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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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August 18, 2000

MEMORANDUM

AGENDA ITEM
For Meeting of: 9-14-00

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Leslie Bright
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

Tracey L. Ligon
Attorney

SUBJECT: Dole for President, Inc. - Statement of Reasons
(LRA #467)

I. INTRODUCTION

The Office of General Counsel has prepared the attached draft Statement of Reasons concluding that Senator Robert J. Dole and Dole for President, Inc. (the "Primary Committee") must repay a total of \$289,736 to the United States Treasury pursuant to 26 U.S.C. § 9038(b)(2) and 11 C.F.R. § 9038.2(b)(4), (2).¹ This amount relates to a \$283,481 repayment determination for a surplus of funds, and \$6,255 for the use of public funds to defray non-qualified campaign expenses (\$1,237 for the "refund" of unpaid contribution, \$930 for payment for services to prepare financial statements, and \$4,088 for unchallenged non-qualified campaign expenses).

¹ Due to the volume of documents being submitted as attachments, we have not included them as attachments to the draft Statement of Reasons. However, all of the attachments will be available for review in the Commission Secretary's Office.

On June 3, 1999, the Commission approved the Audit Report on the Primary Committee and determined that Senator Dole and the Primary Committee must repay a total of \$289,736 to the United States Treasury. The Commission's determination was based on its findings that the Primary Committee had surplus funds of \$283,481, and used \$6,255 of public funds to defray non-qualified campaign expenses (\$1,237 for the "refund" of unpaid contribution, \$930 for payment for services to prepare financial statements, and \$4,088 for unchallenged non-qualified campaign expenses).²

On August 30, 1999, the Primary Committee submitted legal and factual materials in an effort to demonstrate that a lesser repayment is required to be paid to the United States Treasury. On December 15, 1999, the Primary Committee addressed the Commission in an oral hearing. Following the hearing, the Primary Committee submitted supplemental documentation to the Commission on December 22, 1999.

The Office of General Counsel reviewed the Primary Committee's written responses and the arguments presented at the oral hearing.³ Based on that review, this Office recommends that the Commission determine that Senator Dole and the Primary Committee must repay \$283,481 to the United States Treasury based on a surplus of funds, and \$6,255 based on the Primary Committee's use of public funds to defray non-qualified campaign expenses (\$1,237 for the "refund" of unpaid contribution, \$930 for payment for services to prepare financial statements, and \$4,088 for unchallenged non-qualified campaign expenses), making \$289,736 the total repayment due to the United States Treasury.

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission:

1. Determine that Robert J. Dole and Dole for President Inc. must repay \$283,481 within 30 days to the United States Treasury pursuant to 26 U.S.C. § 9038(b)(2) and 11 C.F.R. § 9038.2(b)(4);
2. Determine that Robert J. Dole and Dole for President, Inc. must repay \$6,255 within 30 days to the United States Treasury pursuant to 26 U.S.C. § 9038(b)(2) and 11 C.F.R. § 9038.2(b)(2);

² The Commission also determined that the Committee must make a \$225,536 payment to the United States Treasury for stale-dated checks. See 11 C.F.R. § 9038.6. The Primary Committee has not made this payment.

³ The Audit Division also reviewed the Primary Committee's written responses. Its analysis of the responses is attached to the Statement of Reasons. See Attachment 3.

3. Approve the attached Statement of Reasons; and
4. Approve the appropriate letters.

Attachment

Draft Statement of Reasons (with attachments 1-7)

1

2 **BEFORE THE FEDERAL ELECTION COMMISSION**

3 In the Matter of)
4)
5 Robert J. Dole and)
6 Dole for President, Inc.) LRA #467
7

8 **STATEMENT OF REASONS**
9

10
11 On _____, 2000, the Federal Election Commission

12 (the "Commission") determined that Robert J. Dole (the "Candidate") and Dole for
13 President, Inc. (the "Primary Committee") must repay a total of \$289,736 to the United
14 States Treasury. The Commission's repayment determination is based on:

15 1) a surplus of \$283,481, and 2) the use of \$6,255 in public funds to defray non-qualified
16 campaign expenses. See 26 U.S.C. § 9032(9). The Committee is ordered to repay these
17 amounts to the United States Treasury within thirty (30) calendar days after service of this
18 determination. See 26 U.S.C. § 9038(b)(2); 11 C.F.R. § 9038.2(d)(2). This Statement of
19 Reasons sets forth the factual and legal basis for this Post Administrative Review
20 Repayment Determination. 11 C.F.R. § 9038.2(c)(3).

