Public Record

FEDERAL ELECTION COMMISSION

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FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

April 8, 1999

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Acting Staff Director

FROM: Kim Bright-Coleman
Associate General Counsel

SUBJECT: Perot '96, Inc. Repayment to the United States Treasury (LRA #507)

This informational memorandum is to advise you that on March 11, 1999, Perot '96, Inc. wired funds in the amount of $1,706,915 to the United States Treasury in satisfaction of its repayment obligation arising from the above-referenced matter. Attachment 1.

If you have any questions, please contact Susan L. Kay, the attorney assigned to this matter, at 694-1650.

Attachments

1. Copy of deposit ticket for funds wired by Perot '96, Inc.

99070255845

99•07•025•1846

STANDARD FORM 215C (12-87)
PRESCRIBED BY DEPT. OF TREASURY

DEPOSIT TICKET

DEPARTMENT OF THE TREASURY
FINANCIAL MANAGEMENT SERVICE

DEPOSIT NUMBER	DATE PRESENTED OR MAILED TO BANK (M M D D Y Y)	8-DIGIT AGENCY ACCOUNTING STATION CODE OR 4-DIGIT DISBURSING OFFICE SYMBOL	AMOUNT	DATE CONFIRMED (M M D D Y Y)
825101	0 3-1 1-9 9	2 0 1 8 0 0 0 2	1,706,915.00	0 3-1 1-9 9

203220-2

THIS DOCUMENT WAS GENERATED BY THE FEDWIRE DEPOSIT SYSTEM.
SEE DAILY SUPPORT LISTING OF FDS DEPOSITS.

US TREASURY DEPARTMENT FIN. MAN.
SERVICE HYATTSVILLE, MD 20782

DEPARTMENT OF THE TREASURY
FMS-CREDIT ACCOUNTING BRANCH
P.G. METRO CENTER BUILDING
3700 EAST-WEST HWY, RM 6D37
HYATTSVILLE, MD
20782

FEDERAL ELECTION COMMISSION
Washington, DC 20463

DATE & TIME OF TRANSMITTAL: Monday, March 16, 1998 11:00

BALLOT DEADLINE: Thursday, March 19, 1998 4:00

COMMISSIONER: AIKENS, ELLIOTT, McDONALD, McGARRY, THOMAS

SUBJECT: **Perot '96, Inc. Request for Oral Hearing (LRA #507). Memorandum to the Commission dated March 13, 1998.**

( ) I approve the recommendation(s)

( ) I object to the recommendation(s)

COMMENTS:______________________________

DATE: ______________ SIGNATURE:______________

A definite vote is required. All ballots must be signed and dated. Please return ONLY THE BALLOT to the Commission Secretary. Please return ballot no later than date and time shown above.

FROM THE OFFICE OF THE SECRETARY OF THE COMMISSION

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 13, 1998

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

By: Kim Bright-Coleman
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

Susan L. Kay
Attorney

SUBJECT: Perot '96, Inc.
Request for Oral Hearing (LRA #507)

On December 4, 1997, the Commission made a determination that Perot '96, Inc. (the "Committee") must repay $2,310,127 to the United States Treasury. On February 26, 1998, the Committee submitted its written response to the repayment determination and requested the opportunity to address the Commission in open session in connection with its written response to the repayment determination as provided in the Commission's regulations at 11 C.F.R. § 9007.2(c)(2)(ii). *See* Attachment. The Office of General Counsel recommends that the Commission grant the Committee's request for an oral hearing and schedule the presentation for May 20, 1998.

The Commission's regulations provide publicly funded candidates with the opportunity to respond to a repayment determination by submitting written legal and factual materials to demonstrate that no repayment, or a lesser repayment, is appropriate. 11 C.F.R. § 9007.2(c)(2)(i). A candidate may request an opportunity to

address the Commission in open session. 11 C.F.R. § 9007.2(c)(2)(ii). The candidate should identify in his legal and factual materials the repayment issues he or she wants to address at the oral hearing. *Id.* The Commission may grant this request by an affirmative vote of four of its members, and inform the candidate of the date and time set for the oral hearing. *Id.*

The repayment determination at issue is based on a surplus of funds that remained unspent after the Committee's qualified campaign expenses were paid. 11 C.F.R. § 9007.2(b)(3). Specifically, the Committee will address two separate issues in connection with the repayment determination. First, the Committee contends that it is unable to terminate by the originally expected date and, therefore, requests an extended period to pay winding down costs. An extended winding down period will increase the estimated winding down costs and decrease the amount owed to the United States Treasury as a surplus. 11 C.F.R. §§ 9004.9(a)(1) and (2); 11 C.F.R. §9007.2(b)(3). Second, the Committee disputes the conclusions contained in the Audit Report that certain legal expenses are nonqualified campaign expenses and, therefore, cannot be reflected as outstanding obligations on the Statement of Net Outstanding Qualified Campaign Expenses. 11 C.F.R. § 9004.9(a)(3).

