifteen percent as the level of support required is entirely subjective" chiefly because a candidate who receives a mere 5% of the popular vote in the general election would qualify his or her party to receive federal funding in the next election. (Pl.'s Mem.Supp.Summ.J. at 22.) I find this argument unconvincing. While I agree that a 5% support level or the automatic inclusion of any candidate whose party qualified for federal funding in the last election would probably be an objective selection criteria, that does not necessarily imply that a 15% support level is somehow subjective. The FEC specifically declined to adopt a rule mandating any one standard. *See Perot v. FEC,* 97 F.3d at 559-60. While plaintiffs ***74** have noted that the Final Draft Rule submitted by the General Counsel to the

FEC in 1994 included polls on a list of nonobjective criteria, (Agenda Document, 94-11, Federal Election Comm'n (Feb. 8, 1994), at 73-74), the drafters' rejection of the General Counsel's suggestion manifests a clear intent on their part not to preclude debate sponsors from using polls.

A reasonable person could find it ironic that a candidate need win only 5% of the popular vote to be eligible for federal funding, but must meet a 15% threshold to be eligible for the debates. However, the relevant test is not based on irony, but on objectivity. So long as the 15% support level is sufficiently measurable and verifiable, it would appear to satisfy at least the common definition of an objective requirement. Thus, how the 15% is measured, and whether it can be measured with some degree of precision, generally has more bearing on its objectivity or lack of objectivity than the mere establishment of the 15% level itself.

This is not to say, however, that any pre-established required level of support would necessarily satisfy the regulation's definition of objectivity. The history of 11 C.F.R. § 110.13 makes clear that, although the word "reasonable" does not appear in the regulation's text, "reasonableness is implied." 60 Fed.Reg. 64,262 (1995). The FEC also stated in its rule making that "[s]taging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants." *Id.* Taken together, these statements by the regulation's drafters strongly suggest that the objectivity requirement precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it.

[11] In view of the substantial deference I must accord to the FEC's interpretation of its own regulations, I cannot conclude that it was plainly erroneous or inconsistent with the regulation for the FEC to find that the 15% support level set by the CPD is "objective" for the purposes of 11 C.F.R. § 110.13(c). As Brown indicated in her declaration, several third party candidates have in the past achieved over 15% support in the polls taken at or around the time that the debates are traditionally held. For instance, by September of 1968, George Wallace had achieved a level of support of approximately 20% in the polls. John Anderson was invited by the League of Women Voters to participate in the 1980 presidential debates after his support level reached approximately 15%. Finally, in 1992, Ross Perot's standing in the polls was near 40% at some points and he ultimately received 18.7% of the popular vote that year. (Brown Decl. at ¶ 35.) Thus, third party candidates have proven that they can achieve the level of support required by the CPD. While a lower threshold of support might be preferable to many, such a reading is neither compelled by the regulation's text nor by the drafters' intent at the time the regulation was promulgated. Accordingly, deference to the FEC's interpretation is warranted.

Plaintiffs' second line of attack assaults the CPD's methodology for determining which candidates meet the 15% threshold. They argue that the "CPD's method for determining whether a candidate meets this threshold is also filled with subjective determinations, inaccurate methodologies, and uncertainty." (*Id.* at 23.) They contend that polling is by definition an inexact science because "even the best polls have significant margins of error." (Pls.' Mem.Supp.Summ.J. at 24.) Moreover, plaintiffs note that polls are susceptible to subjective influence by the pollster's choice of who gets polled, how the questions are worded, the names of the candidates included, and when the polls are taken.

While all of plaintiffs' contentions may have merit as factual matters, I cannot conclude that they render unreasonable the FEC's decision that the CPD's debate ***75** criteria are objective. All polls have a margin of error. However, some degree of imprecision is inevitable in almost any measurement. Such imprecision alone does not make a predictor subjective such that it favors one group of candidates over another.

Plaintiffs contend that the polls' margin of error could result in a third party candidate being unfairly excluded from the debates. For instance, they posit a candidate whose actual level of support in the electorate is 18%, but whose polled level of support is only 14% because of the poll's plus or minus 4% margin of error. The same 4% margin of error, though, could just as easily push into the debate a third party candidate who had only 11% actual support. In other words, a poll's margin of error may be equally likely to increase the number of debate participants as to decrease them. Although the

plaintiffs did submit evidence about the problems associated with polling, plaintiffs did not present any evidence to suggest that these problems would systematically work to minor-party candidates' disadvantage.