21 **I. INTRODUCTION**

22 The Primary Committee registered with the Commission on January 12, 1995 as
23 the principal campaign committee for Senator Robert J. Dole, a candidate for the 1996
24 Republican Party's nomination for the office of President of the United States.
25 Attachment 1, at 3. Senator Dole was determined eligible to receive matching funds on
26 May 31, 1995. *Id.* The Primary Committee received \$13,545,771 from the United States
27 Treasury for the purpose of seeking the Republican Party nomination. *Id.* The

1 Commission conducted an audit of the Primary Committee pursuant to 26 U.S.C.
2 § 9038(a).

3 On June 3, 1999, the Commission approved the Audit Report and determined that
4 the Primary Committee must repay a total of \$289,736 to the United States Treasury. *See*
5 Attachment 1.¹ The Commission's repayment determination was based on its findings
6 that the Primary Committee has a surplus of funds in the amount of \$283,481 and used
7 \$6,255 in public funds to defray non-qualified campaign expenses. 11 C.F.R.
8 § 9038.2(b)(4) and (2).

9 On August 30, 1999, the Primary Committee submitted a written response to the
10 Commission seeking an administrative review of the repayment determination and
11 requesting an oral hearing as permitted under 11 C.F.R. § 9038.2(c)(2)(i).² Attachment 2.
12 The Commission granted the Primary Committee's request for an oral hearing and heard
13 an oral presentation by the Primary Committee on December 15, 1999. *See* Attachment
14 4. Following the oral hearing, the Primary Committee submitted additional
15 documentation on December 22, 1999.³ *See* Attachment 5.

¹ The repayment determination does not include a payment of \$225,536 that the Commission determined was due to the United States Treasury for stale-dated checks. 11 C.F.R. § 9038.6.

² On July 30, 1999, the Commission granted the Primary Committee a fifteen-day extension of time to respond to the Commission's repayment determination.

³ The additional documentation was submitted as a follow-up to the oral presentation made to the Commission by both Dole for President, Inc. and Dole/Kemp '96, Inc. At the oral hearing, Dole/Kemp '96, Inc. contested a Commission determination that Dole/Kemp '96, Inc. must repay \$3,168,097 to the United States Treasury. Inasmuch as the additional documentation submitted on December 22, 1999, relates only to issues addressed by Dole/Kemp '96, Inc., it is not discussed herein.

1 II. REPAYMENT NOTIFICATION

2 As a preliminary matter, the Commission addresses a procedural argument raised
3 by the Primary Committee for the first time at its oral hearing. The Primary Committee
4 argued that it was not timely notified of the Commission's repayment determination.
5 Attachment 4 at 7-8. The Primary Committee challenged the timeliness of notification of
6 the Commission's repayment determination as follows:

7 ... we preserved our procedural and due process defenses, and we
8 are preserving or making the argument herein that the notices for
9 repayment are not timely at this point because we don't believe
10 that the notices that had been provided to us in the form of the
11 exit conference memorandum is sufficient to fulfill the three-year
12 requirement under the statute.

13
14 That was not ripe at the time of our response to the exit
15 conference memorandum because we responded in August. The
16 three-year period ran in November after that at that time, but we
17 did preserve that right for both the committees

18
19 Attachment 4 at 7-8.⁴ The Primary Committee's written response stated that in addition
20 to the arguments contained in the written response, the Primary Committee "preserves all
21 constitutional, procedural and jurisdictional claims that may be available to it."

22 Attachment 2 at 1.

23 The Commission concludes that the Primary Committee failed to raise the issue of
24 repayment notification in a timely fashion. Section 9038.2(c)(2)(i) of the Commission's
25 regulations provide that a candidate who disputes the Commission's repayment

⁴ As noted above, at the oral hearing, the Primary Committee stated that it did not believe that notice "in the form of the Exit Conference Memorandum" was sufficient, and that it responded to the Exit Conference Memorandum in August. The Commission presumes that the Primary Committee is referring to the Audit Report, not the Exit Conference Memorandum, with regard to its notification claim because it is the Audit Report, approved by the Commission on June 3, 1999, to which the Primary Committee responded in August 1999. It is also the Commission's issuance of the Audit Report, not the Exit Conference Memorandum, that constitutes notification for purposes of the 3-year notification requirement. See 11 C.F.R. § 9038.2(a)(2).

1 determinations shall submit in writing, within 60 calendar days after service of the
2 Commission's notice, legal and factual materials demonstrating that no repayment, or a
3 lesser repayment, is required. 11 C.F.R. § 9038.2(c)(2)(i). A candidate's failure to timely
4 raise an issue in written materials will be deemed a waiver of the candidate's right to raise
5 the issue at any future stage of proceedings including any petition for review filed under
6 26 U.S.C. § 9041(a). *Id.* However, the Primary Committee did not raise the issue of the
7 Commission's repayment notification in its written response to the Commission's
8 repayment determination. *See* Attachment 2.

