

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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DR. JILL STEIN AND JILL STEIN )  
FOR PRESIDENT, )  
 )  
Petitioners, )  
 )  
v. )  
 )  
FEDERAL ELECTION )  
COMMISSION, )  
 )  
Respondent. )

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No. 21-1213

**PETITION FOR REVIEW OF AGENCY ACTION**

Petitioners Dr. Jill Stein and Jill Stein for President (“Stein”) hereby petition this Court for review of the final determination of Respondent Federal Election Commission (“the Commission”), which the Commission made on September 30, 2021 and served upon Stein on October 1, 2021 in LRA No. 1021. A copy of the Commission’s notice of its final determination and the Commission’s Statement of Reasons in support of the final determination is submitted herewith.

Stein respectfully seeks review of the Commission’s final determination insofar as it orders Dr. Stein and Jill Stein for President to pay the Commission \$175,272.

There were no parties to the proceedings before the Commission other than Stein and the Commission.

Respectfully submitted,

s/Oliver B. Hall

Oliver B. Hall

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### **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was filed using the Court's CM/ECF system on October 29, 2021, and that, pursuant to Federal Rule of Appellate Procedure 15(c), the Clerk must serve the foregoing document on Respondent Federal Election Commission.

s/Oliver B. Hall

Oliver B. Hall



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

October 1, 2021

**VIA ELECTRONIC MAIL**

Harry Kresky, Esq.  
Law Office of Harry Kresky  
128 Binninger Road  
Shushan, NY 12873

Re: Dr. Jill Stein and Jill Stein for President (LRA # 1021)

Dear Mr. Kresky:

The Commission has considered the response submitted on behalf of Dr. Jill Stein and Jill Stein for President (the "Committee") to the Commission's repayment determination. On September 30, 2021, the Commission determined, after administrative review, that Dr. Stein and the Committee must repay \$175,272 to the United States Treasury. Dr. Stein and the Committee must repay this amount within 30 calendar days after service of this determination. 11 C.F.R. § 9038.2(c)(3), (d)(2).

Enclosed is a Statement of Reasons that sets forth the legal and factual basis for the Commission's determination. 11 C.F.R. § 9038.2(c)(3). Judicial review of the Commission's determination is available pursuant to 26 U.S.C. § 9041. You may also file a petition for rehearing with the Commission within 20 calendar days of service of this determination. 11 C.F.R. §§ 9038.2(h), 9038.5(a). If you have any questions regarding the Commission's determination, you may contact me at (202) 694-1533 or at [jblume@fec.gov](mailto:jblume@fec.gov).

Sincerely,

A handwritten signature in cursive script that reads "Joshua Blume".

Joshua Blume  
Attorney  
Policy Division

Enclosure

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of	)	
Dr. Jill Stein	)	LRA 1021
Jill Stein for President	)	

**STATEMENT OF REASONS IN SUPPORT OF REPAYMENT DETERMINATION  
AFTER ADMINISTRATIVE REVIEW****I. SUMMARY OF REPAYMENT DETERMINATION AFTER ADMINISTRATIVE  
REVIEW**

Pursuant to 26 U.S.C. § 9038(b)(1) and (3), on September 30, 2021, the Federal Election Commission determines that Dr. Jill Stein and Jill Stein for President (“Committee”) must repay \$175,272 to the United States Treasury, representing surplus public funds in the Committee’s accounts and public funds received in excess of entitlement. The Commission orders that Dr. Stein repay the \$175,272 within 30 calendar days after service of this repayment determination. 11 C.F.R. § 9038.2(c)(3), (d)(2).

**II. PROCEDURAL BACKGROUND****A. The Commission’s Initial Determination That the Candidate Must Repay****\$175,272 to the United States Treasury.**

Dr. Stein sought the nomination of the Green Party of the United States (“U.S. Green Party”) for the Office of President of the United States at its national nominating convention at the same time that it sought the nomination of other independent state parties that were scheduled to hold their elections and conventions on later dates.

Dr. Stein applied for public funds, and the Commission determined on April 13, 2016 that she was eligible to receive public funds. On August 6, 2016, the Green Party of the United States held its national nominating convention and nominated Dr. Stein to be its presidential

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candidate in the 2016 election. The Commission determined that the date of the nominating convention — August 6, 2016 — was the date on which Dr. Stein would no longer be eligible to receive public funds for the purpose of seeking the nomination. Commission Certification in the Matter of Date of Ineligibility — Jill Stein for President, LRA 1021 (Aug. 12, 2016). This date is known as the “date of ineligibility” or “DOI.” 11 C.F.R. § 9033.5. The Commission notified the candidate of its DOI determination on August 17, 2016. Letter from Margaret Forman, Attorney, to Ms. Jill Stein re: Date of Ineligibility for Public Funds (LRA 1021) (Aug. 17, 2016).

By the conclusion of Dr. Stein’s campaign, she had received \$456,036 in matching fund payments as of the DOI and had received an additional \$134,900 in matching fund payments on January 18, 2017, for a total amount of \$590,936 in matching fund payments. Attachment 1, at 7, n.11 (Apr. 16, 2019).

Following the conclusion of Dr. Stein’s campaign, the Commission conducted a mandatory audit of the Committee’s finances in accordance with 26 U.S.C. § 9038(a). As a result of this audit, the Commission initially determined that the candidate had a surplus of funds at DOI, and that the candidate must repay \$175,272 to the United States Treasury. There were two components to the repayment determination: 1) the public funds portion of the surplus in the Committee’s accounts as of the candidate’s DOI and 2) the public funds received in excess of entitlement after the candidate’s DOI.

The Commission found that the Committee had a surplus as of the DOI of \$200,856. Attachment 1, at 15. The Commission calculated the Committee’s surplus based on the statement of net outstanding campaign obligations (“NOCO Statement”) that the Committee was required to file after the Commission’s DOI determination. *Id.* at 14; 11 C.F.R. § 9034.5. The

NOCO Statement reflects the difference between the Committee's reported assets and liabilities as of the candidate's DOI. 11 C.F.R. § 9034.5. The Committee's liabilities may include costs for winding down expenses.<sup>1</sup> *Id.* § 9034.11. The Commission accordingly included winding down expenses in calculating the net outstanding campaign obligations as of the date of DOI based on estimates and documentation that the Committee made available at the time of the audit. Following the audit, the Commission prepared a verified NOCO Statement, reproduced on the next page:<sup>2</sup>

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<sup>1</sup> Winding down expenses are costs associated with the termination of political activity associated with the candidate's campaign. 11 C.F.R. § 9034.11(a). Such costs may include costs associated with complying with post-election requirements of the Federal Election Campaign Act or the Matching Payment Act and administrative costs associated with winding down activity, such as office space rental, office supplies and staff salaries. *Id.* Campaigns may use public funds to pay for these expenses, and therefore the candidate's statement of net outstanding campaign obligations may account for such costs, up to a certain limit. *Id.* §§ 9034.11(b) (reciting limitations on allowance for winding down costs), 9034.5(b)(2) (including estimated winding down costs in statement of net outstanding campaign obligations).

<sup>2</sup> The NOCO Statement reproduced here is identical to the NOCO Statement as it appears in the Commission's Final Audit Report, except for footnote 4, below, which omits one sentence that originally appeared in that footnote: "This amount will be compared to actual winding down costs and will be adjusted accordingly." Attachment 1, at 14. At the time that the NOCO was originally prepared, this statement would have been accurate. However, the Commission at this point in the process would not undertake such a comparison and Dr. Stein and the Committee have waived the issue (see below), thus exhausting their administrative remedies.

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**Jill Stein for President**  
**Statement of Net Outstanding Campaign Obligations**  
**As of August 6, 2016**  
**As determined at August 31, 2018**

**Assets**

Cash in Bank	\$ 792,935 <sup>3</sup>	
Accounts Receivable	13,289	
Physical Assets @ 60% depreciation	<u>4,200</u>	
<b>Total Assets</b>		<b>\$ 810,424</b>

**Liabilities**

Accounts Payable for Qualified Campaign Expenses as of 8/6/16	\$ (237,602)	
Loan Payable as of 8/6/2016	( 40,000)	
Actual Winding Down Costs (12/9/16 – 8/31/18)	(262,611)	
Estimated Winding Down Costs (9/1/18 – 7/31/2019)	<u>(69,355)<sup>4</sup></u>	
<b>Total Liabilities</b>		<b><u>\$ (609,568)</u></b>

<b>Net Outstanding Campaign Obligations – Surplus</b>	<b><u>\$ 200,856</u></b>
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<sup>3</sup> Amount includes contributions dated prior to DOI and deposited after DOI.

<sup>4</sup> Estimated winding down costs for future reportable periods only. Estimated winding down presented in the Preliminary Audit Report was reduced from \$100,880 to \$69,335 to reflect the remaining winding down period.

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The Commission further found that because Dr. Stein already had a surplus as of the DOI, the United States Treasury's additional \$134,900 public funds payment to the Committee on January 18, 2017 exceeded her entitlement to public funds. Attachment 1, at 20.

The Commission used a pro-rata ratio<sup>5</sup> (.2010) to calculate the public funds portion of the \$200,856 surplus. *Id.* at 15, n.13. The public funds portion was \$40,372 ( $\$200,856 \times .2010$ ).<sup>6</sup> *Id.* See also 26 U.S.C. § 9038(b)(3); 11 C.F.R. § 9038.3(c)(1). The Commission added to this the entire \$134,900 payment of public funds received in January 2017 for a total repayment obligation of \$175,272 ( $\$134,900 + \$40,372$ ). Attachment 1, at 10. Accordingly, on April 16, 2019, the Commission made an initial determination that the Committee must repay \$175,272 to the United States Treasury. *Id.* at 11, 19.

## **B. The Committee Requests Administrative Review of The Commission's Initial Determination.**

The Committee submitted a written response on June 17, 2019, requesting administrative review of the Commission's initial repayment determination and an oral hearing. Attachment 2.

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<sup>5</sup> In calculating the amount of public funds that must be repaid in the event of a surplus, the Commission uses the amount equal to that portion of the surplus bearing the same ratio to the total surplus that the total amount of public funds the candidate received bears to the total deposits made to the candidate's accounts. 11 C.F.R. § 9038.3(c)(1). "Total deposits" means all deposits to all candidate accounts minus transfers between accounts, refunds, rebates, reimbursements, checks returned for insufficient funds, proceeds of loans and other similar amounts. *Id.* § 9038.3(c)(2). The Commission treats all funds in all accounts maintained by a candidate as a mixed pool of private and public funds, and accordingly uses the ratio described to determine the portion of the amounts in the accounts that are public funds. *Kennedy for President Comm. v. FEC*, 734 F.2d 1558, 1564 (private contributions and public funds are a "commingled pool of federal and private monies").

<sup>6</sup> Normally, this amount would have been payable within 30 days of the DOI. 11 C.F.R. § 9038.3(c)(1). However, in this case, the Commission was not aware of the existence of the surplus until after the audit had been conducted. Indeed, had the Commission been aware of the surplus, it would not have authorized the additional payment of public funds in January 2017.

The Commission held the oral hearing on February 25, 2021.<sup>7</sup> Attachment 3. Before addressing the Committee's arguments on the initial repayment determination, we must address a procedural issue. At the oral hearing, the Committee argued that the Commission should revise the NOCO Statement to include additional winding down expenses. On February 18 and 19, before the oral hearing, and between March 1 and March 4, after the oral hearing, the Committee submitted new supporting documents that detailed additional winding down expenses.

Because winding down expenses may be included in the liabilities portion of the NOCO Statement, any additional winding down expenses could reduce the Committee's surplus and, in turn, the amount of the repayment. *See* 11 C.F.R. § 9034.5(b)(2); Attachment 1, at 14. However, making a legal argument for including additional winding down expenses in the NOCO Statement and submitting supporting factual materials at this stage of the adjudication process raises the procedural issue of whether the Committee properly raised, and therefore preserved, the issue for Commission's consideration. 11 C.F.R. § 9038.2(c)(2)(i). We therefore first determine whether the Committee properly raised this issue in its written response.

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<sup>7</sup> The Commission lost its quorum of at least four voting members on August 30, 2019. The Commission may not grant a request for an oral hearing on a repayment determination without the approval of at least four Commissioners. 11 C.F.R. § 9038.2(c)(2)(ii). *See also generally* 52 U.S.C. § 30106(c) (Four affirmative votes required to take any action with respect to chapters 95 and 96 of title 26, dealing with public financing). Apart from a period of approximately one month extending from May 2020 to early July 2020, the Commission remained without a quorum until December 2020.

**III. THE COMMITTEE WAIVED ANY ISSUES OR ARGUMENTS IT MAY HAVE PERTAINING TO WINDING DOWN EXPENSES BY FAILING TO RAISE THEM IN ITS REQUEST FOR ADMINISTRATIVE REVIEW.**

The Commission concludes that the Committee did not properly raise the issue, and, therefore, the Committee waived its argument of including additional winding down expenses in a revised NOCO Statement.