The Office of General Counsel believes that an oral presentation may provide the Commission with additional information and therefore may assist the Commission in deciding whether the Committee has additional winding down costs and whether certain litigation expenses are qualified campaign expenses. Accordingly, this Office recommends that the Commission grant the Committee's request for an oral hearing.

Should the Commission approve our recommendation, the Office of General Counsel proposes that procedures similar to those used for previous presentations be followed. Pursuant to these procedures, the Office of General Counsel will prepare an analysis of the issues presented prior to the date of the presentation. This analysis will be provided to the Commission and to the Committee.

At the presentation, the Chairman will make an opening statement. The Committee will then be given 30 minutes in which to make a presentation on the issues raised in the legal and factual materials submitted by the Committee. 11 C.F.R. § 9007.2(c)(2)(ii). Following the presentation, individual Commissioners, the General Counsel, and the Audit Division may ask questions. 11 C.F.R. § 9007.2(c)(2)(ii). The letter to the Committee will inform the Committee of these procedures and also state that any additional materials the Committee may wish to have the Commission consider should be submitted to the Office of General Counsel within five (5) days following the presentation.

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission:

1. Grant the request of Perot '96, Inc. for an oral hearing as provided at 11 C.F.R. § 9007.2(c)(2)(ii);

2. Schedule the oral hearing for May 20, 1998; and

3. Approve the appropriate letter.

Attachment

Perot '96, Inc. response dated February 26, 1998

HUGHES & LUCE, L.L.P

1717 Main Street
Suite 2800
Dallas Texas 75201
214 939-5500
214 939-5849 fax

Attorneys and Counselors

February 25, 1998

Writers Direct Dial Number

214/939-5416
MULFORC@hughesluce.com

Other Offices
Austin
Houston

Joan D. Aikens
Chairman
Federal Election Commission
999 E. Street N.W.
Washington, DC 20004

Via overnight delivery

Re: Response by Perot '96, Inc. (the "Committee" or "Perot '96") to the Commission's Repayment Determination; Request to Address the Commission

Dear Chairman Aikens:

We are counsel to the Committee. This letter is submitted in that capacity pursuant to 11 C.F.R. § 9007.2(c)(2) with respect to the repayment determination included in the Audit Report on Perot '96 approved by the Commission on December 4, 1997 (the "Audit Report"). We also request an oral hearing regarding these matters pursuant to 11 C.F.R. § 9007.2(c)(2)(ii).

We address two separate issues regarding the repayment determination. First, under FEC regulations the Committee will be unable to terminate operations as hoped by April 1998. Accordingly, associated winding down expenses not in dispute will continue for a period longer than anticipated. Second, the Committee disputes the conclusions contained in the Audit Report with respect to certain legal expenses associated with litigation initiated by the Committee.

Amended NOQCE

Included as Attachment A is a statement of Net Outstanding Qualified Campaign Expenses ("NOQCE") amended as of January 31, 1998. When meeting with Commission audit staff in April 1997 to prepare the original NOQCE, the Committee, which had requested that the audit begin as soon as possible, assumed that it would be able to terminate by April 1998. It will be unable to do so. The resulting reporting and disclosure requirements, expenses related to necessary personnel, phone, rent and other overhead expenses, will continue to be incurred, as will legal services related to compliance, audit and wind down.

ATTACHMENT 1
Page 1 of 39

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Matters which prevent the Committee from terminating include pending actions against the Committee, two outstanding Matters Under Review by the Commission relating to claims against the Committee, the lack of resolution of the audit, the possibility that the audit could result in further enforcement actions against the Committee, the requirement of a final audit for periods subsequent to those covered in the Audit Report, and the Committee's continuing reporting obligations, all of which constitute qualified campaign expenditures as winding down costs. While these matters are not within the Committee's control, we should expect resolution of outstanding matters and claims against the Committee within 10 months of the original estimate. We note in this regard that neither the Dole/Kemp nor Clinton/Gore committees have made any notice of intent to terminate before that date.