9 Based on the Primary Committee's failure to raise its challenge with respect to the
10 repayment notification in its written materials, the Commission concludes that the
11 Primary Committee waived the right to present such challenge at the oral hearing or any
12 future stage of proceedings pursuant to 11 C.F.R. § 9038.2(c)(2)(i). 11 C.F.R.
13 § 9038.2(c)(2)(i). *See Americans for Robertson v. Federal Election Commission*, 45 F.3d
14 486, 491 (D.C. Cir. 1995); *see also Explanation and Justification for § 9007.2(c)(2)(i)*,
15 60 Fed. Reg. 31864 (June 16, 1995) (Candidate's failure to timely raise an issue in the
16 written materials presented pursuant to paragraph (c)(2)(i) will be deemed a waiver of the
17 candidate's right to raise the issue at any future stage of the proceedings).

18 Although the Primary Committee claims that it raised the repayment notification
19 issue in its written response, the Primary Committee's written response merely states that
20 the Committee "preserves all constitutional, procedural and jurisdictional claims that may
21 be available to it." Attachment 2 at 1. This catchall statement provides the Commission
22 with no notice of the nature of the Primary Committee's challenges to the repayment
23 determination as it brings within its ambit an endless array of possible arguments. Simply

1 including such a broad and vague prescription in the written response cannot be construed
2 as having raised or preserved any particular issue inasmuch as this does not give the
3 Commission timely notice of the nature of the challenges to its repayment determination
4 as required by 11 C.F.R. § 9038.2(c)(2)(i).

5 The Commission notes, however, that it is not requiring a perfect pleading in a
6 written response to a repayment determination. Nonetheless, the written response must
7 be sufficient to place the Commission on timely notice as to the nature of the Primary
8 Committee's challenges. *See Fulani for President v. Federal Election Commission*, 147
9 F.3d 924, 927 n.5 (D.C. Cir. 1998) (court denied Committee's petition for rehearing for
10 not setting forth clear and convincing grounds why new questions of fact and law were
11 not and could not have been presented during the earlier determination process, and the
12 court noted that the Committee may have been barred from raising the new theory at the
13 oral hearing pursuant to 11 C.F.R. § 9038.2(c)(2)(i) where the issue had been generally,
14 but not specifically, raised by the Committee in its written submissions).

15 The Primary Committee also proffers the argument that the repayment notification
16 issue was not "ripe" as justification for not raising the issue in its written response.
17 Attachment 4 at 7-8. The Primary Committee appears to argue that the notification issue
18 was not "ripe" until the 3-year notification period expired. However, the 3-year
19 notification period expired on August 14, 1999, three years following the end of the
20 primary matching payment period.⁵ *See* 11 C.F.R. § 9032.6. Subsequently, on August

⁵ The primary matching payment period ended on August 14, 1996, the date on which the Republican Party nominated Senator Dole as its candidate for the office of President of the United States. *See* 11 C.F.R. § 9032.6 (matching payment period may not exceed date on which party nominates its candidate). Thus, the Commission was required to notify the Primary Committee of any repayment determination on or before August 14, 1999. *See* 2 U.S.C. § 9038(c). On June 3, 1999, the Commission

1 30, 1999, the Primary Committee filed its written response to the Commission's
2 repayment determination. Thus, the repayment notification period expired before the
3 Primary Committee submitted its written response. Nevertheless, the Primary Committee
4 did not raise the issue in its written response.⁶ The Commission accordingly rejects the
5 Primary Committee's assertion that the timeliness issue was not ripe.

6 III. SURPLUS REPAYMENT

7 A. Legal Framework

8 The Commission may determine that the candidate's net outstanding campaign
9 obligations ("NOCO"), as defined in 11 C.F.R. § 9034.5, reflect a surplus. 11 C.F.R.
10 § 9038.2(b)(4). Pursuant to 11 C.F.R. § 9034.5, a candidate's NOCO equal the difference
11 between the total of all outstanding obligations for qualified campaign expenses as of the
12 candidate's date of ineligibility, plus estimated necessary winding down costs, less the
13 total of cash on hand as of the close of business on the last day of eligibility, the fair
14 market value of capital assets and other assets on hand; and amounts owed to the
15 committee in the form of, *inter alia*, receivables; or a commercially reasonable amount
16 based on the collectibility of the receivables, *inter alia*. 11 C.F.R. § 9034.5(a).