Plaintiffs also contend that pre-debate polls are misleading because the debates themselves can substantially affect a candidate's viability. However, plaintiffs' argument puts the cart before the horse. The FEC determined in promulgating 11 C.F.R. § 110.13 that debate staging organizations such as the CPD must be given latitude in formulating their debate criteria. *See* 60 Fed.Reg. 64,262. It is difficult to understand why it would be unreasonable or subjective to consider the extent of a candidate's electoral support prior to the debate to determine whether the candidate is viable enough to be included. The FEC itself recognized this point in dismissing two related complaints regarding the 1996 CPD's debate criteria. In its Statement of Reasons for the dismissal, the FEC noted that it had explicitly rejected the General Counsel's suggestion that 11 C.F.R. § 110.13 explicitly precludes consideration of pre-debate polls: "Under the staff's proposed regulation, a debate sponsor could not look at the latest poll results even though the rest of the nation could look at this as an indicator of a candidate's popularity. This made little sense to us." *Statement of Reasons on MURs 4451 & 4473,* Federal Election Comm'n 8 n. 7 (1998). Thus, the language and history of 11 C.F.R. § 110.13 all suggest that it is not inappropriate for debate sponsors to consider pre-debate polls.

In finding that the CPD's method was objective, the FEC relied on its own precedent from the 1996 election that "[w]ith respect to polling and electoral support, the Commission ... declined to preclude the use of polling or 'other assessments of a candidate's chances of winning the nomination or election' when promulgating 11 C.F.R. § 110.13." (AR Tab 14 at 16.) The General Counsel also pointed out that the CPD's 2000 debate criteria were actually more objective than the CPD's 1996 criteria which had been upheld even though they included decidedly less precise ways of measuring a candidate's level of support in the electorate. (AR Tab 14 at 17.) [FN11] While FEC precedent is not binding on this Court, an agency's consistency with its own past rulings is certainly an indicium of reasonableness. *See* ***76DSCC,** 454 U.S. at 37, 102 S.Ct. 38 (noting that "thoroughness, validity, and *consistency* of an agency's reasoning are factors that bear on the amount of deference to be given an agency's ruling") (emphasis added); *In re Sealed Case,* 223 F.3d 775, 783 (D.C.Cir. 2000).

> FN11. In 1996, the FEC upheld CPD criteria which included consideration of the following:
> [P]rofessional opinions of Washington bureau chiefs of major newspapers, news magazines and broadcast networks; the opinions of professional campaign managers and pollsters not employed by the candidates; the opinions of representative political scientists specializing in electoral politics; a comparison of the level of coverage on front pages of newspapers and exposure on network telecasts; and published views of prominent political commentators. (AR Tab 14 at 17.) The Supreme Court has also characterized a congressional candidate's exclusion from a debate based on somewhat similar factors as demonstrative of the candidate's "own *objective* lack of support...." *Arkansas Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 683, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (emphasis added).

With respect to the plaintiffs' argument that "subjective elements" could creep into the polls themselves, plaintiffs presented no evidence to suggest that any of the five polling organizations who will conduct the polls are biased for or against any candidate or party. Indeed, the fact that the average of five polls are being used would appear to reduce the probability of manipulation, even if plaintiffs are right that a weighted approach which accounted for differences in sample sizes amongst the polls might produce more a reliable result. (Admin.Compl.Ex.20.) While it may be true that polls can be misused, without at least some evidence that the independent pollsters have an incentive to rig the process in favor or against any candidate or party, I cannot conclude that the FEC's finding of objectivity was unreasonable.