As reflected on the amended NOQCE, we believe the repayment determination included on the Audit Report should be reduced to $1,581,573 (applying the repayment ratio). The amended NOQCE separates Committee obligations and expense estimates from the actual and estimated legal expenses associated with the litigation filed by the Committee and subject to the dispute of repayment determination discussed below. None of such costs or estimated expenses is included in the calculation of the $1,581,573 repayment amount, which reflects only the extension of the period for expenses approved under the Audit Report as proper winding down costs. We understand this is a routine procedure consistent with other campaigns that were unable to close as originally expected.

Subsequent review by the audit staff of the actual expenses included in these estimates (as well as those already incurred but not yet audited) will provide comfort to the Commission that all such expenses did in fact constitute proper winding down costs, or the Committee will be required to reimburse additional amounts. The Commission's determination now is not an agreement that all such expenses will qualify as winding down costs, only that the Committee is prevented from terminating its existence now and must continue operating for a period longer than anticipated until resolution of the various outstanding claims against the Committee.

Disputed Repayment Issues

On December 4, 1997 the Commission approved Recommendation # 1 contained in the Audit Report regarding repayment of an amount calculated based on the September 30, 1997 NOQCE. Consistent with the amended NOQCE statement, assuming it is acceptable to the audit staff and Commission, the reimbursement amount at issue is $1,581,573. We dispute the Recommendation for the reasons set forth in the Committee's Objections to the Exit Memorandum filed with the Commission on October 6, 1997 (included as Attachment B), and for the reasons set forth below.

The dispute is relatively simple, and involves litigation expenses and anticipated litigation expenses in connection with two matters. Both involve claims of the Committee arising during the election report period. In one, relating to the Commission on Presidential Debates ("CPD"), litigation was initiated during the expenditure report period. In the other, involving claims for

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damages resulting from violation of campaign finance laws during the expenditure report period by the 1996 nominees of the Republican and Democrat parties, an action was filed promptly after the facts giving rise to the claim became known. Each of these is taken in turn.

The CPD litigation concerns the use of subjective criteria in candidate selection by corporations sponsoring debates in violation of election law regulations. The FEC asserted exclusive jurisdiction to evaluate the potential violation, which the court upheld. Attorneys retained in September 1996 to pursue the matter remained under engagement by the Committee to continue the litigation, pending expiration of the period during which the Committee could not return to court. (See Affidavits of Jamin Raskin and Sam Lanham included as Attachments C and D) The FEC could have acted promptly and chose not to. In fact, over a year has past and the Committee has returned to the court to pursue a "failure to act" claim.

In the initial proceedings the court questioned the FEC's ability to in effect "moot" the claim by failing to act until after the election. Counsel for the FEC informed the court that the Committee would not be prevented from pursuing the claim, and that it was possible that the FEC would itself bring an action against the CPD.

The memorandum from the Office of General Counsel included with the Audit Report quotes in part from page 13 of the court's decision. In the words chosen to be quoted by the Office of General Counsel, the court assesses whether acquiescing to the FEC's claim of exclusive jurisdiction will irreparably harm the Committee. While the judge speculates that the FEC may not act swiftly enough to protect the interests of the Committee from the alleged violation of law, in the bench decision the judge speculates, as the Office of General Counsel quotes, that the harm to the Committee in forcing a delay until the FEC acted might still afford some relief, "so that the next cycle would not have these defects."

From this the Office of General Counsel concludes that litigation related to the claim is about an election other than the 1996 election, and is not a qualified campaign expenditure or winding down cost. (Office of General Counsel memo at 4) In fact, the court was substantiating the right of Perot '96 to continue to pursue the litigation. This is made clear by reading the sentence preceding the words quoted by the Office of General Counsel, which also place the quoted words in context. The court notes that the Committee is entitled to "come back to this court later on in the process that is provided by the Federal Election Commission Act, under 437g(a)(a), the Federal Election Commission lawyer asserted they would not be mooted out if they came back to court. What they would have lost if the FEC doesn't agree with them and a have to come to court is the opportunity to debate, but they still may be able to cure any defects in the criteria they allege the debate commission has used. . . ." The full text of the paragraph is included as Attachment E. The position the Office of General Counsel takes today is different from that taken before the court, when the right to continue the litigation was unquestioned.