When a publicly financed candidate wishes to challenge an initial repayment determination, it must submit, in writing, legal and factual materials demonstrating that no repayment, or a lesser repayment, is required, within 60 days after service of the notice of the repayment determination. 11 C.F.R. § 9038.2(c)(2)(i). If the candidate does not timely raise an issue in this written submission, then that issue is considered to have been waived for all further stages of the proceeding, including in subsequent litigation. *Id.*

Although the Committee timely filed its written request for administrative review within 60 days of the Commission's initial repayment determination, the Committee did not raise the argument regarding the additional winding down expenses until the oral hearing, nearly two years later. At the oral hearing, the Committee argued that the Committee's statements in the written submission that "it will be shown that the other findings concerning the nature of winding down expenses, misstatement of financial activity and disclosure of debts likewise cannot survive scrutiny" and "[a]s will be demonstrated in a further submission coming directly from the Committee, were it not for the improper imposition of the August 6, 2016 DOI, no repayment would be called for" sufficed to raise an issue regarding winding down expenses. *See* Attachment 2, at 1, 4; Attachment 3, at 17-18. However, such general statements without any explanation or reasoning are insufficient to raise an issue for the Commission's consideration under 11 C.F.R. § 9038.2(c)(2)(i). As the U.S. Court of Appeals for the District of Columbia Circuit observed in the course of upholding section 9038.2(c)(2)(i)'s requirement

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that all issues must be raised in the written submission, the purpose of such a requirement is to ensure that the Commission has timely notice of the nature of any challenges to its authority. *Robertson v. FEC*, 45 F.3d 486, 491 (D.C. Cir. 1995) (upholding the Commission’s refusal to consider a committee’s argument because the committee failed to make the argument in its written submission).<sup>8</sup> The D.C. Circuit reasoned that the purpose and effect of section 9038.2(c)(2)(i) is similar to the court’s traditional refusal to consider positions taken during oral argument unsupported by the principal brief. *Id.* In considering whether the Committee’s general statement suffices to raise an issue under the regulation, we follow the D.C. Circuit’s analogy to judicial procedure and note that the courts also require more than a general statement of the kind here to preserve an issue or argument for judicial consideration.<sup>9</sup> *See City of Waukesha v. Environmental Protection Agency*, 320 F.3d 228, 250-51 n.22 (D.C. Cir. 2003) (considering argument raised by petitioner in reply brief waived, because argument was made in opening brief “only summarily, without explanation or reasoning” and citing *Tribune Co. v. Federal Communications Commission*, 133 F.3d 61, 69 n.8 (D.C. Cir. 1998) (noting party’s arguments must be sufficiently developed to avoid waiver)). *See also United States v. Hunter*, 739 F.3d 492, 495 (10<sup>th</sup> Cir. 2013) (claim inadequately developed in opening brief is waived).

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<sup>8</sup> The D.C. Circuit upheld a similar pleading requirement in 11 C.F.R. § 9038.5(a)(1)(iii), which requires candidates to state why they could not have raised arguments or issues earlier in the process when petitioning the Commission for rehearing on its administrative determination. *Fulani v. FEC*, 147 F.3d 924, 927 (D.C. Cir. 1998).

<sup>9</sup> *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.”).

Here, no argument was made in the written submission, even summarily.<sup>10</sup> Merely mentioning the subject of winding down expenses in the written submission, without any explanation, reasoning, or argument — indeed, purporting to defer any elaboration to a later time — is insufficient to raise an issue for administrative review. The statement that “it will be shown that the other findings concerning the nature of winding down expenses, misstatement of financial activity and disclosure of debts and obligations likewise cannot survive scrutiny,” Attachment 2, at 1, without more, does not give the Commission any notice of the arguments that the Committee is raising about the winding down expenses. *See Robertson*, 45 F.3d at 491 (D.C. Cir. 1995). The Commission, therefore, declines to consider the Committee’s argument for including additional winding down expenses in the NOCO Statement.<sup>11</sup>

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<sup>10</sup> In its Request for Consideration of a Legal Question, submitted during the audit process, the Committee asked: “Should committees be allowed to incur Winding Down expenses and other Primary expenses after the DOI if they are clearly incurred to improve compliance with existing laws and regulations or if they are clearly required in the course of seeking the qualification for the ballot in various states?” *See* Letter to Commission from Matt Kozlowski, Director of Compliance, Jill Stein for President (Jan. 12, 2018), at 4 (§ IV.2). The Commission noted at the time that the Committee had presented no argument regarding this question, but that in any event, the Commission’s regulations addressed the incurrence and payment of winding down costs, including costs associated with compliance with statutory post-election requirements and other specifically defined administrative costs. *See* Memorandum to Commission from Erin Chlopak, Request for Consideration of a Legal Question Submitted by Jill Stein for President (LRA # 1021) (Feb. 28, 2018), at 2. In the Request for Legal Consideration phase, the Committee asked whether winding down expenses may be incurred after the DOI, whereas here, the Committee has proffered documentation of winding down expenses that it seeks to incorporate into the Commission’s analysis and thus the two presentations are not the same. Even if they were the same, however, the presentation of a question relating to winding down expenses during the earlier phase of the process does not suffice to preserve the issue for Commission review during the administrative review phase. The Commission’s regulations state that the issues must be raised in the written materials seeking administrative review of the repayment determination. 11 C.F.R. § 9038.2(c)(2)(i).

<sup>11</sup> The Committee had ample opportunity to submit adequate documentation relating to winding down expenses during the audit process, but it chose not to do so. *See* Attachment 1, at 17 (noting Committee’s failure to submit adequately documented winding down expenses). In particular, the Committee could have submitted this documentation during the audit fieldwork, after the audit exit conference and in response to the Preliminary Audit Report. The Committee, however, provided no explanation as to why it failed to submit this documentation during these stages of the audit.

**IV. AFTER ADMINISTRATIVE REVIEW, THE COMMISSION DETERMINES THAT AUGUST 6, 2016, IS THE PROPER DATE OF INELIGIBILITY AND THEREFORE THE COMMITTEE MUST REPAY \$175,272 IN PUBLIC FUNDS.**

The Commission concludes that the candidate's date of ineligibility is August 6, 2016.

As result of this conclusion, the Commission determines that the candidate must repay \$175,272 to the United States Treasury.

The connection between the DOI and the repayment is as follows: A candidate may only use public funds to pay for "qualified campaign expenses." 11 C.F.R. § 9034.4(a). A qualified campaign expense is any expense that a candidate incurs in connection with her campaign for the nomination during the period within which she may receive public funds.<sup>12</sup> 26 U.S.C. § 9032(9); 11 C.F.R. § 9032.9. As a general matter, general election ballot access expenses are qualified campaign expenses for minor party candidates. *See, e.g.*, Advisory Opinion 1995-45 (Hagelin for President). To be considered a qualified campaign expense, however, the expense must be incurred on or before the candidate's DOI.<sup>13</sup> *See* 11 C.F.R. § 9032.9(a)(1).

The Commission includes qualified campaign expenses on the NOCO Statement as liabilities. 11 C.F.R. § 9034.5(b). Any liabilities on the NOCO Statement may reduce the amount of the surplus and, consequently, the candidate's repayment obligation. *Id.* §§ 9034.5(a), 9038.3(c)(1).

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<sup>12</sup> Winding down expenses, subject to certain restrictions, are considered qualified campaign expenses. 11 C.F.R. §§ 9034.4(a)(3), 9034.11(a).

<sup>13</sup> Winding down expenses may be incurred after the candidate's DOI. 11 C.F.R. § 9034.11(a) (includes costs of terminating campaign, including complying with post-election requirements of FECA and Matching Payment Act).

The Committee incurred certain ballot access expenses after the DOI. The Commission, therefore, did not include these expenses in the final, verified, NOCO Statement. *See* Attachment 1, at 15 (explaining non-inclusion of ballot expenses incurred after DOI as main difference between Committee's and Commission's NOCO Statements); 11 C.F.R. § 9032.9(a)(1). Moving the DOI to a later date, as the Committee argues, would mean that additional ballot access expenses would be included on the NOCO Statement, potentially reducing or eliminating the surplus of public funds that the candidate would be obligated to repay.

Under Commission regulations, a candidate's eligibility to receive matching funds ends on whichever of the following dates occurs first: the date the candidate becomes inactive, receives insufficient votes, or reaches the end of the matching payment period. *Id.* § 9033.5. Given that Dr. Stein remained active during the nomination process and ultimately received sufficient votes to be the party's nominee, the relevant date for purposes of determining DOI here is the date that the matching payment period ended.

The matching payment period represents the time during which an eligible candidate may receive public funds for the purpose of seeking the nomination of a party for the office of the President of the United States.<sup>14</sup> *See* 26 U.S.C. § 9032(6). While this period always begins on the start of the calendar year during which the general election will occur, the end of the period depends upon the nomination process the candidate undergoes. If a party nominates a candidate during a national convention, then the matching payment period ends on the date the candidate is

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<sup>14</sup> Candidates may continue to receive matching payments after this period for the sole purpose of paying debt incurred during the matching payment period. 11 C.F.R. §§ 9033.5, 9034.5.

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nominated. 26 U.S.C. § 9032(6); 11 C.F.R. § 9032.6(a). If a party does not use a national nominating convention to nominate its candidate, then the period ends either on the date the party nominates the candidate or on the last day of the last national convention held by a major party during the election year, whichever is *earlier*. 26 U.S.C. § 9032(6)(A), (B).

Dr. Stein's candidacy raises the issue of which method should be used to determine the end of the matching period because she sought nomination both from a national committee of a party at a national convention, and from parties that did not nominate candidates at a national convention. 11 C.F.R. § 9032.6(a), (b). Dr. Stein's 2016 letter of candidate agreements and certifications ("9033 Letter")<sup>15</sup> stated that she was seeking the nomination of a number of political parties, including the U.S. Green Party, a national committee which held its national convention in Austin, Texas on August 4-7, 2016. 52 U.S.C. § 30101(14); *see* Advisory Opinion 2001-13 (Green Party of the United States) (concluding that the U.S. Green Party is a "national committee" of a political party); Green Party of the United States FEC Form 1, filed May 29, 2012, <http://docquery.fec.gov/pdf/322/12951903322/12951903322.pdf>. In her 9033 Letter, Dr. Stein certified that she also sought the nomination of several unaffiliated state green parties without ballot lines, with ballot access deadlines of June 1, 2016 (Kansas), July 11, 2016 (South Dakota), August 1, 2016 (Vermont), and August 15, 2016 (Utah). Dr. Stein also certified that she sought the nomination of the Peace and Freedom Party, which was not a national committee and would be holding its state nominating convention in California on

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<sup>15</sup> The initial step in the process of becoming eligible to receive public funds for a presidential candidate is to submit a letter in which the candidate makes certain certifications and agrees to comply with certain requirements of the matching payment program. *See* 26 U.S.C. § 9033(a), (b); 11 C.F.R. §§ 9033.1, 9033.2.

August 13, 2016.<sup>16</sup> The last day of the last national convention held by a major party in 2016 was July 28, 2016. In such circumstances, the Commission has previously given the candidate the benefit of the later independent party nomination dates rather than the earlier date of the national nominating convention, provided that such dates were not later than the date of the last day of the last major party nominating convention. Advisory Opinion 1984-25 (Johnson) at 2; *see also* Advisory Opinion 1984-11 (Serrette), Advisory Opinion 2000-18 (Nader 2000).

Here, the date of the U.S. Green Party's national nominating convention was August 6, 2016. The last day of the last major party nominating convention was July 28, 2016. Dr. Stein also was a candidate for the nomination of several other independent state parties. However, because none of them held a national nominating convention, Dr. Stein could not receive the benefit of any state nomination or ballot access date after July 28, 2016, the last date of the last major party nominating convention. 26 U.S.C. § 9032.6; 11 C.F.R. § 9032.6; Advisory Opinion 1984-25 (Johnson) at 2. Thus, the most advantageous DOI that the Commission could use to calculate Dr. Stein's DOI under the Matching Payment Act and Commission regulations was August 6, 2016, the date of the U.S. Green Party's nominating convention. Accordingly, the Commission determines that August 6, the more advantageous of the two possibilities, is Dr. Stein's DOI. This is consistent with the Commission's regulations and past practice to apply the date that results in the candidate receiving the full benefit of the longest permissible matching

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<sup>16</sup> During the Commission's audit, the Committee submitted a Request for Consideration of a Legal Question, in which it averred that the final ballot access deadline it was working to meet was September 9, 2016.

payment period to which she is entitled, rather than artificially shortening that period merely because the candidate also seeks nominations that are decided at earlier dates.<sup>17</sup>

The Committee argues that the candidate's DOI should not be August 6, 2016,<sup>18</sup> but one of the later general election ballot access dates, if not the latest, instead.<sup>19</sup> It raises four points in support of this argument. First, the Committee argues that Advisory Opinion 1975-53 (Bradley for Senate) established the principle that the quest for access to the general election ballot is effectively a primary election for independent and non-major party candidates and that a publicly financed independent or non-major party presidential candidate may therefore choose the latest of the ballot access dates established by the states. The Committee also points to a Commission regulation that allows independent and non-major party candidates to designate one of three possible dates, and therefore potentially the latest of those dates, as the date of the candidate's

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<sup>17</sup> "Given its conclusion in Advisory Opinion 1984-11, the Commission is of the view that Ms. Johnson's concurrent campaign for the national convention nomination of the Citizens Party should not result in a shorter matching payment period for her, than for a candidate who only seeks the presidential nominations of political parties at the state level, rather than at the national level." Advisory Opinion 1984-25 (Johnson) at 2.

<sup>18</sup> The Committee argues that the Commission has been inconsistent in first resolving the Committee's request for consideration of a legal question by concluding that August 7, 2016 was the DOI, and then subsequently concluding that the DOI was August 6. The Commission's first certification declaring the DOI to be August 7 was the result of a technical error committed by the Office of the General Counsel in its recommendation memorandum to the Commission, which the OGC subsequently corrected upon discovery of the error. *See* Memorandum from Erin Chlopak to Commission, Correction to Memorandum on Request for Consideration of a Legal Question by Jill Stein for President (LRA #1021) (Apr. 24, 2018).

<sup>19</sup> The Committee challenged the DOI determination during the audit, first by invoking the Commission's Program on Requesting Consideration of Legal Questions, *see* Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 84 Fed. Reg. 36602 (July 29, 2019), and then in its responses to the Commission's draft Preliminary and Draft Final audit reports that preceded the issuance of the final audit report. The Committee argued throughout these processes that because it had to incur ballot access expenses to obtain general election ballot qualification for Dr. Stein, and because the Commission has concluded that the incurrence of such expenses is related to the primary election, the Commission should include these expenses when calculating the Committee's net outstanding campaign obligations. The Commission rejected the Committee's arguments both during the Request for Consideration of a Legal Question procedure and in the course of the audit. *See* Certification, Correction to Memorandum on Request for Consideration of a Legal Question by Jill Stein for President (LRA 1021) (May 2, 2018); Attachment 1, at 14-15, 18.