In view of the entire record, I find that it was not arbitrary or capricious for the FEC to conclude that

the CPD's selection criteria are objective. Plaintiffs failed to present significant evidence demonstrating that the FEC's interpretation of 11 C.F.R. § 110.13 was either at odds with the regulation's plain language or the FEC's intent at the time that the regulation was promulgated. I also find that the FEC provided a "sufficiently reasonable" explanation for its decision which was consistent with FEC precedent. *DSCC,* 454 U.S. at 39, 102 S.Ct. 38. Although it might be good public policy to allow more third party candidates into the presidential debates, "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.' " *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 866, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (quoting *TVA v. Hill,* 437 U.S. 153, 195, 98 S.Ct. 2279, 57 L.Ed.2d 117, (1978)).

CONCLUSION

The plaintiffs do have standing to bring their claims because they have stated both competitive and informational injuries that were caused by the FEC's dismissal of their complaint and could be redressed by a court-ordered remand to the agency. However, plaintiffs' claims fail on the merits because they have not overcome their heavy burden of showing that the FEC's interpretation of its own regulation was erroneous or that its explanation for its decision was incoherent or unreasonable. Accordingly, defendant's motion for summary judgment will be granted and plaintiffs' motion will be denied. An Order consistent with this Opinion is being issued today.

ORDER AND JUDGMENT

For the reasons set forth in the Memorandum Opinion issued today, it is hereby

ORDERED that plaintiffs' Motion for Summary Judgment [10] be, and hereby is, DENIED. It is further

ORDERED that defendant's Motion for Summary Judgment [9] be, and hereby is, GRANTED. It is further

ORDERED that judgment be entered in favor of the defendant.

This is a final appealable Order.

112 F.Supp.2d 58

END OF DOCUMENT

TAB E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5337 **September Term, 2000**

00cv01775

Filed On:

Patrick J. Buchanan, et al.,
Appellants

v.

Federal Election Commission,
Appellee

BEFORE: Ginsburg, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of the motion for leave to participate as amicus curiae, and the briefs filed by the parties, it is

ORDERED that the motion for leave to participate as amicus curiae be granted. The Clerk is directed to file the lodged amicus brief. It is

FURTHER ORDERED that with respect to the single issue presented in appellants' brief for expedited consideration (whether the fifteen percent electoral support requirement is illegal to the extent it excludes a candidate who has qualified for general election federal campaign funding) the district court's order filed September 14, 2000, be affirmed substantially for the reasons stated therein.

The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of the appeal.

Per Curiam

DHG/PAH

TAB F

[10-1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
SEP 21 2000
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

NATURAL LAW PARTY OF THE UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civ. Act. No. 1:00CV02138 (ESH)

ORDER AND JUDGMENT

For the reasons set forth in the Memorandum Opinion dated August 28, 2000, in Natural Law Party of the United States, et al., v. Federal Election Commission, Civil Action No. 98-1025 (ESH), the plaintiffs have standing in this case.

For the reasons set forth in Part II of the September 14, 2000, Memorandum Opinion in Patrick J. Buchanan, et al. v. Federal Election Commission, Civil Action No. 00-1775 (RWR), it is

ORDERED that defendant's Motion for Summary Judgment be, and hereby is, GRANTED.

It is further ORDERED that judgment be, and hereby is, entered in favor of the defendant.

This is a final appealable Order.

Signed this 21st day of September, 2000.

Ellen S Huvelle
ELLEN SEGAL HUVELLE
United States District Judge

(2)

RECEIVED
SEP 25 2000
PWMA
FILE

12

TAB G

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5338 **September Term, 2000**

00cv02138

Filed On:

The Natural Law Party of the United States of America, et al.,
Appellants

v.

Federal Election Commission,
Appellee

BEFORE: Ginsburg, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of the brief filed by appellants, it is

ORDERED that with respect to the issue presented by appellants for expedited consideration, whether the fifteen percent electoral support requirement is illegal because the safe harbor provisions of 2 U.S.C. § 431 do not apply to corporate contributions and expenditures governed by 2 U.S.C. § 441b, the district court's order filed September 21, 2000, be affirmed. Appellants failed to raise this argument in district court. See District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1084 (D.C. Cir. 1984). It is

FURTHER ORDERED that, to the extent appellants argue that even if the safe harbor provisions apply, the fifteen percent electoral support requirement is illegal because it favors some candidates over others, the district court's order filed September 21, 2000, be affirmed substantially for the reasons stated therein.

The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of the appeal.

Per Curiam

DHG/PAH