Consistent with the position originally expressed by the FEC to the court, the audit staff also informed Perot '96 that it could pursue the filing of an amicus brief in the *Forbes* litigation as a qualified campaign expenditure and winding down cost, as a necessary predicate to the pending

CPD litigation. (The CPD also filed an amicus brief because of the relevance of that case to the Committee's claim against the CPD.) It was only at the end of the audit process, in the fall of 1997, that the FEC staff position shifted. That shift, as evidenced by statements in the Audit Report, the Memorandum from the Office of General Counsel included in the Audit Report, and in statements at the December 4th Commission Hearing (the transcript of which is included as Attachment F), is based on an articulated supposition by the Office of General Counsel that someone is up to no good here, that the litigation pertains to a future election and not the 1996 election.

The Office of General Counsel supports this position by asserting the lack of "nexus" to the 1996 election (Memorandum of Office of General Counsel at 3) (ignoring the fact that the claim and litigation were instituted during and pertain to the 1996 election, and could have been resolved during the 1996 election had the FEC chosen to act promptly); by reciting the partial quote from the court discussed above and informing the Commission "If you look at what the court said in the initial litigation, . . . the court pretty much said, any relief that could be fashioned could not be fashioned for the 1996 election. Therefore, it only could be for a future election" (Memorandum of Office of General Counsel at 4; Commission Hearing Transcript at 6) (ignoring the entire point of the judge's remarks, that the Committee would not be prevented from continuing the litigation after the election); by "quoting" an alleged statement by Sam Lanham appearing in a newspaper article on October 30, 1997 (Memorandum of Office of General Counsel at 3) (which was not a quote but a statement by a reporter which Mr. Lanham disavows, as reflected in the affidavit attached as Attachment D). In addition, in response to questions noted on page 5 of the Commission Hearing Transcript, the audit staff suggested to the Commission, inaccurately, that litigation with respect to the claim has ended. It has not. As evidenced by the court decision, transitory audit staff approval of the *Forbes* amicus brief, and the ongoing legal services being performed, it was expected to and has continued.

With pretzel logic the FEC, which delayed the Committee in pursuing the claim, now contends that the claim itself is intended to affect a future election. The Office of General Counsel suggests that the purpose and nature of the claim somehow is now miraculously transubstantiated into a claim involving a different election. What the Office of General Counsel has in mind here as a benefit in a future election is certainly unclear: there is no assurance that if the litigation is successful that objective criteria will be selected that has no "impact" on third parties, Ross Perot, or anyone else, and in effect maintains the status quo. The situation in 1996 was unique: polls showed over 70% of voters believed Ross Perot should be in the debates; he was denied participation based on an improper subjective determination; the campaign was harmed as a result. While the Office of General Counsel seems preoccupied with its guess on the future political motives of Ross Perot, which is both inappropriate and wrong (see Affidavit of Ross Perot attached as Attachment G), the legal issue here is straightforward.

The Committee has a valid claim for redress. It is based on a violation of the regulation that prohibits the use of subjective criteria by corporations in selecting participants for candidate debates. It is a claim that pertains to the 1996 election. It is a claim that arose during the expenditure report period and a claim that the Committee would have then resolved had the FEC

acted promptly or left unchallenged the Committee's authority to bring its action in court. The claim and associated litigation expenses were and remain in furtherance of the 1996 election. A commitment and retention of counsel to pursue the litigation until its conclusion was made during the expenditure report period. The resolution of litigation initiated as a qualified campaign expense that continues beyond the election (in this instance solely due to inaction by the Commission) are continuations of the same claim and a valid winding down expense.

Moreover, the Commission has never before taken a position contrary to the right to pursue to resolution litigation begun during an expenditure report period as a qualified campaign expense. The position of the Audit Report and the Office of General Counsel is without legal precedent. While we are aware of the relevant inexperience of all involved in public funding of independent and third party candidacies, we believe the Audit Report misrepresents entirely the position of the Commission in the 1980 John Anderson campaign.