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primary election.<sup>20</sup> See 11 C.F.R. § 100.2(c)(4). Second, the Committee asserts that the Commission, in later advisory opinions, particularly Advisory Opinions 1984-11 (Serrette) and 1984-25 (Johnson), upon which the Commission relied in establishing the DOI, deviated without explanation from the approach of Advisory Opinion 1975-53 (Bradley for Senate) by limiting the assignment of the DOI using ballot access dates to the last day of the last major party convention. Third, in the Committee's view, the Commission did not adequately explain its change of position and thus has acted arbitrarily and capriciously, thus violating due process. See Attachment 2, at 4 (citing *Common Cause v. FEC*, 906 F.2d 705 (D.C. Cir. 1990) and *Fox TV Stations, Inc. v. Federal Communications Commission*, 280 F.3d 1027, 1044-45 (D.C. Cir. 2002), *mod. Fox Television Stations, Inc. v. Federal Communications Commission*, 293 F.3d 537 (2002)). Finally, the Committee argues that the ostensibly new, more restrictive position established in Advisory Opinions 1984-11 (Serrette) and 1984-25 (Johnson) undermines the Commission's earlier asserted view that it seeks to administer the election laws in a manner that fosters equal treatment of major party and minor party or independent candidates. It therefore allegedly denies the Committee the equal protection of the laws. *Id* (citing *Riddle v. Hickenlooper*, 742 F.3d 922 (10<sup>th</sup> Cir. 2014) and *Green Party of Connecticut v. Garfield*, 616 F.3d 213 (2<sup>d</sup> Cir. 2010)).

The Commission disagrees with the Committee's interpretation of the relevant authorities. Advisory Opinion 1975-53 (Bradley for Senate) applied a different statute — the Federal Election Campaign Act — and did not address the principles for calculating the DOI for

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<sup>20</sup> The regulation provides that the candidate may choose one of three dates to designate as the date of the primary election: "(i) The day prescribed by applicable State law as the last day to qualify for a position on the general election ballot . . . (ii) The date of the last major party primary election, caucus, or convention in that State . . . (iii) [i]n the case of non-major parties, the date of the nomination by that party. . ." 11 C.F.R. § 100.2(c)(4).

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a publicly financed candidate under the Matching Payment Act.<sup>21</sup> Thus, Advisory Opinion 1975-53 (Bradley for Senate) is materially distinguishable from the present circumstances. *See* 11 C.F.R. § 112.5(a)(2) (a person may rely on an advisory opinion if the person is involved in the specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered). Further, the two statutory schemes in this context are different. Even though 11 C.F.R. § 100.2(c)(4) and the 1975 advisory opinions specify that under FECA's definition of primary election, the minor party candidate may choose the latest of three possible dates to designate as the primary election, the Matching Payment Act, which is concerned with delimiting the period of time during which a candidate may be considered eligible to receive public funding, instructs the Commission to use the *earlier* of the possible dates for determining the DOI: either the date the party nominates the candidate or the last day of the last major party convention in the relevant election year where the party does not nominate the candidate at a national nominating convention. 26 U.S.C. § 9032(6); 11 C.F.R. § 9032.6(b). Because the Matching Payment Act and Commission regulations specify what date may serve as the DOI, the Commission has no discretion to use a different, later, DOI as the Committee argues.<sup>22</sup>

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<sup>21</sup> Advisory Opinion 1975-53 (Bradley for Senate) does not mention the Matching Payment Act, concerned as it is, as its title indicates, with a Senate campaign. Advisory Opinion 1975-44 (Socialist Workers 1976 National Campaign Committee) contains a passage recognizing the impact of the public funding provisions, however: "Since the date pertaining to petition qualification vary from State to State, the Commission considers it necessary to prescribe a uniform date when, for purposes of 18 U.S.C. § 608(b), the petition process ends for minor party presidential candidates. The Commission concludes that the prescribed date should be when the presidential nominee last selected before the general election is nominated by a national nominating convention of a major political party. It is noted that this date coincides with the date when an eligible minor party presidential candidate, entitled to public funding before the general election, may properly expend or obligate funds "to further his election" (citing 26 U.S.C. § 9002(11), (12))." *Id.* at 2.

<sup>22</sup> Because section 100.2(c)(4) and the 1975 advisory opinion apply a different statute under materially distinguishable circumstances, there is no change of mind or position to explain. *See Motor Vehicle Mfrs. Assn. v.*

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In Advisory Opinion 1984-25 (Johnson), the Commission explained that the definition of “matching payment period” “appears to contemplate, if not require, that [a non-major party] candidate have an opportunity to establish eligibility and collect matchable contributions for a period of time that closely approximates the period available to major, party candidates.” Advisory Opinion 1984-25 (Johnson) at 2. Congress sought to ensure parity between major and non-major party candidates with respect to the length of time that each would be eligible to receive and spend public funds. Consequently, instead of creating favoritism between major party and minor party candidates, the predicate of the Committee’s equal protection claim, the Matching Payment Act seeks to avoid creating such favoritism. *Riddle*, 742 F.3d at 929-30 (invalidating statute creating different contribution limits for major party and write-in candidates on ground that it evinces favoritism). In any event, even if the application of § 9032(6) results in some disadvantage to minor party candidates vis-à-vis major party candidates, the remedy would lie with Congress, rather than with the Commission.

The Commission has not neglected the relevant statutory and regulatory analysis in arriving at its conclusion.<sup>23</sup> *See Common Cause*, 906 F.2d at 706-07 (no indication that

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*State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (agency may change mind but must explain why reasonable to do so); *Fox TV Stations, Inc. v. Federal Communications Commission*, 280 F.3d 1027, 1044-45 (D.C. Cir. 2002) (same in context of informal rulemaking), *mod. Fox Television Stations, Inc. v. Federal Communications Commission*, 293 F.3d 537 (2002).

<sup>23</sup> The Committee also argues that the Commission’s 2016 DOI determination was inconsistent with the Commission’s determination in 2012, when Dr. Stein also received public matching funds. The Committee notes that Dr. Stein’s DOI in 2012 was September 6, the date of the state of Alabama’s deadline for Dr. Stein to qualify for a position on the general election ballot in that state, even though Dr. Stein had obtained the U.S. Green Party’s nomination by national nominating convention in August of that year. But this is not so. In 2012, Dr. Stein was nominated as candidate for president by the U.S. Green Party on July 14, 2012 at the party’s national nominating convention. The last day of the last national convention held by a major party in 2012 was September 6, 2012, which coincided with Alabama’s deadline for ballot qualification. The Commission determined that the latest permissible date of ineligibility was the last day of the last major party convention — September 6, 2012 — and thus that date, rather than the July 14 nomination date, determined the end of Dr. Stein’s matching payment period for the

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Commission applied regulatory affiliation factors to analysis of affiliation issue). Rather, the Commission considered the Matching Payment Act, as well as regulations implemented under these statutes, in arriving at its DOI determination.

To the extent, therefore, that the candidate opposes the Commission's application of the Matching Payment Act to determine that the candidate's national nominating convention date is the DOI, the candidate's quarrel is with the statute itself. Section 9032(6) of the Matching Payment Act is a duly enacted law of Congress and no court has undermined or otherwise questioned its legal validity or its application to the issue presented here. In the absence of a court decision finding section 9032(6) unconstitutional, the Commission lacks the authority to make an administrative determination premised on an act of Congress being considered unconstitutional. *See Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of constitutionality is generally outside an administrative agency's authority); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) (noting, in the context of the Commission's administrative enforcement process that "[i]t was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional."); Advisory Opinion 2018-07 (Mace) at 5. As the Commission has previously recognized in other contexts, "[b]ecause no court has invalidated the [statutory] limitation . . . on constitutional grounds, we are required to give the [] provision[] full force." Advisory Opinion 2012-32 (Tea Party Leadership Fund *et al.*) at 3; *cf* Advisory Opinion 2011-12 (Majority PAC *et al.*) at 4 (declining to interpret the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310

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2012 presidential election. The Commission therefore applied the same methodology in both cases, choosing the latest of the available dates based upon the rules set forth in 26 U.S.C. § 9032(6).

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(2010), as a basis for not applying statutory contribution limits that were not considered in that case).

## **V. CONCLUSION**

The Commission determines that, within 30 days of service of this Repayment Determination After Administrative Review, Dr. Jill Stein and Jill Stein for President must repay public funds in the amount of \$175,272 to the United States Treasury due to the existence of a surplus and to having received public funds in excess of entitlement. 26 U.S.C. § 9038(b)(1), (3); 11 C.F.R. §§ 9038.2(b)(1), 9038.3(c).

## **ATTACHMENTS**

1. Final Audit Report of the Commission, approved Apr. 16, 2019.
2. Committee's Request for Administrative Review, dated June 17, 2019.
3. Transcript of Hearing in the Matter of Administrative Review Hearing: Jill Stein Repayment Determination (LRA #1021), Agenda Document No. 21-10-A (Feb. 25, 2021).



# Final Audit Report of the Commission on Jill Stein for President

(January 17, 2015 – December 31, 2016)

## Why the Audit Was Done

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

## Future Action

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

## About the Campaign (p. 3)

Jill Stein for President is the principal campaign committee for Jill Stein, a candidate for the Green Party nomination for the office of President of the United States. The Committee is headquartered in Lexington, Massachusetts. For more information, see the chart on the Campaign Organization, p. 3.

## Financial Activity<sup>2</sup> (p. 4)

### • Receipts

○ Contributions from Individuals	\$ 11,010,439
○ Matching Funds Received	456,035
○ Loans Received	40,000
○ Offsets to Operating Expenditures	716,735
<b>Total Receipts</b>	<b>\$ 12,223,209</b>

### • Disbursements

○ Operating Expenditures	\$ 11,885,379
○ Transfers to Other Authorized Committees	22,300
○ Fundraising Disbursements	15,156
○ Contribution Refunds	2,465
○ Other Disbursements	250
<b>Total Disbursements</b>	<b>\$ 11,925,550</b>

## Commission Findings (p. 5)

- Net Outstanding Campaign Obligations - Surplus (Finding 1)
- Matching Funds Received in Excess of Entitlement (Finding 2)
- Misstatement of Financial Activity (Finding 3)
- Reporting of Debts and Obligations (Finding 4)

<sup>1</sup> 26 U.S.C. §9038(a).

<sup>2</sup> These figures contain primary, general and recount activity. The general and recount activity combined accounted for approximately \$9,590,974, or 78% of total receipts, and approximately \$9,618,886 or 81% of total disbursements. See Committee Structure on p. 1.



# **Final Audit Report of the Commission on Jill Stein for President**

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(January 17, 2015 – December 31, 2016)

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# Part I

## Background

### Authority for Audit

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

### Scope of Audit

Unless noted in the Committee Structure section below, this audit examined JSFP's primary election activity only. The following areas were covered by this audit:

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

### Committee Structure

JSFP was the only campaign committee authorized by Jill Stein (the Candidate) for the 2016 Presidential election and conducted primary, general and recount activity for the Candidate. JSFP opened six bank accounts: one checking and one savings account for each activity. JSFP deposited contributions received before the Candidate's nomination into the primary checking account, and most contributions received after the nomination into the general checking account. JSFP received matching funds for its primary campaign. This audit covered JSFP's primary election activity to determine if the expenses were qualified campaign expenses defrayed in connection with the primary election.<sup>3</sup>

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<sup>3</sup> Under Title 26, this audit included an examination of JSFP's Statement of Net Outstanding Campaign Obligations based solely on JSFP's primary election activity for the purpose of determining the extent to which the Candidate was entitled to primary matching funds (Finding 1). Due to the committee's structure, this audit also covered a Title 52 examination of JSFP's overall consistency between reported figures and bank activity, which included general and recount activity. For clarification, the Audit staff has indicated in Finding 3 – Misstatement of Financial Activity, those transactions that were not related to primary election activity.

## **Commission Guidance**

### **Request for Early Commission Consideration of a Legal Question**

Pursuant to the Commission's "Policy Statement Establishing a Program for Requesting Consideration of Legal Questions by the Commission," JSFP requested early consideration of two legal questions raised during the audit. The first question pertained to whether the Commission's original determination of the Candidate's date of ineligibility (DOI) was proper. The second question was whether committees should be permitted to incur winding down expenses and other primary expenses after the DOI if they are clearly incurred to improve compliance with existing laws and regulations or if they are clearly required in the course of seeking the qualification for the ballot in various states.<sup>4</sup>

The Commission concluded, by a vote of 4-0, to reaffirm JSFP's original DOI as August 6, 2016.<sup>5</sup> (See Finding 1, p. 8.)

### **Inventory of Campaign Records**

The Audit staff routinely conducts an inventory of campaign records before it begins audit fieldwork. JSFP's records were materially complete when fieldwork commenced.<sup>6</sup>

### **Audit Hearing**

JSFP declined the opportunity for a hearing before the Commission on the matters presented in this report.

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<sup>4</sup> Although JSFP's request purported to identify three separate questions for review, two of the questions raised the same essential issue, which is whether the Commission's original DOI determination was proper. Therefore, those two questions were consolidated into a single question.

<sup>5</sup> JSFP presented no argument in its Request for Consideration of a Legal Question regarding the second question, however, the response to this question is addressed directly in the Commission's regulations. The regulations provide for the payment of winding down costs, i.e. costs associated with the termination of political activity, including compliance with statutory post-election requirements and other specifically defined administrative costs. 11 CFR §§ 9034.4(a)(3) and 9034.11. Because the regulations directly address the payment of winding down costs, there was no need for the Commission to reach a determination on the second question in the request.