17 Section 9038.3(c)(1) of the Commission's regulations states that, if on the last day
18 of candidate eligibility the candidate's NOCO, as defined in 11 C.F.R.

approved the Audit Report and determined that the Primary Committee must repay a total of \$289,736 to the United States Treasury. See Attachment 1. The Audit Report, along with a letter from the Commission notifying the Primary Committee of its repayment determination, was mailed to the Primary Committee on June 10, 1999, and received by the Primary Committee by June 14, 1999, within the three-year notification period.

⁶ As noted previously, the Commission granted the Primary Committee a fifteen-day extension of time to respond to the Commission's repayment determination.

1 § 9034.5, reflect a surplus, the candidate shall within 30 calendar days of the ineligibility
2 date repay to the Secretary an amount which represents the amount of matching funds
3 contained in the candidate's surplus. 11 C.F.R. § 9038.3(c)(1).

4 A qualified campaign expense is a purchase, payment, distribution, loan, advance,
5 deposit, or gift of money or anything of value incurred by or on behalf of a candidate in
6 connection with his campaign for nomination. 26 U.S.C. § 9032(9).

7 **B. Audit Report Repayment Determination**

8 In the context of the Audit Report, the Commission determined that the Primary
9 Committee owed a repayment of \$283,481 to the United States Treasury for a surplus of
10 funds. Attachment 1, at 48. The Commission determined that the Primary Committee's
11 Statement of Net Outstanding Campaign Obligations ("NOCO Statement") as of August
12 14, 1996, showed that the Primary Committee was in a surplus position in the amount of
13 \$916,828, and therefore \$283,481 ($\$916,828 \times .309198^7$) is repayable to the United States
14 Treasury. The Audit Report noted that the principal reason for the surplus is that the
15 Primary Committee paid all wind down costs, including the obligations of Dole/Kemp
16 '96 (the "General Committee"). Attachment 1, at 47-48. The Commission determined
17 that the Primary Committee's payment of wind down expenses of the General Committee
18 is not a qualified campaign expense of the Primary Committee. Attachment 1 at 51-52.
19 These disbursements may be treated as repayable to the United States Treasury by the
20 Primary Committee as a non-qualified campaign expense pursuant to 11 C.F.R.
21 § 9038.2(b)(1), or as an amount the General Committee or the Dole/Kemp '96, Inc.

⁷ This figure represents the Primary Committee's repayment ratio as calculated pursuant to 11 C.F.R. § 9038.3(c)(1). Attachment 1 at 47.

1 Compliance Committee ("the GELAC") owes the Primary Committee. The NOCO
2 Statement in the Audit Report shows this amount as due from the GELAC.⁸ Attachment
3 1 at 46.

4 **C. Committee's Response to Repayment Determination**

5 In response to the Commission's determination that the Primary Committee was
6 in a surplus position, the Primary Committee argues three points. First, the Primary
7 Committee contends that it is permitted to pay the entire amount of wind down costs
8 including costs associated with the general campaign since "there is nothing in 11 C.F.R.
9 § 9034.4(a)(3) ... which limits such payments to wind down costs of [the Primary
10 Committee]." Attachment 2 at 3. The Primary Committee cites the language in the
11 regulations permitting the Primary Committee to pay "costs associated with the
12 termination of political activity, such as the costs of complying with the post election
13 requirements of the Act and other necessary administrative costs of winding down the
14 campaign," and points out that the term "campaign" is not defined. *Id.* The Primary
15 Committee states that "given the difficulty of attributing portions of wind down costs to
16 the primary and the general, it makes sense to permit the primary campaign to pay the
17 entire amount of such costs." *Id.*

18 Second, the Primary Committee notes that Section 9038.2(b)(4) of the
19 Commission's regulations, "which states that the Commission may determine that the
20 candidate's net outstanding campaign obligations ... reflect a surplus," does not require

⁸ The Audit Report attributes the amount of the Primary Committee's disbursements for wind down expenses of the General Committee as an amount the GELAC owes the Primary Committee since the GELAC is specifically permitted to pay wind down expenses after the end of the expenditure report period and this amount will not be subject to the General Committee's expenditure limitation. 11 C.F.R. § 9004.4(a)(4)(iii) and 11 C.F.R. § 9003.3(a)(2)(iii); Attachment 3 at 2, n. 1.