Addendum # 2 to the Final Audit Report on the National Unity Campaign for Anderson is included as Attachment H. As is noted on page 3 of the Anderson Report Addendum, and based on knowledge and belief, the Anderson campaign used funds awarded under the Presidential Election Fund Act to pay legal expenses in connection with litigation it instituted as plaintiff, which continued for three and four years following the end of the 1980 election. The audit staff and Office of General Counsel state that this litigation was funded by court awards of attorneys' fees. In actuality the litigation was funded from the Fund Act and actions for recovery of legal expenses were secondary to the underlying claims of ballot access rights, and depended on the success of those claims. (The recovery of attorneys' fees is an issue related to the nature of the ballot access claims which, if successful, can include actions for legal expenses which generally cover only a portion of the fees.) As is clear from the second paragraph on page 3 of the Anderson Report Addendum included as Attachment H, publicly provided funds were used to finance the litigation. The issue presented by the Anderson Audit Report was whether the proceeds of any attorneys' fees awarded in connection with successful litigation would thereby properly be repayable to the US Treasury.

The position of the Commission in the Anderson audit is consistent with the position that claims arising during the expenditure report period which are pursued through litigation continuing beyond the period constitute qualified campaign expenditures as winding down costs. Simple fairness requires that the Commission apply consistently the regulations, particularly in the situation faced by the Committee, where the timing of the expenditures was dictated by the FEC. The Office of General Counsel queries how the election of 1996 could be affected by a decision in the CPD litigation. It is affected in the same manner court decisions in 1984 regarding ballot access affected the 1980 election. The determinative issue is whether the litigation initiated constitutes a qualified campaign expense. Where it does, as the Audit Report concludes the CPD litigation did, a committee is entitled to pursue its claim.

In the litigation involving illegal contributions and expenditures by Republicans and Democrat parties, the Committee filed a cause of action seeking damages for harms to it incurred

during the campaign by the illegal activities of others. This claim is no different from any claim giving rise to a cause of action in which the Committee redresses its legal rights to collect damages for harms done to it during the campaign. Arguably, the Committee has an obligation to do so under the relevant regulations. Had the Committee discovered that it had been harmed by the theft of assets or been over-charged under a contract during the course of the campaign, it would similarly file an action in order to muster the assets of the Committee. In accordance with the Anderson audit precedent, it would appear that any recovery would be required to be returned to the US Treasury.

Finally, we note that we disagree with characterizations in the Audit Report of numerous facts, and note the FEC is a party in opposition to the Committee in the subject litigation and could have an incentive to limit funding of the actions regardless of their merit as qualified campaign expenses and winding down costs.

Footnotes (b), (c) and (d) to the amended NOQCE included as Attachment A reflect the appropriate adjustments necessary to include therein the actual and estimated expenses related to matters disputed.

Sincerely,

Ross Clayton Mulford

RCM:rmm
Attachments

cc: Lawrence M. Noble
Tom Halter

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Attachment A

PEROT '96, INC.
STATEMENT OF NET OUTSTANDING QUALIFIED CAMPAIGN EXPENSES
As of December 5, 1996
As Determined January 31, 1998

ASSETS

Cash on Hand	$ 700	
Cash in Bank	3,295,644	
Accounts Receivable	639,235	
Total Assets		$3,935,579

OBLIGATIONS

Accounts Payable for Qualified Campaign Expense	301,416	
Actual Winding Down Costs (a) (December 6, 1996 - January 31, 1998)	1,056,738 (b)	
Estimated Winding Costs (February 1, 1998 - February 28, 1999) (See attached Scheduled I)	944,537 (c)	
Total Obligations		$2,302,691 (b)(c)
Net Outstanding Qualified Campaign Expenses (Surplus)		$1,632,888 (b)(c)(d)

(a) Actual legal fees dealing with ongoing compliance, reporting wind down, MURs, audit, accounting, and unrelated to matters referenced in (b) and (c) were estimated to be $100,000 between July 1997 and April 1998 (or $10,000 per month). Actual costs through 1/31/98 were $113,088, in part due to additional MURs filed against the campaign and the disputed Draft and Final Audit Report. A break-down of actual legal costs through 1/31/98 is attached as Schedule II.

(b) Litigation expenses paid through 9/30/97 totaling $32,842 are not included; litigation expenses totaling $505,274 paid from 9/30/97 through 1/31/98 are also not included. Though not included both are disputed as qualified campaign expenses and winding down costs by the Committee and subject to request for rehearing of repayment determination. Post 9/30/97 amounts are subject to audit verification and approval.

(c) See attached schedule. Does not include $1,206,000 estimated litigation costs disputed as qualified campaign expenses and winding down costs by the Committee and subject to request for rehearing of repayment determination. Amounts are subject to audit verification and approval.