<sup>6</sup> The Audit staff encountered delays prior to fieldwork due to JSFP's inability to timely provide complete computerized information.

## Part II

### Overview of Campaign

#### Campaign Organization

<b>Important Dates</b>	
• Date of Registration	July 14, 2015
• Eligibility Period <sup>7</sup>	April 13, 2016 – August 6, 2016
• Audit Coverage <sup>8</sup>	January 17, 2015 – December 31, 2016
<b>Headquarters</b>	
Lexington, Massachusetts	
<b>Bank Information</b>	
• Bank Depositories	One
• Bank Accounts	Six (One checking and one savings account each for primary, general and recount activity)
<b>Treasurer</b>	
• Treasurer When Audit Was Conducted	Steven Welzer (9/30/2015 – present)
• Treasurer During Period Covered by Audit	John W. Andrews (7/09/2015 – 9/29/2015) Steven Welzer (9/30/2015 – present)
<b>Management Information</b>	
• Attended Commission Campaign Finance Seminar	No
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff

<sup>7</sup> On March 28, 2016, the Candidate submitted a signed letter (dated March 18, 2016 and subsequently revised on April 5, 2016) to the Commission seeking to become eligible to receive Presidential primary matching funds and agreeing that she and her authorized committee would comply with the conditions set forth in 11 CFR §9033.1(b). A threshold submission was submitted on March 28, 2016, and the Commission certified the Candidate as eligible to receive matching funds on April 13, 2016. The period during which the Candidate was eligible for matching funds ended on August 6, 2016, the Candidate's DOI.

<sup>8</sup> The audit covered the period from JSFP's first bank deposit on January 17, 2015. The Audit staff also conducted limited reviews of receipts and expenditures after December 31, 2016, to determine whether the Candidate was eligible to receive additional matching funds.

## Overview of Financial Activity (Audited Amounts)<sup>9</sup>

<b>Cash on hand @ January 17, 2015</b>	<b>\$ 0</b>
<b>Receipts</b>	
○ Contributions from Individuals <sup>10</sup>	11,010,439
○ Matching Funds Received <sup>11</sup>	456,035
○ Loans Received	40,000
○ Offsets to Operating Expenditures	716,735
<b>Total Receipts</b>	<b>\$ 12,223,209</b>
<b>Disbursements</b>	
○ Operating Expenditures	11,885,379
○ Transfers to Other Authorized Committees	22,300
○ Fundraising Disbursements	15,156
○ Contribution Refunds	2,465
○ Other Disbursements	250
<b>Total Disbursements</b>	<b>\$ 11,925,550</b>
<b>Cash on hand @ December 31, 2016</b>	<b>\$ 297,659</b>

<sup>9</sup> These figures contain primary election, general election and recount activity. See Committee Structure on p. 1.

<sup>10</sup> JSFP received approximately 50,924 contributions from 42,486 individuals totaling \$2,135,681 for primary election activity.

<sup>11</sup> As of the Candidate's DOI, August 6, 2016, JSFP had received matching funds totaling \$456,036. JSFP received an additional \$134,900 on January 18, 2017, for a total of \$590,936.

## **Part III**

### **Summaries**

#### **Commission Findings**

##### **Finding 1. Net Outstanding Campaign Obligations - Surplus**

The Audit staff's review of JSFP's financial activity through December 31, 2016, and estimated winding down costs indicated that the Candidate had a surplus of funds, as of her DOI, in the amount of \$200,856. Of this surplus amount, JSFP is required to make a pro rata repayment of \$40,372.

In JSFP's initial Statement of Net Outstanding Campaign Obligations (NOCO) filed during the matching fund period, cash on hand was understated and accounts payable and winding down expenses were both overstated. As such, JSFP's NOCO indicated an apparent deficit position and therefore eligible to receive matching funds. The Audit staff's analysis of the NOCO, however, determined that surplus funds were received and the Candidate was not eligible for all of the matching funds she received. The Preliminary Audit Report recommended that JSFP provide evidence that the Candidate did not have surplus funds as of her DOI.

In response to the Preliminary Audit Report recommendation, JSFP disagreed it was in a surplus position and stated if the disallowed ballot access costs and recently updated winding down estimates were considered, it would instead be in a deficit position and therefore not be required to make a repayment. JSFP provided documentation and an updated NOCO to support its position. Based on this documentation and JSFP's 2017 and 2018 reported activity on Schedule B (Itemized Disbursements), the Audit staff updated its NOCO to reflect increased ballot access costs incurred prior to DOI and increased winding down actual costs. These adjustments reduced the repayment amount, but the revised NOCO still reflected a surplus position.

In response to the Draft Final Audit Report, JSFP maintained that it did not owe a repayment. No documentation was provided by JSFP to support this assertion.

The Commission determined that \$40,372 was repayable to the United States Treasury. (For more detail, see p. 8.)

##### **Finding 2. Matching Funds Received in Excess of Entitlement**

The Audit staff's NOCO statement, as presented in Finding 1, indicated a surplus position, as of August 6, 2016, the Candidate's DOI. Therefore, JSFP was not entitled to the matching fund payment of \$134,900, it subsequently received on January 18, 2017. The Preliminary Audit Report recommended that JSFP provide evidence that the Candidate did not have surplus funds as of her DOI.

In response to the Preliminary Audit Report recommendation, JSFP provided documentation and an updated NOCO, and stated that it was entitled to all matching fund payments due to its increased winding down expenses, even if previously disallowed ballot access and other expenses were not considered. After the Audit staff incorporated the expenses that were documented as pertaining to the primary election into its revised NOCO, JSFP was still in a surplus position and therefore not entitled to the matching fund payment it received after the Candidate's DOI.

In response to the Draft Final Audit Report, JSFP disagreed that the Candidate was in a surplus position. JSFP did not provide any documents to support its assertion.

The Commission determined that \$134,900 was repayable to the United States Treasury. (For more detail, see p. 16.)

### **Finding 3. Misstatement of Financial Activity**

During audit fieldwork, a comparison of JSFP's reported financial activity with its bank records revealed a misstatement of receipts and disbursements for 2015 and 2016 and a misstatement of ending cash on hand in 2016. In 2015, JSFP understated its reported receipts and disbursements by \$31,495 and \$35,042 respectively; and in 2016, JSFP understated its reported receipts, disbursements and ending cash on hand by \$996,384, \$800,310 and \$192,527 respectively. The Preliminary Audit Report recommended that JSFP amend its disclosure reports to correct the misstatements.

In response to the Preliminary Audit Report recommendation and the Draft Final Audit Report, JSFP stated it was in the process of amending its reports to correct the misstatements, but to date, no amended reports have been filed.

The Commission approved a finding that JSFP misstated its financial activity for calendar years 2015 and 2016. (For more detail, see p. 17.)

### **Finding 4. Disclosure of Debts and Obligations**

During audit fieldwork, the Audit staff identified debts totaling \$17,015 not disclosed on Schedule D-P (Debts and Obligations), as required. The Preliminary Audit Report recommended that JSFP amend its reports to disclose the outstanding debt.

In response to the Preliminary Audit Report recommendation and the Draft Final Audit Report, JSFP stated it was in the process of amending its reports to correct the disclosure of debts and obligations, but to date, no amended reports have been filed.

The Commission approved a finding that JSFP did not disclose debts and obligations totaling \$17,015. (For more detail, see p. 20.)

## **Summary of Amounts Owed to the United States Treasury**

Finding 1 (p. 8)	Pro-rata portion of the Surplus Matching Funds	\$ 40,372
Finding 2 (p. 16)	Matching Funds Received in Excess of Entitlement	\$ 134,900
<b>Total Due United States Treasury</b>		<b>\$ 175,272</b>

## Part IV

### Commission Findings

#### **Finding 1. Net Outstanding Campaign Obligations - Surplus**

##### **Summary**

The Audit staff's review of JSFP's financial activity through December 31, 2016, and estimated winding down costs indicated that the Candidate had a surplus of funds as of her DOI in the amount of \$200,856. Of this surplus amount, JSFP is required to make a pro rata repayment of \$40,372.

In JSFP's initial Statement of Net Outstanding Campaign Obligations (NOCO) filed during the matching fund period, cash on hand was understated and accounts payable and winding down expenses were both overstated. As such, JSFP's NOCO indicated an apparent deficit position and therefore eligible to receive matching funds. The Audit staff's analysis of the NOCO, however, determined that surplus funds were received and the Candidate was not eligible for all of the matching funds she received. The Preliminary Audit Report recommended that JSFP provide evidence that the Candidate did not have surplus funds as of her DOI.

In response to the Preliminary Audit Report recommendation, JSFP disagreed it was in a surplus position and stated if the disallowed ballot access costs and recently updated winding down estimates were considered, it would instead be in a deficit position and therefore, not be required to make a repayment. JSFP provided documentation and an updated NOCO to support its position. Based on this documentation and JSFP's 2017 and 2018 reported activity on Schedule B (Itemized Disbursements), the Audit staff updated its NOCO to reflect increased ballot access costs incurred prior to DOI and increased winding down actual costs. These adjustments reduced the repayment amount, but the revised NOCO still reflected a surplus position.

In response to the Draft Final Audit Report, JSFP maintained that it did not owe a repayment. No documentation was provided by JSFP to support this assertion.

The Commission determined that \$40,372 was repayable to the United States Treasury.

##### **Legal Standard**

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

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

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

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

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

- An expense that is:
  - Incurred by or on behalf of the candidate (or his or her campaign) during the period beginning on the day the individual becomes a candidate and continuing through the last day of the candidate's eligibility under 11 CFR §9033.5;
  - Made in connection with the candidate's campaign for nomination; and
  - Not incurred or paid in violation of any federal law or the law of the state where the expense was incurred or paid. 11 CFR §9032.9.
- An expense incurred for the purpose of determining whether an individual should become a candidate, if that individual subsequently becomes a candidate, regardless of when that expense is paid. 11 CFR §9034.4.
- An expense associated with winding down the campaign and terminating political activity. 11 CFR §9034.4(a)(3).

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

**E. Winding Down Costs.** A primary election candidate who runs in the general election must wait until 31 days after the general election before using any matching funds for winding down costs, regardless of whether the candidate receives matching funds for the general election.

11 CFR §9034.11(d).

**F. Documentation of Disbursements.** Each candidate shall have the burden of proving that disbursements made by the candidate and/or her authorized committee are qualified campaign expenses. 11 CFR §9033.11.

**G. Surplus.** The Commission may determine through audits and examinations that the candidate's net outstanding campaign obligations, as defined in 11 CFR §9034.5, reflect a surplus. When a surplus is identified, the candidate shall, within 30 days of the ineligibility date, repay to the United States Treasury an amount which represents the

amount of matching funds contained in the candidate's surplus. The amount shall be an amount equal to that portion of the surplus which bears the same ratio to the total surplus that the total amount received by the candidate from the matching payment account bears to total deposits made to the candidate's accounts. The Commission will provide the candidate with a written notice of its repayment determination.

11 CFR §§9038.2(b)(1)(ii) and (c)(1) and 9038.3(c)(1).

**H. Entitlement to Matching Payments after Date of Ineligibility.** If, on the date of ineligibility a candidate has net outstanding campaign obligations, as defined under 11 CFR §9034.5, that candidate may continue to receive matching payments for matchable contributions received and deposited on or before December 31<sup>st</sup> of the Presidential election year, provided that he or she still has net outstanding campaign debts on the day when the matching payments are made. 11 CFR §9034.1(b).

## Facts and Analysis

### A. Facts

The Candidate's DOI was August 6, 2016. The Audit staff reviewed JSFP's financial activity through December 31, 2016; analyzed actual and projected winding down costs;<sup>12</sup> and prepared the NOCO that appears below.

**Jill Stein for President**  
**Statement of Net Outstanding Campaign Obligations**  
**As of August 6, 2016**  
**As determined at August 31, 2018**

#### Assets

Cash in Bank	\$ 792,935 [a]	
Accounts Receivable	13,289	
Physical Assets @ 60% depreciation	<u>4,200</u>	
<b>Total Assets</b>		<b>\$ 810,424</b>

#### Liabilities

Accounts Payable for Qualified Campaign Expenses as of 8/6/16	\$ (237,602)	
Loan Payable as of 8/6/2016	( 40,000)	
Actual Winding Down Costs (12/9/16 – 8/31/18)	(262,611)	
Estimated Winding Down Costs (9/1/18 – 7/31/2019)	<u>( 69,355) [b]</u>	
<b>Total Liabilities</b>		<b><u>\$ (609,568)</u></b>

<b>Net Outstanding Campaign Obligations – Surplus</b>	<b><u>\$ 200,856</u></b>
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#### Footnotes to NOCO Statement:

- [a] Amount includes contributions dated prior to DOI and deposited after DOI.
- [b] Estimated winding down costs for future reportable periods only. This amount will be compared to actual winding down costs and will be adjusted accordingly. Estimated winding down presented in the Preliminary Audit Report was reduced from \$100,880 to \$69,335 to reflect the remaining winding down period.

<sup>12</sup> The actual winding down costs were reviewed through August 31, 2018, the last date JSFP provided banking and disbursement documentation to support its actual winding down expenses.

**i. Surplus Pro-Rata Repayment Calculation**

The Audit staff's NOCO calculations indicated there were surplus funds of \$200,856 as of DOI. Of this amount, \$40,372 ( $\$200,856 \times .2010^{13}$ ) is the pro-rata portion of the surplus that is repayable to the United States Treasury.

**ii. NOCO Differences:** The primary differences between JSFP's NOCO and the NOCO prepared by the Audit staff are discussed below:

**a. Cash In Bank**

The primary difference between the assets section of the NOCO presented above and those prepared by JSFP is the cash in bank balance. JSFP understated cash by \$313,079. Most of the understatement of cash represented funds received prior to the Candidate's DOI, but deposited after, with a majority consisting of contributions less than \$200 made by credit card. Further, a majority of these credit card contributions were included in JSFP's receipts database as contributions made to the primary election and were reported as unitemized contributions. The remaining difference pertained to outstanding disbursement checks that had not cleared the bank as of DOI that were not included in JSFP's cash in bank calculation. The understatement of assets caused the NOCO statements to show a larger deficit and matching fund entitlement than was the case.

