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December 24, 2003

Ruth Heilizer  
Attorney  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

RE: MUR 5391

Dear Ms. Heilizer:

The undersigned represents respondents Democratic Party of Virginia-Federal Campaign Committee ("DPV"), and Abbi G. Easter, as Treasurer in the above mentioned Matter Under Review. In this matter, the Commission has found reason to believe that the DPV has violated 2 U.S.C. § 434(b) in connection with errors it had made in connection with reports filed with the Commission during the 2000 general election campaign. By this letter, the DPV wishes to respond to the Commission's finding and its offer of pre-probable cause conciliation.

The facts of this matter are not in dispute. However, the DPV vehemently disputes many unfair characterizations made by the Commission in its brief in this matter. Furthermore, the DPV believes that the Commission's proposed civil penalty in this matter is unwarranted and highly excessive.

**FACTUAL ANALYSIS**

During the 2000 general election campaign, the DPV established, as is traditional for state parties to do, a "coordinated campaign" organization to execute its general election get-out-the-vote operations. The coordinated campaign project was operated out of a separate office in Alexandria, VA, which is approximately 100 miles away from the party headquarters in Richmond, VA. The coordinated campaign had its own staff, including a Director and Comptroller. The Director and Comptroller were responsible for providing data regarding its financial activities to the Richmond office which, in turn, prepared and filed consolidated disclosure reports with the Commission. The errors and omissions that are the subject of this matter were activities that were undertaken at the Alexandria office.

As a threshold matter, the DPV's ability to properly investigate and respond to the allegations made by the FEC has been hampered by several factors. These factors include: (1) the individual that is primarily responsible for preparing FEC reports for the DPV, Karen Nuckols, is seriously ill. Ms. Nuckols is an independent Certified Public Accountant and is the person that has the most familiarity with the facts that lead to the errors and omissions that are the basis of this matter. Ms. Nuckols was also the individual that was responsible for preparation of amendments to correct those errors. Essentially, but for a brief telephone conversation, Ms. Nuckols was unavailable to assist the current DPV staff and our office in reconstructing the relevant facts in this matter. However, as described later, Ms. Nuckols has provided some vital information that helps explain several issues in this matter; (2) the Executive Director of the DPV during the 2001 amendment process, Alan Moore, is no longer with the DPV.<sup>1</sup> Efforts to contact Mr. Moore have been unsuccessful. The DPV will continue to attempt to contact Mr. Moore as we believe he will be cooperative and help provide additional information regarding this matter; (3) the staff of the coordinated campaign, who were the individuals directly responsible for the errors and omissions that are at issue in this matter, left the DPV immediately after the November 2000 election. The committee is attempting to contact Kendra Sue Derby, who was the Director of the coordinated campaign. Thus far, attempts to reach Ms. Derby have been unsuccessful.

While the actual facts, as are described in the Commission's brief, are essentially accurate, the DPV believes that the factual analysis unfairly attempts to characterize ordinary administrative errors and turn them into some type of wholesale attempt by the DPV to avoid disclosure requirements. For example, the Factual and Legal Analysis of the General Counsel's brief states that subsequent amendment to the DPV reports reflect a net increase of 31% and 32% increase in disclosed activity. Read in isolation, this would appear to lead the reader to the conclusion that there was wholesale non-reporting that occurred in DPV reports. However the fact of the matter is that almost all of this misreporting consisted of two transactions that canceled each other out.

The transactions at issue in this matter stem from an erroneous wire transfer, which was corrected within days of the transfer. Ordinarily, it is questionable as to whether such errors, that essentially negate each other, are even required to be disclosed on Commission reports. However, in this matter, the erroneous transfer, and the corrective transfer occurred in different reporting periods. Therefore, the DPV deemed it appropriate and necessary to include all transactions on its amendments, even those that were erroneous and quickly corrected.

It should be easy to understand the inadvertent nature of the reporting errors that have occurred in this matter. Presumably the coordinated campaign staff intended to wire \$710,000 to Greer, Margolis, Mitchell & Burns, and disclosed this intent to the DPV staff

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<sup>1</sup> Mr. Moore joined the DPV in January 2001 and was not the Executive Director during the 2000 election period. The DPV is not aware what role that the Executive Director at the time, Craig Beiber, played in the preparation of the FEC report. We do not believe that Mr. Bieber, nor is the DPV aware of any other individual, who would be able to provide any insight as to the facts raised in this matter. This should not surprise the Commission since the relevant facts in this matter occurred over three years ago.