(d) Characterization of amounts referenced in footnotes (b) and (c) as qualified campaign expenses and winding down costs would not result in a surplus.

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Schedule 1

PEROT '96, INC.
Estimated Wind Down Costs
As of January 31, 1998

COMMITTEE OBLIGATIONS	1998											1999		
	February	March	April	May	June	July	August	September	October	November	December	January	February	Total
Office Space	4,500	4,500	4,500	4,500	4,500	4,500	4,500	4,500	4,500	4,500	4,500	4,500	4,500	58,500
Salaries & Benefits	44,000	44,000	44,000	44,000	44,000	44,000	44,000	44,000	44,000	44,000	44,000	44,000	44,000	572,000
Telecommunications	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	26,000
Postage & Shipping	500	500	500	500	500	500	500	500	500	500	500	500	500	6,500
Supplies	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	13,000
Accounting Fees	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	13,000
Legal Fees (compliance, reports, records, audit, headings, final audit, MURs, enforcement, termination) (1)	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	130,000
Legal Fees (audit court challenge) (2)	0	0	20,000	20,000	20,000	20,000	20,000	0	0	0	0	0	0	100,000
Other	1,964	1,964	1,964	1,964	1,964	1,964	1,964	1,964	1,965	1,965	1,965	1,965	1,965	25,53[illegible]
Total Obligations	64,964	64,964	84,964	84,964	84,964	84,964	84,964	64,964	64,965	64,965	64,965	64,965	64,965	944,53[illegible]
COMMITTEE CLAIMS														
Legal Fees (2)	115,000	125,000	125,000	115,000	108,000	108,000	105,000	105,000	100,000	100,000	100,000	0	0	1,206,000
Total	179,964	189,964	209,964	199,964	192,964	192,964	189,964	169,964	164,965	164,965	164,965	64,965	64,965	2,150,53[illegible]

(1) Estimates received from outside counsels for compliance Hughes & Luce and Skadden Arps.

(2) Estimates received from litigation counsel Godwin & Carlton; Thoits & Love; Cuddy & Lanham; Jamine Raskin.

ATTACHMENT 2 Page 3 of 37

PEROT '96 NOQCE
Breakdown of Legal Expenses
Paid From July 1, 1997 Through January 31, 1998

Compliance Legal			
Hughes & Luce		87,577	
Skadden Arps		25,511	
Total Compliance Legal		113,088	Footnote (a)
Disputed Legal Expenses			
Jamin Raskin	27,208		
Cuddy & Lanham	5,634		
		32,842	Footnote (b)
Godwin & Carlton	144,999		
	156,035		
	83,154		
Thoits, Love	42,404		
	42,316		
Jamin Raskin	12,875	481,784	
Cuddy & Lanham	27		
	1,032		
	3,199		
	4,786		
	6,479		
Mayberry	2,929	18,452	
Hughes & Luce	5,039	5,039	
		505,274	Footnote (b)
TOTAL LEGAL EXPENSES		651,204	

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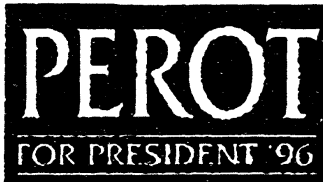

Perot '96, Inc.
P.O. Box 96
Dallas, Texas 75221

October 6, 1997

Robert J. Costa
Assistant Staff Director, Audit Division
Federal Election Commission
999 E Street NW
Washington, DC 20463

Dear Mr. Costa,

We object to certain of the Audit Findings and Recommendations contained in the Exit Conference Memorandum of the Audit Division on Perot '96 ("Exit Memorandum"), as summarized below and discussed in the following pages.

- **Staff Advances: Perot '96 at all times complied with the purpose and intent of 11 CFR §116.5.**

The stated purpose of 11 CFR § 116.5 is to prevent extended loans to campaigns in financial difficulty under the guise of employee incurred campaign expenses not promptly reimbursed. The Exit Memorandum notes that a Perot '96 staff member in limited instances charged to his credit card incidental campaign expenses associated with candidate appearances, primarily hotel expenses of the candidates and a junior staff member without credit cards. Because Perot '96 was unable to obtain campaign credit cards the staff director had no alternative, due to the impracticality and FEC compliance problems associated with traveling with large amounts of campaign cash, and the requirements for credit cards by hotels and others. The staff director was in each instance promptly reimbursed -- typically in less than half the time permitted and always before he actually paid the expense. The purpose and intent of § 116.5 were complied with in full, and any technical and unavoidable violation is de minimus compared with instances in which the Commission took no action, including instances where reimbursement was never made or was delayed until discovered in the FEC post election audit.