**b. Accounts Payable for Qualified Campaign Expenses****1. Ballot Access Petitioning Expenses**

The primary difference between the accounts payable section of the NOCO presented on the previous page and those prepared by JSFP is with the amount of ballot access petitioning expenses.<sup>14</sup> JSFP included all ballot access petitioning expenses, including those incurred after DOI, thus overstating the amount calculated by the Audit staff by \$255,671.<sup>15</sup> As noted in the legal standards above, only expenses incurred on or before DOI can be considered qualified campaign expenses. Therefore, the Audit staff did not include ballot access petitioning expenses incurred after DOI in its calculation of the NOCO. Furthermore, in many instances, the incurrence dates of the ballot access petitioning expenses were not sufficiently documented by JSFP and JSFP made no additional documentation available. Due to the lack of documentation, the Audit staff also did not include these undocumented expenditures in its NOCO calculations.

<sup>13</sup> This figure (.2010), calculated pursuant to 11 CFR §9038.3(c)(1), represents JSFP's repayment ratio and was calculated by dividing the total matching funds received as of DOI (\$456,035) by the adjusted total deposits made to the candidate's accounts as of DOI (\$2,269,118). Therefore, the repayment ratio was  $\$456,035/\$2,269,118 = 20.10\%$ .

<sup>14</sup> Ballot access petitioning is required for all states when a minor party candidate seeks to be included on the general election ballot for the state. Each state has unique petitioning requirements and cutoff dates, and some dates were subsequent to the Candidate's DOI.

<sup>15</sup> The Audit staff's review of all disbursements paid post DOI also resulted in the identification of additional expenses unrelated to ballot access that were not included in JSFP's NOCO accounts payable section.

## 2. Winding Down Expenses

The Audit staff's initial calculation of actual winding down expenses excluded expenses that were not adequately documented by JSFP. As of the date of the Preliminary Audit Report, JSFP had not provided banking and supporting disbursement documentation for winding down expenses made after August 1, 2017. Therefore, the winding down expenses for the months not documented were initially reflected on the NOCO as \$0.<sup>16</sup> Estimated monthly winding down expenses only include future reporting periods.

JSFP's NOCO also included winding down expenses that were incurred after DOI but before the end of the expenditure report period, December 9, 2016, totaling \$42,727. Since the Candidate participated in the general election, the Audit staff considered disbursements on or before December 9, 2016<sup>17</sup> to be expenses pertaining to the general election, in accordance with 11 CFR §§9002.12(a) and 9034.11(d), and therefore did not include them on the NOCO as winding down expenses for the primary election.

Both winding down expense adjustments discussed above reduce the amount of liabilities on the NOCO and therefore reduce the amount of the matching funds entitlement.

### B. Preliminary Audit Report & Audit Division Recommendation

The Audit staff presented a preliminary NOCO statement and related work papers to the JSFP representative at the exit conference. The JSFP representative stated he would need to review the work papers to determine why all credit card contributions had not been included in the cash on hand in the NOCO. He also stated he disagreed with how the ballot access petitioning costs were allocated on the NOCO and stated he based this on previous audit reports. The representative stated it was his understanding that all ballot access costs were primary election expenses regardless of the date they were incurred. In response to the exit conference, the JSFP representative provided documentation to support that certain ballot access petitioning costs were incurred prior to DOI.

Subsequent to the exit conference, JSFP requested early consideration of two legal questions raised during the audit. The first question pertained to whether the Commission's original determination of the Candidate's DOI was proper. The second question was whether committees should be permitted to incur winding down expenses and other primary expenses after the DOI if they are clearly incurred to improve compliance with existing laws and regulations or if they are clearly required in the course of seeking the qualification for the ballot in various states.<sup>18</sup>

<sup>16</sup> As of the date of the Preliminary Audit Report, the excluded months were August 2017 through July 2018.

<sup>17</sup> General election date = November 8, 2016 + 31 days = December 9, 2016.

<sup>18</sup> Although JSFP's request purported to identify three separate questions for review, two of the questions raised the same essential issue, which is whether the Commission's original DOI determination was proper. Therefore, those two questions were consolidated into a single question.

The Commission concluded, by a vote of 4-0, to reaffirm JSFP's original DOI as August 6, 2016.<sup>19</sup>

The Preliminary Audit Report recommended that JSFP provide evidence that the audited NOCO was not in a surplus position. Absent such evidence, the Audit staff stated it would recommend that the Commission make a determination that \$66,196, representing the pro-rata portion of the surplus, was repayable to the United States Treasury.

### **C. Committee Response to Preliminary Audit Report**

In response to the Preliminary Audit Report recommendation, JSFP continued to maintain its position that ballot access laws in each state should dictate which expenses qualify as qualified campaign expenses for the primary election, and not necessarily the candidate's DOI. The Commission, however, concluded by a vote of 4-0 that JSFP's DOI was August 6, 2016. As noted in the legal standards above, only expenses incurred on or before DOI can be considered qualified campaign expenses. Therefore, the Audit staff did not include ballot access petitioning expenses incurred after DOI in its calculation of the NOCO.

JSFP also provided documentation and an updated NOCO, which, when compared to its initial NOCO, reflected an overall increase in total assets of \$332,051, the majority of which included an increase in cash on hand of \$314,561. The Audit staff concurred with \$313,079, with the difference of \$1,482 being JSFP's overstatement of cash on hand.

JSFP's updated NOCO also included an overall increase in total obligations of \$294,820, all of which pertained to "estimated winding down expenses" that JSFP's NOCO reflected as \$516,789. JSFP did not provide a listing to support all of the winding down expenses to justify an increase. JSFP provided bank statements for primary and general election bank accounts only, some check copies written on primary, general and recount bank accounts, and accounting and payroll listings of selected expenses paid in 2017 and 2018. However, none of this documentation included election designation information. This was important because JSFP paid certain winding down expenses, such as salary, that were fully documented with payroll processing reports but those reports did not include the amount allocated to the primary election for each pay-period and/or employee. To supplement JSFP's documentation, the Audit staff used its reports filed with the Commission to calculate the amount allocated by JSFP to the primary election. The Audit staff's analysis resulted in additional actual winding down expenses of \$123,967 and a reduction in the estimated winding down expenses of \$31,525.

In addition to the analysis of winding down expenses, the Audit staff also reviewed invoices that were previously submitted and identified additional accounts payable expenses totaling \$36,035.

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<sup>19</sup> JSFP presented no argument in its Request for Consideration of a Legal Question regarding the second question, however, the response to this question is addressed directly in the Commission's regulations. The regulations provide for the payment of winding down costs, i.e. costs associated with the termination of political activity, including compliance with statutory post-election requirements and other specifically defined administrative costs. 11 CFR §§ 9034.4(a)(3) and 9034.11. Because the regulations directly address the payment of winding down costs, there was no need for the Commission to reach a determination on the second question in the request.

Although the Audit staff could not confirm JSFP's total obligations increase, it did verify additional accounts payable based on invoices, totaling \$36,035, additional actual winding down expenses totaling \$123,967, and a reduction in estimated winding down expenses of \$31,525, for a net increase in obligations of \$128,477 (\$36,035 + 123,967 – 31,525), and updated the NOCO above accordingly.

The updated NOCO reduced the amount of the surplus from \$329,333 to \$200,856 however, a pro-rata repayment of the surplus was still required.

#### **D. Draft Final Audit Report**

The Draft Final Audit Report acknowledged JSFP's response to the Preliminary Audit Report. Based on that response the Audit staff updated the NOCO, which reduced the amount of the surplus. The Audit staff calculated a pro-rata repayment of the surplus as \$40,372 (\$200,856 X .2010).

#### **E. Committee Response to Draft Final Audit Report**

In response to the Draft Final Audit Report, JSFP maintained that it did not owe a repayment. According to JSFP, if the audited NOCO had included additional winding down costs, totaling \$258,973, the Candidate's NOCO would have reflected a deficit amount totaling \$58,117, and ultimately no repayment to the United States Treasury would be required. No documentation was provided by JSFP to support its assertion.

#### **Commission Conclusion**

On March 27, 2019, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission make a determination that a pro rata repayment of \$40,372 is repayable to the United States Treasury.<sup>20</sup>

The Commission approved the Audit staff's recommendation.

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<sup>20</sup> JSFP also requested that the Commission delay making a repayment determination to give it an opportunity to work with the Audit staff to resolve discrepancies it purports exist in the NOCO statement. The Commission rejected this request for a delay.

## **Finding 2. Matching Funds Received in Excess of Entitlement**

### **Summary**

The Audit staff's NOCO statement, as presented in Finding 1, indicated a surplus position, as of August 6, 2016, the Candidate's DOI. Therefore, JSFP was not entitled to the matching fund payment of \$134,900, it subsequently received on January 18, 2017. The Preliminary Audit Report recommended that JSFP provide evidence that the Candidate did not have surplus funds as of her DOI.

In response to the Preliminary Audit Report recommendation, JSFP provided documentation and an updated NOCO, and stated that it was entitled to all matching fund payments due to its increased winding down expenses, even if previously disallowed ballot access and other expenses were not considered. After the Audit staff incorporated the expenses that were documented as pertaining to the primary election into its revised NOCO, JSFP was still in a surplus position and therefore not entitled to the matching fund payment it received after the Candidate's DOI.

In response to the Draft Final Audit Report, JSFP disagreed that the Candidate was in a surplus position. JSFP did not provide any documents to support its assertion.

The Commission determined that \$134,900 was repayable to the United States Treasury.

### **Legal Standard**

**A. Entitlement to Matching Payments after Date of Ineligibility.** If, on the date of ineligibility a candidate has net outstanding campaign obligations as defined under 11 CFR §9034.5, that candidate may continue to receive matching payments for matchable contributions received and deposited on or before December 31<sup>st</sup> of the Presidential election year, provided that he or she still has net outstanding campaign debts on the day when the matching payments are made. 11 CFR §9034.1(b).

**B. Repayments.** The Commission may determine that certain portions of the payments made to a candidate from the matching payment account were in excess of the aggregate amount of payments to which such candidate was entitled. Examples of such excessive payments include, but are not limited to, payments made to the candidate after the candidate's date of ineligibility where it is later determined that the candidate had no net outstanding obligations. 11 CFR §§9034.5 and 9038.2 (b)(1)(i).

### **Facts and Analysis**

#### **A. Facts**

On January 18, 2017, JSFP received its only post-DOI matching fund payment of \$134,900. The Audit staff's NOCO calculations indicated, however, that JSFP was in a surplus position as of DOI and was not entitled to receive additional matching funds (see Finding 1, p. 8). Therefore, JSFP is required to make a dollar for dollar repayment of this entire matching fund payment to the United States Treasury.

**B. Preliminary Audit Report & Audit Division Recommendation**

The Audit staff presented this matter to the JSFP representative at the exit conference in conjunction with the presentation of the audit calculated NOCO discussed in Finding 1 above. JSFP's response pertaining to receipt of matching funds in excess of entitlement is also detailed in Finding 1 above.

The Preliminary Audit Report recommended that JSFP provide evidence that it did not receive matching funds in excess of entitlement. Absent such evidence, the Audit staff stated it would recommend that the Commission make a determination that \$134,900 was repayable to the United States Treasury.

**C. Committee Response to Preliminary Audit Report**

In response to the Preliminary Audit Report recommendation, JSFP provided documentation and an updated NOCO, and stated that even if all ballot access and other previously disallowed expenses were not considered primary election expenses, JSFP was still entitled to all matching fund payments it received due to its updated projections for winding down expenses

**D. Draft Final Audit Report**

The Draft Final Audit Report acknowledged JSFP's response but the Audit staff continued to disagree that JSFP was entitled to the matching fund payment it received after DOI. As discussed in Finding 1 above, after the Audit staff incorporated the expenses that could be documented as pertaining to the primary election into its revised NOCO, JSFP was still in a surplus position and therefore not entitled to the matching fund payment of \$134,900, it received after the Candidate's DOI.

**E. Committee Response to Draft Final Audit Report**

In response to the Draft Final Audit Report, JSFP disagreed that the Candidate was in a surplus position. JSFP explained that it experienced confusion with respect to initial bank balances, ballot access costs and its calculation of winding down expenses at the time it submitted its last matching fund request, but JSFP still considered the NOCO balance to be in a deficit position. JSFP did not provide any documents to support its assertion.

**Commission Conclusion**

On March 27, 2019, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission make a determination that \$134,900 is repayable to the United States Treasury.

The Commission approved the Audit staff's recommendation.

**Finding 3. Misstatement of Financial Activity****Summary**

During audit fieldwork, a comparison of JSFP's reported financial activity with its bank records revealed a misstatement of receipts and disbursements for 2015 and 2016 and a misstatement of ending cash on hand in 2016. In 2015, JSFP understated its reported receipts and disbursements by \$31,495 and \$35,042 respectively; and in 2016, JSFP

understated its reported receipts, disbursements and ending cash on hand by \$996,384, \$800,310 and \$192,527 respectively. The Preliminary Audit Report recommended that JSFP amend its disclosure reports to correct the misstatements.

In response to the Preliminary Audit Report recommendation and the Draft Final Audit Report, JSFP stated it was in the process of amending its reports to correct the misstatements, but to date, no amended reports have been filed.

The Commission approved a finding that JSFP misstated its financial activity for calendar years 2015 and 2016.

### Legal Standard

**Contents of Reports.** Each report must disclose:

- the amount of cash on hand at the beginning and end of the reporting period;
- the total amount of receipts for the reporting period and for the calendar year;
- the total amount of disbursements for the reporting period and for the calendar year;
- and certain transactions that require itemization on Schedule A (Itemized Receipts) or Schedule B (Itemized Disbursements). 52 U.S.C. §30104(b)(1), (2), (3), (4) and (5).