that were responsible for filing the DPV October Quarterly Report. In fact, the wire was erroneously sent to Applied Political Technologies ("APT"). The September bank statement for the DPV's coordinated campaign federal account confirmed an outgoing wire transfer of \$710,000. Of course, since the transaction was done by wire transfer, no other information would have been included with the bank statement that would assist the DPV in confirming the actual recipient of the transfer. The October Quarterly Report was filed with the FEC on October 12, 2000. Therefore, the earliest that the DPV staff responsible for preparation of the wire errors was likely in early November 2000, when the October bank statements would have been received by the DPV. It should be kept in mind that the statement would have arrived at the DPV on or about election day in a Presidential election year. During such periods, state party staffs are at maximum stress due to the high amount of campaign activity occurring at that time. Furthermore, the coordinated campaign staff responsible for the transactions at issue in this matter left the state party immediately after the November election day. Unfortunately, due to the current unavailability of Ms. Nuckols or any other staff with first hand knowledge of these events, it has not been possible to verify all of these facts from first-hand knowledge of the staff involved at the time. However, this is a logical and likely explanation for the events as they occurred. This explanation is further supported by the fact that on December 7, 2000, the committee filed an amended Pre-General Report that began the process of correcting the public record regarding this error. Another issue raised by the General Counsel's brief was the inadvertent disclosure that the return of the wire from APT was disclosed as coming from the DSCC. This error is understandable, considering that the DSCC had sent two wires, one federal and one non-federal, for the total amount of \$710,000 during the previous week.

After the campaign, the DPV decided to conduct a comprehensive audit of its financial activities for the 2000 calendar year. In an initial review of the committee's documents, Ms. Nuckols realized that the duplicative wire transfers needed to be corrected, as well as several other transactions, as described in the General Counsel's brief. During the next several months, Ms. Nuckols conducted a thorough review of the DPV's financial activity. Rather than file piecemeal amendments that may or may not be accurate, the DPV decided to wait until the review was completed before filing comprehensive amendments to its reports. Ms. Knuckles efforts were further compounded by the lack of documentation for wire transfers that was maintained by the coordinated campaign staff, as well as by several transactions, in the amount of \$710,000, that seemed to negate each other, as well as the fact that the staff responsible for these transactions were no longer employed by the DPV. While Ms. Derby did provide some assistance to the DPV in explaining these transactions during 2001, the DPV believes that Ms. Derby's explanations were both incomplete and incorrect. Thus, these explanations further compounded the committee's problems with respect to these transactions and increased the amount of time it took to complete the amendments.

The General Counsel's brief, while accurately restating the facts, appears to characterize the errors as a 31% understatement of financial activity. The DPV believes that this categorical statement would leave the impression that the committee materially omitted a large number of financial activity from its reports. In fact, these errors were

almost the exclusive result of a large erroneous transaction that was corrected within five days of the original transaction. Other than these transactions, the committee's reports were well within material compliance with the federal reporting requirements. The DPV began the process of voluntarily amending its reports in December in 2000, and had essentially corrected all errors by August 2001. Further explanatory materials were provided to the Commission in January 2002. Inexplicably, almost two years after all amendments were properly filed, the Commission chose to initiate this enforcement action.

The Commission is also taking issue with the DPV's characterization of the errors at issue in this matter as a "made in error by the bank." See Cover letter to the DPV amendment to the 2000 Pre-General report which was filed with the Commission on January 15, 2002. The Commission requests sworn affidavits at the DPV or the DPV's bank or any other documentation that explains this error. While the DPV views this request as unprecedented, unnecessary and overly intrusive, the DPV presumes that the Commission has generated this line of questioning due to the fact that, in Advisory Opinion 2001-12, the DPV claimed that an allocation transfer was not made due to a "bank error."

The DPV would like to emphasize that it does not take its responsibilities with respect to compliance with the FECA lightly nor would it intentionally mislead either the Commission or the general public as to the reason the erroneous transfer was made. Thus, the DPV did not, and would not use its bank as a default excuse for any erroneous transactions that may have occurred. In each instance, the DPV had a good faith belief that the errors were, in fact, caused by its bank.

In response to the DPV's request, the DPV has made an extensive effort to determine the reason as to why Mr. Moore's letter of January 15, 2002 states that the transfer to APT was a bank error. First, the DPV searched its own files for any documentation that would clarify this issue. Unfortunately, the lack of documentation for wire transfers, which is the primary reason for the confusing set of events that lead to the initiation of this matter in the first place, has not assisted the DPV in determining the true cause of the wire errors. Second, the DPV has requested documentation concerning the wire transfers from Wachovia Bank. Wachovia bank has indicated that, since the DPV does not have the original "wire transfer numbers" it will be unable, at this time, to retrieve any documentation regarding the wires. Third, despite her serious medical condition, Ms. Nuckols, was able to provide some critical information in a brief telephone interview with our office. Ms. Nuckols indicated that it was her recollection that the January 15, 2002 letter's assertion that the original wire to APT was due to a bank error was based upon a representation made to her and Mr. Moore by Ms. Derby when questioned as to why the wires occurred. Unfortunately, due to Ms. Nuckols current medical condition, the DPV has been unable to obtain a sworn statement from Ms. Nuckols to that effect. The DPV has been unable to reach either Mr. Moore or Ms. Derby to corroborate Ms. Nuckols recollection. The DPV will continue to attempt to contact both Mr. Moore and Ms. Derby to determine whether either of them have any knowledge or recollection of the issues presented in this matter.