1 the Commission to use the NOCO Statement to determine surplus, "especially if that
2 figure does not accurately reflect an actual surplus." Attachment 2 at 2. The Primary
3 Committee asserts that Section 9038.2(b)(4) also does not mention making repayment on
4 the entire amount of the alleged surplus, but rather states only that "the Commission may
5 determine that the net income derived from an investment or other use of surplus public
6 funds after the candidate's date of ineligibility ... shall be paid to the Treasury." *Id.*

7 Finally, the Primary Committee asserts that treating the \$916,828 amount as a
8 surplus mischaracterizes its financial condition since, at the time of its response, *i.e.*,
9 August 30, 1999, the Primary Committee had a bank balance of only \$21,676, and
10 anticipated having a \$0 balance after required transfers of funds to the General
11 Committee.⁹ Attachment 2 at 2. The Committee argues that the \$916,828 surplus figure
12 is a fiction since it is generated by an "alleged" account receivable from the GELAC
13 stemming from the "erroneous claim" that \$1,070,801 paid by the Primary Committee in
14 wind down costs should have been paid by GELAC. *Id.* Further, the Primary Committee
15 argues that treating the \$916,828 as a repayable surplus is counter to the purpose of the
16 repayment provisions "which is to prevent the misuse by a campaign of appropriated
17 public funds," and that "requiring a repayment based on a surplus that does not actually
18 exist defeats this purpose and makes the repayment provisions punitive in nature." *Id.*

19 **D. Post-Administrative Review Repayment Determination**

20 The Commission concludes that the Primary Committee must repay \$283,481 to
21 the United States Treasury for surplus funds. The Primary Committee's payment for

⁹ The Commission determined in the audit that the Primary Committee must transfer funds to the General Committee to cover the cost of items that the Primary Committee should have paid. Attachment 1 at 45-46.

1 winding down costs associated with the general election is a non-qualified campaign
2 expense for the Primary Committee. See 26 U.S.C. § 9032(9).

3 On the precise subject of funding general election expenses with primary funds,
4 the Explanation and Justification for 11 C.F.R. § 9034.4 states that “the Presidential
5 Election Campaign Fund Act, the Presidential Primary Matching Payment Account Act,
6 and Commission regulations require that publicly funded presidential candidates use
7 primary election funds only for expenses incurred in connection with primary elections,
8 and that they use general election funds only for general election expenses. 26 U.S.C.
9 § 9002(11), 9032(9); 11 C.F.R. § 9002.11, 9032.9. These requirements are tied to the
10 overall primary and general election expenditure limits set forth at 2 U.S.C. § 441a(b) and
11 (c), and at 26 U.S.C. § 9035(a). See also 11 C.F.R. § 110.8(a), 9035.1(a)(1).”¹⁰
12 *Explanation and Justification for 11 C.F.R. § 9034.4*, 60 Fed. Reg. 31854, 31866 (June
13 16, 1995). The Primary Committee received \$13,545,771 for the purpose of financing
14 Senator Dole’s efforts to capture the 1996 Republican Party nomination for the office of
15 President. These funds were not intended to finance Senator Dole’s general election
16 campaign.¹¹

17 Consistent with these principles, the term “campaign” in 11 C.F.R. § 9034.4(a)(3),
18 which provides that costs associated with the termination of political activity associated

¹⁰ In the context of an advisory opinion, the Commission has found that a qualified campaign expense must be incurred in connection with the same campaign for which matching fund eligibility and entitlement has been asserted by the candidate and determined by the Commission. See Advisory Opinion 1988-05 (Commission found use of candidate’s 1988 primary election campaign funds to retire outstanding debts of his 1984 primary election campaign would not be qualified campaign expense of the 1988 campaign).

¹¹ Senator Dole received the Republican Party nomination on August 14, 1996. Thereafter, Senator Dole was certified to receive, and received, \$61,820,000 in public funds from the United States Treasury under the Presidential Election Campaign Act for the purpose of financing his general election activities.

1 with winding down the campaign shall be considered qualified campaign expenses, refers
2 to the primary election campaign, and not the general election campaign. 11 C.F.R.
3 § 9034.4(a)(3). This conclusion is further supported by the Explanation and Justification
4 for revisions to Section 9034.4(a)(3). *Explanation and Justification for 11 C.F.R.*
5 § 9034.4(a)(3), 52 Fed. Reg. 20864 (June 3, 1987). There, the Commission noted its
6 intention to prevent the use of matching funds pursuant to Section 9034.4(a)(3) for
7 expenses associated with campaign activity occurring beyond the candidate's date of
8 eligibility. The Commission explained that it had proposed to "limit winding down costs
9 to qualified campaign expenses incurred before the candidate's date of ineligibility for
10 goods and services received before that date," and stated that "the main objective of that
11 proposal was to ensure that candidates did not use matching funds for obligations
12 incurred before their ineligibility date that are used to continue the candidate's campaign
13 after that date." *Explanation and Justification for 11 C.F.R. § 9034.4(a)(3)*, 52 Fed. Reg.
14 20864, 20870 (June 3, 1987). Given the Commission's explicit intention to preclude the
15 use of matching funds for a candidate to continue to campaign after the candidate's date
16 of ineligibility, the Commission certainly did not intend for Section 9034.4(a)(3) to
17 permit the use of matching funds for wind down expenses of the general election, which
18 are expenses that arise directly from a candidate continuing to campaign in an entirely
19 different election.¹²