### Facts and Analysis

#### A. Facts

As part of audit fieldwork, the Audit staff reconciled JSFP's reported activity<sup>21</sup> with its bank records for calendar years 2015 and 2016. The reconciliation revealed that JSFP misstated its receipts and disbursements for both years. The following charts outline the discrepancies between JSFP's disclosure reports and its bank records.

2015 Reported Activity to Bank Activity			
	Reported	Bank Records	Discrepancy
Beginning Cash on hand @ January 1, 2015	\$0	\$0	\$0
Receipts	\$244,196	\$275,691	\$31,495 Understated
Disbursements	\$221,985	\$257,027	\$35,042 Understated
Ending Cash on hand @ December 31, 2015	\$22,211	\$18,664	\$3,547 Overstated

The understatement of receipts resulted from the following:

• Contributions from individuals not on reports	+ \$43,877
• Unexplained difference	- <u>12,382</u>
<b>Net Understatement of Receipts</b>	+ <u>\$31,495</u>

<sup>21</sup> Due to JSFP's consolidated reporting as one entity for primary, general and recount activity; the incorrect identification of election designations on the reports; the missing election designation information in some of the database records; and the large volume of transactions not required to be itemized, it was impossible for the Audit staff to exclude the general and recount activity from this reconciliation, especially during the post DOI period, which was August 7, 2016 through December 31, 2016.

The understatement of disbursements resulted from the following:

• Payments for salaries and wages not reported	+	\$45,364
• Disbursements reported but did not clear the bank	-	14,903
• Credit card fees not reported	+	4,455
• Miscellaneous disbursements not reported	+	126
<b>Net Understatement of Disbursements</b>	+	<u>\$35,042</u>

The \$3,547 overstatement of the ending cash on hand resulted from the misstatements described above.

2016 Reported Activity to Bank Activity <sup>22</sup>			
	Reported	Bank Records	Discrepancy
Beginning Cash on hand @ January 1, 2016	\$22,211	\$18,664	\$3,547
Receipts	\$10,951,133	\$11,947,517	\$996,384 <sup>23</sup> Understated
Disbursements	\$10,868,212	\$11,668,522	\$800,310 <sup>24</sup> Understated
Ending Cash on hand @ December 31, 2016	\$105,132	\$297,659	\$192,527 Understated

The understatement of receipts resulted from the following:

• Contributions from individuals not reported	+	\$565,893
• Contributions from individuals reported, not supported by bank deposit	-	128,420
• Offsets to operating disbursements not reported	+	6,328
• In-kind contributions not reported as a receipt	+	247
• Interest Income underreported	+	25
• Unexplained difference <sup>25</sup>	+	<u>552,311</u>
<b>Net Understatement of Receipts</b>		<u>\$996,384</u>

The understatement of disbursements resulted from the following:

• Credit card fees not reported	+	\$451,344
• Disbursements to vendors not reported	+	365,676
• Disbursements reported but did not clear the bank	-	74,774
• Disbursements directly from Paypal receipts, not reported	+	35,762
• Payments for salaries and wages, not reported	+	27,000
• In-kind contributions not reported as disbursement	+	247
• Unexplained difference	-	<u>4,945</u>
<b>Net Understatement of Disbursements</b>		<u>\$800,310</u>

<sup>22</sup> This activity represents primary election, general election and recount activity. See Committee Structure, p. 1.

<sup>23</sup> General election and recount activity represents \$815,959, or 82% of the understated receipts totals.

<sup>24</sup> General election and recount activity represents \$688,355 or 86% of the understated disbursement totals.

<sup>25</sup> Due to the volume of contributions and an incomplete receipts database from JSFP, the specific individual contributors could not be identified; however, it appeared that the majority of this unexplained difference pertained to deposits in the bank made after the general election.

The \$192,527 understatement of the ending cash on hand resulted from the misstatements described above.

**B. Preliminary Audit Report & Audit Division Recommendation**

The Audit staff presented this matter to the JSFP representative at the exit conference along with schedules detailing the discrepancies. During the exit conference, the JSFP representative stated he had no explanation for the discrepancies but would research and determine if there was a pattern that would explain the cause. In its response to the exit conference, JSFP made no comment on this finding.

The Preliminary Audit Report recommended that JSFP amend its disclosure reports to correct the misstatements.

**C. Committee Response to Preliminary Audit Report**

In response to the Preliminary Audit Report recommendation, JSFP stated it was in the process of making the necessary amendments to correct the misstatements.

**D. Draft Final Audit Report**

The Draft Final Audit Report outlined that no amended reports had been filed to correct the misstatement.

**E. Committee Response to Draft Final Audit Report**

In response to the Draft Final Audit Report, JSFP stated it was in the process of amending its reports to correct the misstatements, but to date, no amended reports have been filed.

**Commission Conclusion**

On March 27, 2019, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission find that JSFP misstated its financial activity for calendar years 2015 and 2016.

The Commission approved the Audit staff's recommendation.

**Finding 4. Disclosure of Debts and Obligations****Summary**

During audit fieldwork, the Audit staff identified debts totaling \$17,015 not disclosed on Schedule D-P (Debts and Obligations), as required. The Preliminary Audit Report recommended that JSFP amend its reports to disclose the outstanding debt.

In response to the Preliminary Audit Report recommendation and the Draft Final Audit Report, JSFP stated it was in the process of amending its reports to correct the disclosure of debts and obligations, but to date, no amended reports have been filed.

The Commission approved a finding that JSFP did not disclose debts and obligations totaling \$17,015.

**Legal Standard**

**A. Continuous Reporting Required.** An authorized committee must disclose the amount and nature of outstanding debts and obligations until those debts are extinguished. 52 U.S.C. §30104(b)(8) and 11 CFR §§104.3(d) and 104.11(a).

**B. Separate Schedules.** An authorized committee must file separate schedules for debts owed by and to the committee with a statement explaining the circumstances and conditions under which each debt and obligation was incurred or extinguished. 11 CFR §104.11(a).

**C. Itemizing Debts and Obligations.**

- Once it has been outstanding 60 days from the date incurred, a debt of \$500 or less must be reported on the next regularly scheduled report.
- A debt exceeding \$500 must be disclosed in the report that covers the date on which the debt was incurred, except reoccurring administrative expenses (such as rent) shall not be reported as a debt before the payment due date. 11 CFR §104.11(b).

**D. Disputed Debts.** A disputed debt is a bona fide disagreement between the creditor and the committee as to the existence of a debt or the amount owed by the committee. Until the creditor and committee resolve the dispute (assuming the creditor did provide something of value), the committee must disclose:

- The amount the committee admits it owes;
- The amount the creditor claims is owed; and
- Any amounts the committee has paid the creditor. 11 CFR §116.10.

**Facts and Analysis****A. Facts**

During audit fieldwork, the Audit staff used the available disbursement records to reconcile the accounts of JSFP's largest primary election vendors, including accounts payable expenses for the NOCO. The Audit staff identified debts owed to these vendors totaling \$17,015, that were not disclosed on Schedule D-P, as required. For one transaction, totaling \$13,114, the majority of the error pertained to the disputed debt with one advertiser that was initially invoiced to JSFP for services in August 2016 and was ultimately paid in January 2017. During audit fieldwork, a JSFP representative stated the amount of this invoice had been in dispute, but agreed that this debt should have been reported until the final invoice amount was negotiated and paid.

**B. Preliminary Audit Report & Audit Division Recommendation**

The Audit staff presented this matter to the JSFP representative at the exit conference and provided schedules detailing the unreported debts for each relevant reporting period. This matter was discussed with the JSFP representative during fieldwork and at the exit conference. The representative stated he was familiar with the matter and understood the finding. In its response to the exit conference, JSFP made no comment on this finding.

The Preliminary Audit Report recommended that JSFP provide documentation demonstrating that the amount owed, of \$17,015, did not require reporting as debt on

Schedule D-P. Absent such documentation, the Preliminary Audit Report recommended that JSFP amend its reports to disclose the outstanding debt and continue to disclose it until extinguished.

**C. Committee Response to Preliminary Audit Report**

In response to the Preliminary Audit Report recommendation, JSFP stated it was in the process of making the necessary amendments to correct the disclosure of debts and obligations.

**D. Draft Final Audit Report**

The Draft Final Audit Report indicated that no amended reports had been filed to correct the disclosure of debts and obligations.

**E. Committee Response to Draft Final Audit Report**

In response to the Draft Final Audit Report, JSFP related it was in the process of amending its reports to correct the disclosure of debts and obligations, but to date, no amended reports have been filed.

**Commission Conclusion**

On March 27, 2019, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission find that JSFP did not disclose debts and obligations totaling \$17,015.

The Commission approved the Audit staff's recommendation.

LAW OFFICE OF  
**HARRY KRESKY**

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June 17, 2019

BY EMAIL AND REGULAR MAIL

Federal Election Commission  
999 E Street NW  
Washington, DC 201463

Re: Response to Final Audit Report

Dear Sir or Madam:

This office represents the Jill Stein for President Committee (the “Committee”) and submits this response to the Federal Election Commission’s (the “Commission”) final audit report (the “report”) transmitted by letter dated April 17, 2019.

The pivotal issue in this matter is the status of necessary and anticipated ballot access expenses incurred after the purported Date of Ineligibility (“DOI”). The Committee submits that these expenses are reimbursable under the primary matching funds program (the “program”). The Commission seeks repayment of money received by the Committee for them. The Committee questions the DOI applied by the Commission and its rationale for disallowing reimbursement.

For the reasons set forth below, the establishment of an August 6, 2016 DOI was arbitrary, capricious and contrary to the letter and intent of the matching funds program and its past interpretation and application. The Commission’s position that matching funds paid for ballot access and related activities carried out after that date must be repaid is irrational and contrary to the applicable regulations, law and constitutional principles.

The Committee will demonstrate herein that were reimbursement of these ballot access and related expenses allowed, no repayment would be called for. In addition, it will be shown that the other findings concerning the nature of winding down expenses, misstatement of financial activity and disclosure of debts and obligations likewise cannot survive scrutiny.

The establishment of the DOI- In its “Response to a Request for Consideration of a Legal Question” dated February 28, 2018, the Commission notes that, in addition to the Green Party nomination, Jill Stein also sought the nomination of parties that did not have a national nominating convention and, therefore, settled on the date of the later of the Green Party nominating conventions (“August 7, 2016”) or the last major party nominating convention which was before the Green Party convention. But then in the final audit report, it gave the date as August 6, 2016, the supposed date of the Green Party convention. These and the other

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inconsistencies described below affect not only the DOI, but the status of funds expended for ballot access under the program.

In a series of advisory opinions dating back to 1975, the Commission expressed its commitment “to construe the provisions of the Act in a manner consistent with Constitutional requirements, regardless of a candidate’s party affiliation or independent status.” It found that “the petition process required of the presidential candidates of the minor parties as the equivalent of the primary elections and convention process of the major party candidates.” AO 1975-44.

In AO 1975-53 the Commission held that in the case of a campaign for Senate, the DOI was the later of the last day to file a nominating petition for a place on the general election ballot or the date of the last major party primary.

The position taken by the Commission in these cases is consistent with 11 CFR 100.2(c)(4):

“With respect to individuals seeking federal office as independent candidates, or without nomination by a major party (as defined in 26 U.S.C. 9002(6)), the primary election is considered to occur on one of the following dates, at the choice of the candidate:(i) The day prescribed by applicable State law as the last day to qualify for a position on the general election ballot may be designated as the primary election for such candidate.(ii) The date of the last major party primary election, caucus, or convention in that State may be designated as the primary election for such candidate.(iii) In the case of non-major parties, the date of the nomination by that party may be designated as the primary election for such candidate.”

(emphasis added)

The application of these principles would require the Commission to accept the Committee contention that the DOI was the date of the petition filing deadline of the last state in which it sought ballot access, and funds so expended for ballot access were matchable until that date. The position taken by the Commission in the instant matter deviates from this principal and, consequently from the commitment to construe FECA in a manner consistent with U.S. Constitution.

In subsequent years the Commission abandoned this principle of parity with major party candidates in applying the matching fund program to the presidential campaigns of independent and minor party candidates. Thus, in AO 1984-11 the Commission ruled that the DOI of a candidate seeking the nomination of one or more minor parties is “the earlier of (1) the last date when Mr. Serrette is nominated by any political party on the state level, or (2) the last day of the last national convention held by a major political party in 1984.” Thus, funds expended on ballot

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access (i.e. petition for a place on the ballot) incurred in petition drives after the DOI would not be reimbursed:

“In Mr. Serrette's situation, expenditures will apparently be made to collect petition signatures for the general election ballot. The Commission is of the opinion that these expenses, to the extent they are paid or incurred within what would be Mr. Serrette's matching payment period if he becomes eligible for matching funds, would be qualified campaign expenses for purposes of the Matching Payment Act.”

*See also*, AO 1984-25 and AO 2000-18.

The Commission has articulated no reason for deviating from its previous commitment to parity and its invocation of the need “to construe the provisions of the Act in a manner consistent with Constitutional requirements, regardless of a candidate’s party affiliation or independent status.” The consequence is dramatic. A major party candidate who secures the nomination of a major party (with the help of primary matching funds) faces no hurdles to or further expenses to insure his or her appearance on the ballot of all fifty states. A minor party or independent candidate must continue to incur the expenses of ballot access in numerous states after the DOI. The Committee’s January 12, 2018 submission identified 25 such states.