Based upon the above information, the DPV is not necessarily asserting that it was, in fact, the bank's error that lead the DPV to make such a statement in its January 15, 2002 letter, but rather a good faith belief that this was the case based upon Ms. Derby's representation to that effect. Although Ms. Derby did not participate in the actual amendment of the reports, Ms. Derby was uniquely situated to have direct knowledge as the reason the September 29<sup>th</sup> wire was inadvertently sent to APT.<sup>2</sup> Therefore, it was perfectly reasonable for Mr. Moore and Ms. Knuckles to rely upon Ms. Derby's statement when the DPV prepared and filed the January 15, 2002 amendment.

Due to the proximity to the holiday season, Ms. Nuckols's illness, as well as the fact that there is no current DPV staff that was involved in the facts that are involved in this matter, the DPV has had considerable difficulty in responding to OGC's allegations in this matter, as well as complying with the Commission's request for additional information, including affidavits and additional documentation.

If the Commission insists, the DPV will continue to review its own files, request information from the bank, as well as pursue direct interviews and possible affidavits from both Mr. Moore and Ms. Derby. Of course, Mr. Moore and Ms. Derby's desire to cooperate in this matter is out of the control of the DPV.

### CONCLUSION

The DPV does not dispute the basic facts in this matter. They are an accurate description of what had occurred. However, the DPV does not believe that the errors made by the DPV on their report were out of the ordinary for standards set by the Commission for similarly situated matters. Although there were two large transactions that negated each other that were originally omitted from reports, the DPV made extensive efforts, at great expense, to voluntarily and relatively quickly correct those errors. As early as December 2000, amendments were filed to correct the 2000 Pre-General Report. Comprehensive amendments were filed by August 2001. The Commission should not seek to punish committees that voluntarily and comprehensively correct their reports. It is understandable, and common, for state party committees, in the heat of a general election campaign, to make a certain amount of clerical and disclosure errors. In this instance, the error was compounded by matching wire transfers that went out and came back in. The lack of proximity of the two campaign offices also contributed to this inadvertent error.

In many instances, the Commission does not seek to punish committees who are required to amend their reports due to material misstatements in response to an audit for cause. Therefore, the DPV is baffled as to why the Commission is seeking such a large civil penalty in this matter. To do so would discourage similarly situated committees from voluntarily amending disclosure reports to correct such errors on their reports. The

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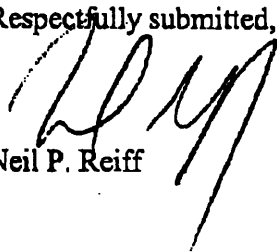
<sup>2</sup> Since Ms. Derby left the state party in November 2000, we believe that it is highly doubtful that Ms. Derby was aware that the state party had requested Advisory Opinion 2001-11 nor would she be familiar with the facts therein.

DPV does not yet know whether the statement that the APT transfers were due to a bank error is correct or not. However, we do not believe that the Commission should take that into account. To be sure, the DPV believes that this statement reflected a good faith belief of an assertion made by a former staff member responsible for the coordinated campaign. The DPV, in no way, intended to mislead the Commission or the general public and viewed this as an innocuous explanation as to why the transactions occurred. Unlike the situation addressed in Advisory Opinion 2001-11, the DPV was not trying to recoup any federal dollars but merely attempting to correct its disclosure reports. The amendments would have been necessary irrespective of what caused the transfer errors to occur and required no other financial adjustments. Therefore, the DPV had no incentive to intentionally submit a misleading reason as to why the APT transactions occurred. In either event, the APT transfer was an inadvertent error that was corrected within days of its occurrence.

Based upon the above, the DPV does not believe that this matter warrants the resources of the Commission, and further believes that the proposed civil penalty in this matter is unnecessary and highly excessive. Furthermore, the Commission's approach in this matter will serve to deter similarly situated committees from filing voluntary, comprehensive amendments to their reports.

Nevertheless, since the DPV is unable to properly defend itself, due to the lack of availability to material witnesses, the DPV wants to see an expeditious end to this matter.

Respectfully submitted,

  
Neil P. Reiff