¹² Consideration of other provisions in the Commission's regulatory framework for administering the public financing of presidential primary elections also compels the conclusion that the term "campaign" in Section 9034.4(a)(3) refers to the primary election campaign. For example, if Section 9034.4(a)(3) were construed to permit candidates to use primary matching funds to pay winding down costs associated with the general election campaign, candidates would be required to estimate necessary winding down costs for the general election at the beginning of the general election. See 11 C.F.R. §§ 9033.5, 9032.6. Section 9034.5(a) requires candidates to submit a statement of net outstanding campaign obligations 15 calendar days after the candidate's date of ineligibility, which, at the latest, is the date on which the party nominates

1 The Commission can rely on the candidate's NOCO Statement as of the date of
2 ineligibility to determine if the Primary Committee has a surplus, and an obligation to
3 make a pro rata repayment to the United States Treasury. Section 9038.3(c)(1) of the
4 Commission's regulations states that, if on the last day of candidate eligibility the
5 candidate's NOCO, as defined in 11 C.F.R. § 9034.5, reflects a surplus, the candidate
6 shall within 30 calendar days of the ineligibility date repay to the Secretary an amount
7 which represents the amount of matching funds contained in the candidate's surplus. 11
8 C.F.R. § 9038.3(c)(1). When a committee does not contest the surplus, the provision is
9 self-executing and does not require the Commission to take any action for the repayment.
10 *Dukakis v. Federal Election Commission*, 53 F.3d 361, 363 (D.C. Cir. 1995)(court held
11 that where candidate does not dispute that his or her campaign has a surplus, 26 U.S.C.
12 § 9038(b)(3), the statutory basis for 11 C.F.R. § 9038.3(c)(1), is self-executing, requiring
13 no Commission-initiated conduct). However, inasmuch as the Primary Committee
14 disputes the surplus determination and has failed to voluntarily repay a pro rata portion of
15 the surplus pursuant to Section 9038.3(c)(1), the Commission has properly required the
16 repayment. *Cf. Id.* Not requiring a repayment of public funds when the Commission has
17 determined that a committee has a surplus would be inconsistent with the basic premise
18 that committees must return unused public funds to the United States Treasury. 26
19 U.S.C. § 9038(b)(3).

20 The Commission rejects the Primary Committee's argument that the calculation of
21 its net outstanding campaign obligations should not be the basis of a repayable surplus

days after the candidate's date of ineligibility, which, at the latest, is the date on which the party nominates its candidate.

1 because it mischaracterizes the Committee's current cash position. The Commission also
2 rejects the Primary Committee's argument that the Commission's surplus determination
3 is a fiction and thus not repayable because it is based on an account receivable from the
4 GELAC. Pursuant to Section 9034.5, a candidate's net outstanding campaign expenses
5 are calculated as of the candidate's date of ineligibility,¹³ see 11 C.F.R. § 9034.5. Surplus
6 determinations are based on NOCO Statement calculations made pursuant to Section
7 9034.5. See 11 C.F.R. § 9038.2(b)(4). Section 9034.5 sets forth the method for
8 calculating a candidate's net outstanding campaign expenses, and specifically includes
9 consideration of a committee's accounts receivable. See 11 C.F.R. § 9034.5. As a
10 condition precedent to receiving primary matching funds, the Primary Committee agreed
11 to, *inter alia*, the Commission's method of calculating the candidate's NOCO, as well as
12 the consequences of any resulting surplus. See 26 U.S.C. § 9033(b)(1); Attachment 6 at
13 4.

14 Finally, contrary to the Primary Committee's argument, requiring the Primary
15 Committee to repay a pro rata share of a surplus is not punitive. The purpose of the
16 Commission's repayment determination is to return to the United States Treasury
17 taxpayer funds that are in excess of the amount needed by the Primary Committee to
18 satisfy its outstanding debts and obligations. See *Kennedy for President Committee v.*
19 *Federal Election Commission*, 734 F.2d 1558, 1565 (D.C. Cir. 1984). For the foregoing
20 reasons, the Commission determines that the Primary Committee has a surplus of

¹³ The date of the candidate's ineligibility is important as the cutoff date for calculating the statement of a candidate's net outstanding campaign obligations because it represents the date on which the candidate can no longer use public funds for the purpose of seeking the Presidential nomination and, thus, can no longer incur qualified campaign expenses except to pay such things as campaign-related debt and expenses associated with winding down the campaign. See 11 C.F.R. § 9032.9.