That submission claimed that the Committee relied on AO 1995-45 (sought by the Presidential campaign of minor party candidate Dr. John Hagelin in planning its effort with the assumption that ballot access expenditures in those states would be matched.) In that Advisory Opinion the Commission stated:

“It has long been the view of the Commission that, for non-major party candidates, the process by which they satisfy the requirements of State law governing qualification for a position on the general election ballot serve purposes similar to a primary election or other nominating process. See Advisory Opinions 1984-11 and 1975-44. This view is supported by the Commission regulations defining the term "election," which state that, for non-major party and independent candidates, the day prescribed by applicable State law as the last day to qualify for a position on the general election ballot may be designated as the primary election for such candidate. 11 CFR 100.2(c)(4)(i). Based on this reasoning, the Commission concluded in Advisory Opinions 1984-25 and 1984-11, that the ballot access expenses of candidates for minor party nominations would be qualified campaign expenses.”

Indeed, Dr. Jill Stein’s 2012 presidential campaign received matching funds for ballot access expenses in each state where it was sought and no repayment was required. Moreover, the DOI that cycle was a month later, September 6, 2012.

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Constitutional considerations- Just as the Constitution mandates equal treatment of minor party and independent campaigns under FECA, it forbids discrimination against them in the allocation of public monies. Thus, in *Riddle v. Hickenlooper*, 742 F.3d 922 (10th Cir. 2014), the Court of Appeals held that a campaign finance program that favored major party candidates over others violated the equal protection clause of the U.S. Constitution. Cf. *Green Party of Conn. v. Garfield*, 616 F.3d 213 (2d Cir. 2010).

Further, a decision by the Commission which is arbitrary and capricious will not pass judicial muster. *Common Cause v. FEC*, 906 F.2d 705 (D.C. Cir. 1990). In *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1044-45 (D.C. Cir. 2002); modified in *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537 (2002), the Court of Appeals, in scrutinizing new rules issued by the Federal Communications Commission, stated:

“The Commission may, of course, change its mind, but\_ it must explain why it is reasonable to do so. See [\*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.\*, 463 U.S. 29, 57, 77 L. Ed. 2d 443, 103 S. Ct. 2856 \(1983\)](#) An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.”); [\*Telecomm. Research and Action Ctr. v. FCC\*, 255 U.S. App. D.C. 287, 801 F.2d 501, 518 \(D.C. Cir. 1986\)](#).

“The Commission now argues that the refusal of the Congress to allow the agency to implement the *1984 Report* and its decision in the 1996 Act to retain an ownership cap rendered irrelevant the views the Commission expressed in the *1984 Report*. When the Congress in 1996 directed the Commission periodically to review the ownership cap, however, it did nothing to preclude the Commission from considering certain arguments in favor of repealing the cap -- including the arguments the Commission had embraced in 1984. So long as the reasoning of the *1984 Report* stands un rebutted, the Commission has not fulfilled its obligation, upon changing its mind, to give a reasoned account of its decision.”

Here, the Commission provides no rationale for its deviation from its earlier commitment to parity between major party candidates and minor party or independent ones.

As will be demonstrated in a further submission coming directly from the Committee, were it not for the improper imposition of the August 6, 2016 DOI, no repayment would be called for.

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A hearing before the Commission is request to address issues pertaining to the DOI.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'HK' or a stylized 'K' with a horizontal stroke.

Harry Kresky

cc: Steven Welzer, Treasurer

Emery Celli Brinckerhoff & Abady LLP  
Litigation Counsel

DATE: June 17, 2019

TO: Federal Election Commission  
1050 First St, NE  
Washington, DC 20463

FROM: Jill Stein for President  
Compliance Department  
PO Box 260197  
Madison, WI 53726

SUBJECT: Committee Response to Final Audit Report (FAR)

Mary Moss,

Enclosed is a copy of the Committee's response (including the materials provided by the Law Office of Harry Kresky) to the Final Audit Report findings sent April 17, 2019. Should there be any difficulties accessing these records, please contact Matt Kozlowski, Director of Compliance, at [Finance@Jill2016.com](mailto:Finance@Jill2016.com).

Sincerely,

Steven Welzer  
Treasurer  
Jill Stein for President

## Ballot Access Expenditures – DOI Impact

### Ballot Access Costs – Post DOI

Following August 6<sup>th</sup>, 2016, the Jill Stein for President Campaign expended \$310,477.48 in direct expenses in support of ballot access petitioning activities. These expenses included the costs of paying petitioners for ballot signatures, printing costs, filing fees, and other such direct expenses. Note: this figure does not include any costs of supervision, national staff support for such operations, office expenses, or other associated costs that would be included in an adjusted DOI for the committee.

In the findings presented by the audit staff, a total of \$255,671 in such expenses were identified as not being qualified expenditures due to the date when these costs were incurred.

Given these figures, and the determination of NOCO surplus, these costs exceed the amount determined to be in surplus per the Commission's findings prior to any other adjustments to DOI, winding down costs, or other such adjustments.

### Finding 3. Misstatement of Financial Activity

Utilizing the schedules and details provided by the Audit Division, the Committee has finalized all such amendments to update disclosures of financial activity. The Committee has begun the process of uploading these amendments via filing software.

### Finding 4. Disclosure of Debts and Obligations

Utilizing the schedules and details provided by the Audit Division, the Committee has finalized all such amendments to update disclosures of debts and obligations. The Committee has begun the process of uploading these amendments via filing software.



## APPEARANCES:

On Behalf of the Federal Election Commission:

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On Behalf of Jill Stein for President Committee:

HARRY KRESKY, ESQ.  
Law Offices of Harry Kresky  
2600 Netherland Avenue, Suite 3104  
Riverdale, New York 10463

Also Present:

JILL STEIN  
NASSIM NOURI, Campaign Volunteer  
JOHN ANDREWS, Campaign Volunteer

1 P R O C E E D I N G S

2 HEARING OFFICIAL: Good morning. The oral hearing  
3 for the Jill Stein For President will now come to order. I  
4 want to remind everyone that for today's regular open  
5 meeting, it will begin 15 minutes, excuse me, after the  
6 conclusion of this hearing.

7 This hearing will be conducted pursuant 11 C.F.R.  
8 section 9038.2(c)2. Jill Stein For President is the  
9 principal campaign committee of former presidential  
10 candidate Dr. Jill Stein. The committee requested  
11 administrative review of the Commission's determination that  
12 the committee must repay public matching funds in the amount  
13 of \$175,272 to the United States Treasury. As part of its  
14 administrative review request, the committee requested this  
15 oral hearing, which was granted by the Commission on January  
16 22nd of 2021.

17 Before us today, we have Mr. Harry Kresky, counsel  
18 for the committee, along with former presidential candidate  
19 Dr. Jill Stein, and campaign volunteers Ms. Nassim Nouri and  
20 Mr. John Andrews. And I want to say welcome to all of you.

21 Representing the Commission we have from our  
22 Office of General Counsel Mr. Joshua Bloom, Ms. Jennifer  
23 Waldman, Mr. Lorenzo Holloway and Mr. Neven Stipanovic.

24 The Commission's consideration of the repayment  
25 issue in this matter has an extensive history so I'll first

1 provide a little background.

2           The Green Party nominated Dr. Stein as its  
3 presidential candidate on August the 6th, 2016 during its  
4 national nominating convention. Shortly after the  
5 convention, the Commission concluded that Dr. Stein's date  
6 of ineligibility was August the 6th, the date of the  
7 nomination.

8           The date of ineligibility, DOI for short, is a  
9 term mentioned numerous times in the Commission's  
10 regulations and refers to the ending date of the matching  
11 payment period.

12           The committee challenged the Commission's DOI  
13 determination on two separate occasions, and each time the  
14 Commission affirmed that the DOI was August the 6th of 2016.

15           The question of whether of Dr. Stein's DOI should  
16 be later than August 6th is significant because the  
17 determination of the DOI controls the magnitude of the  
18 committee's repayment obligation.

19           On April 16th, 2019, the Commission completed its  
20 audit of the committee's activities during the 2015/2016  
21 presidential election cycle and issued its final audit  
22 report. The audit report concluded that the committee had  
23 to repay \$175,272 to the United States Treasury because the  
24 committee had surplus campaign funds as of the DOI and had  
25 received excess public funds after that date.

1           Once the Commission issues a final audit report, a  
2 publicly financed candidate, such as Dr. Stein, may seek  
3 administrative review of the Commission's repayment  
4 determination, and the committee has exercised that option  
5 here on her behalf.

6           The sole purpose of today's hearing is to give the  
7 committee an opportunity to address through the Commission  
8 and to demonstrate that no repayment or a lesser repayment  
9 is required.

10           In past oral hearings regarding repayment  
11 determinations, we have given the committee's representative  
12 up to 30 minutes for an opening presentation. I suspect  
13 that counsel might not need that much time this morning, but  
14 we do want to make sure that the committee is treated the  
15 same as others who have come before us to challenge  
16 repayment determinations.

17           Counsel, your presentation should be limited to  
18 those matters raised in the committee's written response to  
19 the Commission's repayment determination that you filed on  
20 June 17th, 2019. The administrative review process set  
21 forth in 11 C.F.R section 9038 .2(c)2 allows for challenges  
22 to repayment determinations. Accordingly, this hearing is  
23 not a proper forum to address other challenges.

24           At the conclusion of the committee's presentation,  
25 each Commissioner will have the opportunity to ask

1 questions. I will then ask the General Counsel and the  
2 audit division if they have any questions. At the end of  
3 today's hearing, you'll have the opportunity to make a  
4 closing statement.

5 After this hearing, the committee will have five  
6 days in which to submit additional materials for Commission  
7 consideration. Pursuant to 11 C.F.R. section 9038.2(c)3,  
8 the Commission will then make a repayment determination  
9 following an administrative review and issue a statement of  
10 reasons in support of that determination.

11 And counsel, if you'd like, it's time for you to  
12 proceed your presentation. Thank you.

13 MR. KRESKY: Thank you, Madam Chair. Can  
14 everybody hear me? I'm Harry Kresky. Good morning. I'm  
15 the attorney for the Jill Stein For President Committee  
16 2016.

17 The repayment that we're considering today is  
18 based on a date of ineligibility, a DOI, that's unsupported  
19 by law, logic, and precedent. It undermines the effort to  
20 achieve a fair balance between candidates of the major  
21 parties and independent and minor party presidential  
22 candidates. It ignores the fact that unlike major party  
23 candidates whose nomination guarantees them a ballot line in  
24 all 50 states, candidates like Dr. Stein have to undergo an  
25 extended effort to petition for a place on the ballot for

1 weeks after receiving a minor party nomination. A system  
2 that does not take this into account is unjustifiable as a  
3 matter of law and public policy.

4 A candidate seeking a major party nomination can  
5 receive matching funds throughout his or her effort to win  
6 their party's nomination. If the DOI of a minor party  
7 candidate is the date of their nominating convention, he or  
8 she is deprived of matching funds at the very point where  
9 the arduous and expensive effort to achieve ballot status --  
10 ballot access -- intensifies. In light of the realities of  
11 independent and minor party presidential campaigns, the only  
12 fair framework is one that assures that funds expended on  
13 ballot access are matchable regardless of convention dates  
14 of the various parties, major and minor.

15 The final -- excuse me -- the final audit report  
16 states on page 11 that the candidate's DOI was August the  
17 6th, 2016. That was the date of the Green Party convention.  
18 However, this is inconsistent with a series of Advisory  
19 Opinions issued by the Commission dating back to 1975.

20 In AOR 1975-53, the Commission stated, "with  
21 respect to individuals seeking a ballot position in the  
22 general election for federal office without nomination by a  
23 party, a primary election shall be deemed to have occurred  
24 when the day prescribed by applicable state law as the last  
25 day to qualify for a petition on the general election

1 ballot, or the date of the last major party convention" --  
2 I'm sorry -- "major party primary election, whichever is  
3 later."

4           A source of confusion may have been AOR 1975-44  
5 where the issue was how to apply limits to campaign  
6 donations. There, the Commission, in an effort to having  
7 uniform limit for various campaigns, stated "Accordingly,  
8 for the purpose applying the limitations in 18 U.S.C.  
9 Section 608, the Commissioner will view the petition process  
10 required of the presidential candidates of the minor parties  
11 as the equivalent of the primary elections and convention  
12 process of the major party candidates. Therefore, an  
13 individual may contribute \$1,000 to a presidential candidate  
14 of a minor party for his or her petition effort and another  
15 \$1,000 to the candidate for his or her general election  
16 effort.

17           "Since the dates pertaining to petition  
18 qualification vary from state to state, the Commission  
19 considers it necessary to prescribe a uniform date when for  
20 purposes of 18 U.S.C. 608(b), the petition process ends for  
21 minor party presidential candidates. The Commission  
22 concludes that the prescribed date should be when the  
23 presidential nominee last selected before the general  
24 election is nominated by a national nominating convention of  
25 a major party."

1           This seeming contradiction can be reconciled by  
2 recognizing that AOR 1975-44 applies to the question of how  
3 to uniformly apply contribution limitations. That is not  
4 the issue in the case at bar. Rather, it is when  
5 expenditures by the 2016 Stein Campaign cease to be  
6 matchable. AOR 1975-53 governs in that case.

7           The question turns on the particularities of the  
8 2016 Stein Campaign and those of other candidates. Unlike  
9 the issue of allowing expenditures for ballot access to be  
10 matched, the issue of when general election contributions  
11 can be allowed -- are allowed -- can be uniformly applied to  
12 all candidates without inherently prejudicing minor party  
13 and independent candidates.

14           There was an argument to be made for uniformity in  
15 the application of contribution limits that in no way  
16 applies to the qualification of funds used to a ballot  
17 access to be matched by the federal government. Dr. Stein's  
18 2012 campaign was able to utilize as its DOI, the last day  
19 to petition, in states where the Green Party did not have  
20 ballot access. That date that year happened to coincide  
21 with the date of the last major party nominating convention.  
22 That was not the case in 2016.

23           Pegging the DOI for a minor party candidate to the  
24 date of a major party convention introduces an unacceptable  
25 element of arbitrariness. If expenditures for ballot access

1 are matchable, that should be the case regardless of when  
2 the candidate in question, or any other candidate, receives  
3 the party nomination.