1 \$916,828 and, therefore, must make a repayment to the United States Treasury in the
2 amount of \$283,481 ($\$916,828 \times .309198$).

3 **IV. NON-QUALIFIED CAMPAIGN EXPENSES**

4 In the context of the Audit Report, the Commission determined that the Primary
5 Committee made disbursements totaling \$20,231 for non-qualified campaign expenses
6 and must, therefore, repay \$6,255 ($\$20,231 \times .309198$) to the United States Treasury.
7 These non-qualified campaign expenses include a \$4,000 refund of an unpaid
8 contribution check, a \$3,009 payment for the preparation of a United States Senate
9 financial disclosure statement, \$6,465 in payments to local jurisdictions for tax penalties,
10 \$1,703 in duplicate payments to two vendors, and \$5,054 that was paid for the personal
11 travel of campaign staff. Attachment 1 at 50. The Primary Committee's response
12 challenges only the Commission's determination that the Primary Committee must repay
13 \$1,237 ($\$4,000 \times .309198$) for refunding an unpaid contribution and \$930 ($\$3,009 \times$
14 $.309198$) for paying for the preparation of a United States Senate financial disclosure
15 statement, leaving a \$4,088 ($\$13,222 \times .309198$) balance of unchallenged non-qualified
16 campaign expenditures.

17 The Commission reviewed the Primary Committee's response and concludes that
18 the Primary Committee must repay \$6,255 for its use of funds to defray non-qualified
19 campaign expenses, including \$1,237 for the refunded contribution, \$930 for the
20 preparation of the financial statements, and \$4,088 for the balance of unchallenged non-
21 qualified campaign expenses.

22

1 **A. Refund of a Contribution**

2 In the context of the Audit Report, the Commission determined that the Primary
3 Committee's disbursement of \$4,000, purportedly paid by the Primary Committee to
4 refund an excessive contribution check that was never paid to the Primary Committee due
5 to insufficient funds in the contributor's account, was a non-qualified campaign expense
6 and, therefore, repayable to the United States Treasury.

7 In its written response to the repayment determination, the Primary Committee
8 argues that it is unfair to require a repayment in connection with a disbursement that it
9 made to purportedly refund the excessive portion of a contribution. The contribution was
10 in excess of the contribution limitation of the FECA. Attachment 2 at 2-3. The Primary
11 Committee explains that it received a \$5,000 contribution check from Skilled Healthcare
12 PAC, and that it "refunded" \$4,000 after realizing that the PAC had not qualified as a
13 multicandidate committee.¹⁴ Attachment 2 at 3. However, the Primary Committee
14 explains, the bank would not honor the original \$5,000 contribution check from Skilled
15 Healthcare PAC due to insufficient funds. Attachment 2 at 2-3. The Primary Committee
16 asserts that despite repeated efforts, it was unable to retrieve the \$4,000 from the PAC,
17 which it understands no longer exists. Attachment 2 at 3. The Primary Committee
18 asserts that under these circumstances, the Commission should not consider the \$4,000
19 disbursement a non-qualified campaign expense as it would be unfair to penalize the
20 Committee for a second time with a repayment when it has already suffered a \$4,000 loss.

¹⁴ The FECA permits multicandidate committees to make contributions to a candidate and his or her authorized committee which, in the aggregate, do not exceed \$5,000. 2 U.S.C. § 441a(a)(2). However, political committees that do not qualify as multicandidate committees may only make contributions to a candidate and his or her authorized committee which, in the aggregate, do not exceed \$1,000. 2 U.S.C. § 441a(a)(1).

1 *Id.*

2 The Commission concludes that the \$4,000 erroneously paid by the Primary
3 Committee to Skilled Healthcare PAC was a non-qualified campaign expense, and that a
4 pro rata portion of this disbursement is repayable to the United States Treasury. The
5 funds were not spent in connection with the candidate's campaign for nomination because
6 the original contribution check was never paid to the Primary Committee; thus, the
7 Primary Committee's \$4,000 disbursement was lost. While the Primary Committee may
8 have made a mistake in making the \$4,000 disbursement, committees must exercise a
9 duty of care when disbursing taxpayer funds. *See generally* 11 C.F.R. § 9034.4(b)(8)
10 (Commission considers factors indicating whether committee exercised duty of care in
11 determining whether lost or misplaced items are considered non-qualified campaign
12 expenses). The factual record indicates that the Primary Committee did not exercise the
13 duty of care in failing to ascertain the propriety of making the \$4,000 disbursement. The
14 Primary Committee first deposited the contribution check from Skilled Healthcare PAC
15 in April, 1995; redeposited the check in May, 1995; and did not disburse the \$4,000 until
16 September, 1995, *see* Attachment 3 at 5. In light of the Committee's failure to exercise a
17 duty of care by making the \$4,000 disbursement after unsuccessful attempts to collect on
18 the original contribution check, the Commission concludes that the \$4,000 disbursement
19 was a non-qualified campaign expense. Therefore, a pro rata portion of the \$4,000 must
20 be returned to the United States Treasury. Thus, the Primary Committee must repay
21 \$1,237 ($\$4,000 \times .309198$) to the United States Treasury.

22

B. Payment for Services to Prepare Financial Statements

In the context of the Audit Report, the Commission determined that a \$3,009 payment by the Primary Committee for the preparation of a United States Senate financial disclosure statement was a non-qualified campaign expense and is therefore repayable in pro rata portion to the United States Treasury. Attachment 1 at 50. The Primary Committee challenges the Commission's determination, asserting that Senator Dole was required to file a financial statement both as a presidential candidate and as a Senator, and that there is overlap between these reporting requirements and the same information is used to prepare the presidential and the Senate disclosure statements. Attachment 2 at 3. Therefore, the Primary Committee argues that it was appropriate for the Primary Committee to pay "its portion" of gathering and reporting the financial information; thus, there should be no repayment in connection with the Primary Committee's payments for services to prepare Senator Dole's financial statements. *Id.*

The total cost to prepare the financial statements was \$4,815. An invoice reflects that three-eighths of the cost of the financial services ($3/8 \times \$4,815 = \$1,806$) related to Senator Dole's campaign for the Republican presidential nomination, while the remaining five-eighths of the cost ($5/8 \times \$4,815 = \$3,009$) related to Senator Dole's responsibilities to the United States Senate. Attachment 7. However, the record reflects that the Primary Committee paid the total cost of \$4,815 for the financial services. The \$3,009 portion of the cost was not spent in connection with the Candidate's campaign for nomination because it was related to Senator Dole's responsibilities to the United States Senate. Although the Primary Committee claims that the same information was used for both the presidential and Senate statements, the Primary Committee did not provide any

1 documentation to support an allocation different from that reflected on the invoice,¹⁵ see
2 11 C.F.R. § 9033.11(a). Therefore, the Commission concludes that the Primary
3 Committee's \$3,009 payment for the preparation of a United States Senate financial
4 disclosure statement is a non-qualified campaign expense, and that the Primary
5 Committee must repay \$930 ($\$3,009 \times .309198$) to the United States Treasury. See
6 *Robertson v. Federal Election Commission*, 45 F.3d 486, 492 (D.C. Cir. 1995)
7 ("recipients of matching funds bear the burden of accounting for allocation and
8 documentation of campaign expenses").

9 V. CONCLUSION

10 For the foregoing reasons, the Commission determines that Senator Robert J. Dole
11 and Dole for President, Inc. must repay a total of \$289,736 to the United States Treasury
12 pursuant to 26 U.S.C. § 9038(b)(2). The Commission determined that Robert J. Dole and
13 Dole for President, Inc. must, within 30 days, repay to the United States Treasury
14 \$283,481 for a surplus of funds pursuant to 26 U.S.C. § 9038(b)(2) and 11 C.F.R.
15 § 9038.2(b)(4), and \$6,255 for the use of public funds to defray non-qualified campaign
16 expenses pursuant to 26 U.S.C. § 9038(b)(2) and 11 C.F.R. § 9038.2(b)(2).

17 Attachments

- 18 1. Report of the Audit Division on Dole for President, Inc. dated
19 June 3, 1999.
- 20 2. Request of Dole for President, Inc. for an Administrative Review
21 of the Repayment Determination dated August 30, 1999.
- 22 3. Memorandum from the Audit Division to the Office of General Counsel (Analysis
23 of the Administrative Review Request) dated October 7, 1999.

¹⁵ The Primary Committee has not stated whether its argument that the same information was used for Senator Dole's presidential campaign and his Senate disclosure statement supports a 50/50 allocation or some other allocation.

- 1
- 2 4. Transcript of the Dole for President, Inc. Oral Hearing before the Federal Election
- 3 Commission on December 15, 1999.
- 4
- 5 5. Supplemental Submissions of Dole for President, Inc. dated December 22, 1999.
- 6
- 7 6. Candidate Certification Letter (and Amended Page Three)
- 8
- 9 7. Invoice for Financial Services