4           Indeed, the coincidence of the two dates in 2012  
5 created a situation where Dr. Stein was penalized for the  
6 understandable expectation that her efforts would be treated  
7 similarly in 2016. Dr. Stein relied on this expectation.  
8 Indeed, she received matching funds for this ballot access  
9 activity in 2016. It's a form of entrapment to now apply a  
10 DOI of August 6th to the very same activity. Moreover, the  
11 2016 Stein Campaign was not even aware of the new DOI until  
12 after the campaign ended and after funds were expended for  
13 ballot access and match.

14           Pegging the DOI for a minor party candidate to the  
15 date of a major party convention makes planning and  
16 fundraising very difficult. Indeed, it would be impossible  
17 to identify the date of the DOI for the next presidential  
18 cycle in 2024 until other players decide on the date of  
19 their conventions. Such a decision will likely be made  
20 without regard to the needs of non-major party presidential  
21 candidates for that cycle. Even worse, it invites the major  
22 parties to pick an early date, which prejudices the  
23 interests of independent and minor party candidates.

24           There was no basis to move the DOI to August 6th,  
25 the date of the Green Party convention. The first

1 indication of this approach was AOR 1984-11, and I'm reading  
2 from it.

3 "The Matching Payment Act and Commission  
4 regulations require that matching payments as well as all  
5 disbursements of an eligible candidate's campaign committee  
6 be used only for qualified campaign expenses. Qualified  
7 campaign expenses may only be incurred with respect to the  
8 period in which the candidate is eligible for matching  
9 payments.

10 "The date when the candidate becomes ineligible  
11 coincides with the last day -- with the last day of the  
12 matching payment period for that candidate. Accordingly,  
13 campaign expenditures made or campaign obligations incurred  
14 within the matching period would satisfy the timeliness  
15 requirement for a qualified campaign expense. In addition,  
16 such expenses must also be made in conjunction with the  
17 campaign's campaign for nomination.

18 "In Mr. Serrette's situation, [the candidate at  
19 that time,] expenditures will apparently be made to collect  
20 petition signatures for the general election ballot. The  
21 Commission is of the opinion that these expenses to the  
22 extent they are paid or incurred within what would be Mr.  
23 Serrette's matching period, if he becomes eligible for  
24 matching funds, would be qualified campaign expenses for the  
25 purposes of the matching payment act."

1           This AOR doesn't indicate that this is in fact a  
2   change from AOR 1975-53, nor is any reason for such a change  
3   articulated. In fact, the new standard is entirely  
4   circulated -- is entire circular. Qualified campaign  
5   expenditures, we are told, are those made in the period when  
6   the campaign is eligible for matching funds. This  
7   contradicts the principle that efforts to get on the ballot  
8   is part of the primary effort, regardless of when it occurs.  
9   It compounds the very legal and constitutional problems this  
10   principle was designed to prevent; that is the very  
11   different terrain an independent or a minor party candidate  
12   must navigate. Namely, ballot access efforts must continue  
13   after the convention and well into September of the election  
14   year.

15           This concern was directly expressed in AOR 1975-  
16   44. There, the Commission stated: "However, in this case,  
17   as in the past the Commission is concerned to construe the  
18   provisions of the act in a manner consistent with  
19   constitutional requirements regardless of a candidate's  
20   party affiliation or independent status.

21           "The primary election and convention process is a  
22   procedure through which major parties typically determine  
23   their candidates for the general election. The procedure  
24   for presidential candidates of minor parties, however,  
25   differs in that most states have a separate petition process

1     whereby such candidates may qualify for general election  
2     ballot.

3             "Accordingly, for the purpose for applying the  
4     limitations in 18 U.S.C. 608, the Commission will view the  
5     petition process required of presidential candidates of the  
6     minor parties as the equivalent of the primary elections and  
7     convention process of major party candidates."

8             This perspective was applied in AOR 1995-45 which  
9     makes no mention of the matching funds period. It states  
10    unequivocally: "It has long been the view of the Commission  
11    that for nonmajor party candidates the process by which they  
12    satisfy the requirements of state law governing  
13    qualification for a position on the general election ballot  
14    serve purposes similar to a primary election or other  
15    nominating process.

16            This view is supported by the Commission  
17    regulations defining the term elections -- "election." --  
18    which state that for non-major party and independent  
19    candidates, the date prescribed -- the date prescribed by  
20    applicable state law as the last day to qualify for a  
21    position on the general election ballot may be designated as  
22    the primary election for such candidate." The AOR cites 11  
23    CFR 100.2(c)(4)(i).

24            Based on this reasoning the Commission concluded  
25    in its Advisory Opinions 1984-25 and 1984-11 that the ballot

1 access expenses of candidates for minor party nominees would  
2 be qualified campaign expenses. Let me read the cited  
3 regulation, 11 CFR 100.2(c)(4)(i).

4           The cited regulation states, and I'm quoting here,  
5 "With respect to individuals seeking federal office as  
6 independent candidates or without nomination as a major  
7 party, (as defined in 26 U.S.C.9002(6)), the primary  
8 election is considered to occur on one of the following  
9 dates at the choice of the candidate: the day prescribed by  
10 applicable state law as the last day to qualify for a  
11 position on the general election ballot may be designated as  
12 the primary election for such a candidate; (2), the date of  
13 the last major party primary election, caucus or convention  
14 in that state may be designated as a primary election for  
15 such a candidate; and (3), in the case of nonmajor parties,  
16 the date of the nomination by that party may be designated  
17 as the primary election for such a candidate."

18           I reiterate, which of these applies is at the  
19 choice of the candidate. Obviously, the choice of the Green  
20 Party and Dr. Stein was the latest possible date, which is  
21 geared to the dates for the petitioning process to get on  
22 general election ballots in the many states where the Green  
23 Party did not have ballot status. The Stein Campaign had  
24 every right to rely on this construct when it expended funds  
25 for ballot access and accepted matching fund payments for

1     them.

2                 Let me just speak briefly about the procedural  
3     background here. There was no complaint. This matter was  
4     generated by audit. The final audit report issued on April  
5     17th, 2019 alleged that as of the DOI, the campaign had a  
6     surplus of \$200,856, the net outstanding campaign  
7     obligations, or NOCO. This required two repayments. One,  
8     pursuant to a regulatory formula, a prorated repayment of  
9     \$40,372 was due. In addition, the matching funds payment of  
10    \$134,900, received on January 12th, 2017 was required to be  
11    repaid. Thus, the order called for total repayment of  
12    \$175,272.

13                The campaign disputed these numbers in particular  
14    contending that disbursements for ballot access expenses  
15    after the August 6th, 2016 DOI should have been included in  
16    the amount of \$255,671. This amount would have been enough  
17    to eliminate the NOCO surplus, and therefore eliminate the  
18    repayment.

19                The significance of the date of the DOI is  
20    obvious. On March 17, 2019, the Commission voted to approve  
21    the audit report including the \$175,000 repayment.

22                The campaign's position is that if the DOI is  
23    extended, as it should be, to the last day of petitioning in  
24    states where the Green Party did not have ballot access --  
25    ballot status -- then the repayment goes away.

1           In addition, the campaign has recently provided  
2   documentation demonstrating additional winddown costs, which  
3   we contend are continuing.

4           To recap, the repayment determination should  
5   include campaign expenditures for ballot access after the  
6   Commission's DOI of August 6, 2016. These expenditures  
7   amounted to another \$255,671 in ballot access costs  
8   exceeding the surplus of \$200,856 claimed in the audit  
9   report. Technically speaking, the surplus NOCO calculated  
10   in the audit report should have been corrected to a deficit  
11   of \$55,430. The additional winddown costs referenced above,  
12   would further increase the NOCO deficit. In the absence of  
13   a surplus NOCO, the prorated repayment of \$40,372 claimed in  
14   the audit report is eliminated. The corrected deficit NOCO  
15   also eliminates the repayment of \$134,900 in matching funds  
16   that was called for in the audit.

17           These expenditures were for petitioning drives in  
18   states where the Green Party did not have ballot access.  
19   As such, they are matchable under a corrected DOI. Indeed,  
20   how could they not be in as much as the entire construct for  
21   minor parties is based on the proposition that expenditures  
22   to get on the ballot are the equivalent of primary  
23   expenditures. To rule otherwise would constitute a form of  
24   entrapment.

25           First the matching funds were already paid;

1 second, in 2012 they were treated as matchable expenditures.  
2 The expenditures were made in a reasonable, good-faith  
3 belief that as they were necessary to achieve ballot status,  
4 they were valid and matchable.

5 Thank you.

6 HEARING OFFICER: Thank you, Counsel.

7 Do any Commissioners have any questions? Does the  
8 Office of General Counsel, or the audit division have any  
9 questions?

10 MR. BLUME: Madam Chair?

11 HEARING OFFICER: Yes, Mr. Blume?

12 MR. BLUME: Yes, thank you, I just have one  
13 question. Mr. Kresky alluded to the fact that the committee  
14 provided the Commission with documents pertaining to  
15 winding-down expenses in advance of the hearing. And so I  
16 would just like to ask how the documents relate to issues  
17 that were raised in the committee's recent submission  
18 requesting administrative review of the repayment  
19 determination.

20 MR. KRESKY: In my letter of June 17th, 2019  
21 requesting the hearing, the last paragraph states, "as will  
22 be demonstrated in the further submission coming directly  
23 from the committee were it not for the improper imposition  
24 on August 6th DOI, no repayment would be required." And in  
25 addition to that --

1 DR. STEIN: This is Jill asking for recognition.

2 HEARING OFFICER: Yes, Dr. Stein.

3 DR. STEIN: Yes, I would just point out, in the  
4 letter that attorney Kresky is referencing, which was the  
5 formal request for this administrative hearing, he states in  
6 the -- one, two, three -- fourth paragraph that the  
7 committee will herein demonstrate that reimbursement of  
8 ballot access and related expenses, as well as the nature of  
9 winding-down expenses would specifically be addressed, and  
10 would change the repayment order as well as the calculation  
11 of the net outstanding campaign obligation. The surplus  
12 would be impacted by winding-down expenses as well as ballot  
13 access expenses that should be recognized.

14 So that is specifically stated in that fourth  
15 paragraph.

16 MR. KRESKY: Thank you Dr. Stein.

17 HEARING OFFICER: Thank you. Are there any  
18 further questions? None?

19 Mr. Kresky or Dr. Stein would you care to make a  
20 closing statement?

21 MR. KRESKY: I can just briefly -- I don't have  
22 very much to add. I think what is important is that the  
23 Matching Funds Program was designed to and is required to be  
24 conducted in a way that treats minor parties and independent  
25 candidates as favorably as the major parties are treated.

1           And in fact, you could make the case, and I think  
2     the case is a sound one, that matching payments themselves,  
3     which many major party candidates don't even accept now, are  
4     specifically designed to give a leg up to minor party and  
5     independent candidates who don't have the financial clout of  
6     the major party candidates, particularly in the presidential  
7     situation.

8           So to arbitrarily apply a DOI which denies  
9     matching funds for ballot access and winding-down costs, and  
10    in particular ballot access, which is not even a factor for  
11    a major party candidate, because the major parties already  
12    have ballot status in every state, really undermines the  
13    purpose of the Matching Funds Program in my opinion. And in  
14    particular, the Commission's concern for an obligation to  
15    see to it that all candidates, major and minor, and  
16    independent are treated equally and not prejudiced by the  
17    Matching Funds Program and the Commission's activities and  
18    conduct. Thank you.

19           DR. STEIN: And may I have recognition?

20           HEARING OFFICER: Yes, Dr. Stein.

21           DR. STEIN: Thank you. Yes, and I wanted thank  
22    Attorney Kresky for that very substantive review of the  
23    critical Advisory Opinions, and the critical regulations and  
24    statutes.

25           And there's a lot of detail here, and as a

1    layperson, not a lawyer, but, you know, anybody watching  
2    this as a public hearing, or viewing it afterwards as a  
3    public hearing, let me just say that I think the real key  
4    issues here, as Attorney Kresky just summarized, are really  
5    whether the independents and minor parties have equal access  
6    to the ballot as determined by our access to public funding.  
7    And the public funding program, it seems, you know, has to  
8    meet that need for those candidates and political groups  
9    that don't have access to deep pockets and the various forms  
10   of finance that really dominate, as this Commission knows so  
11   well, that have come to dominate our electoral process.

12            And if, you know, you've probably seen recent  
13   polls, one from Gallup just done last week that showed the  
14   public hunger for a variety of political opinions now is at  
15   an all-time high. And it really, I think, it's the mission  
16   or one of the missions of this Commission, you know, is to  
17   ensure that there is a public forum in our elections, and  
18   that there are a variety of political viewpoints  
19   represented, which there is so much hunger for right now.

20            And I think it's a tribute to the Commission that  
21   its very foundational Advisory Opinions stress this point  
22   and made it possible for small parties and independents to  
23   have access to the ballot through a broad definition of this  
24   question of eligibility.

25            And it was -- you know -- the process was defined

1 early on in such a way that small parties and small players  
2 and independents could have access to that public funding in  
3 order to achieve ballot status.

4 And with that, that opportunity having been  
5 provided to us in 2012, we had certainly expected that it  
6 would be consistent in 2016. And we were really quite  
7 shocked to learn after the fact that that was not going to  
8 be the case.

9 And I would just urge you to look carefully at  
10 Attorney Kresky's submission which details, I think  
11 beautifully, how it is that the legal structures were  
12 established in order to meet our highest small-d democratic  
13 aspirations that our elections should be truly competitive,  
14 open, publicly funded to the extent possible, and that there  
15 would be a real opportunity for the American people to have  
16 an inclusive conversation and a diverse set of choices as a  
17 part of that process.

18 Thank you for your consideration.

19 HEARING OFFICER: Thank you. This hearing is  
20 adjourned.

21 (End of audio file.)

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