- **Occupation/Employer Disclosure: Perot '96 obtained and filed supplemental information in compliance with FEC regulations and instructions.**

Reports Analysis Division staff instructed representatives of Perot '96 while employees of Perot '92 that the staff preferred cumulative rather than regular amendments to supply supplemental contributor information. When informed of the change in preference by the FEC audit staff, Perot '96 promptly filed the information by amendment.

- **Legal expenses related to ongoing matters under review before the Commission are qualified campaign expenses and winding down costs.**

Anticipated legal expenses relate to outstanding matters under review with respect to which the Commission has not yet acted. Had the FEC acted with respect to complaints involving Perot '96 during the expenditure report period, legal expenses, including associated litigation expenses, would have been qualified campaign expenditures. The campaign conserved funds because the FEC had not yet acted with respect to these matters. To deny the opportunity of representation in matters arising during the campaign simply because the campaign ended before the FEC acted is inappropriate and without legal basis.

A. Perot '96 was at all times in compliance with the purpose and intent of §116.5.

The potential abuses that 11 CFR § 116.5 was adopted to address are not at issue here. In adopting 11 CFR §116.5 the Commission was explicit in its purpose: to prevent the circumvention of contribution limits when a committee experiences financial difficulties and a staff member covers ongoing committee expenses with personal resources without expectation of prompt reimbursement. 35 Fed. Reg. 26,382-26, 383 (1989).

The Exit Memorandum finding involves credit card charges incurred by a campaign staff director during campaign travel.[1] All such expenses were promptly reimbursed within the 60 day limit from the closing date of the employee's billing statement. In fact, audit staff research reflects that reimbursement was almost always made within 30 days after the expense was incurred. In each instance, the staff member was reimbursed before he actually paid the expense. At no time during this period did Perot '96 experience financial difficulties. The use of a credit card by the staff member was simply a practical necessity. To suggest that the situation is equivalent to an attempt to circumvent contribution limitations is completely inaccurate. If any violation occurred it was merely technical and inadvertent, and quickly corrected.

Perot '96 sought campaign credit cards for candidates and staff undertaking campaign travel. These were sought to avoid the risk of inadvertent contributions by candidates and staff, and to maintain strict financial controls. However, credit card providers do not consider political campaigns among those enterprises most credit-worthy. Multiple requests by Perot '96 for credit cards were denied. As the Exit Conference Memorandum notes, three major credit card companies were unwilling to provide business credit cards to Perot '96. A memorandum detailing the efforts of Perot '96 in this regard has been previously supplied to the audit staff.

The expenses at issue deal solely with expenses incurred by the staff director charged with overseeing candidate appearances, for hotel charges of nominees and staff lacking credit cards and incidental candidate appearance expenses where credit cards were required by vendors. The use by the staff director of his personal credit card was the only alternative. If campaign credit cards are unavailable, it is unrealistic to expect presidential and vice-presidential nominees to stand in hotel cashier lines in all instances, or to expect all staff members, especially young or college age individuals working on political campaigns, to meet the credit requirements to be issued personal credit cards.

If the audit staff interpretation of the regulation were correct, violations would be unavoidable for campaigns denied credit cards. Presidential nominees should not be required to stand in registration lines and young staff persons without credit cards denied participation in campaigns due to an

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[1] The Exit Memorandum shows that the highest balance was $26,292.51 on October 16, 1996.

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ATTACHMENT 1
Page 11 of 31

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interpretation of § 116.5. In addition, means other than use of personal credit cards would involve traveling with large quantities of campaign cash, dramatically increasing the possibility of inappropriate expenditures and posing much more significant reporting, compliance and disclosure issues. And that would not solve the requirement of vendors such as hotels, operators of auditoriums and others who require credit cards to guarantee payment.

Because the campaign was not in financial difficulty, and because reimbursement was prompt, any inference that the staff member intended to delay reimbursement or made an "advance" is completely inaccurate. The Commission appears to be in accord with that conclusion. The 1992 Kerry Democratic presidential primary campaign received staff advances from two campaign representatives. One apparently did not seek reimbursement until the advance was discovered in the post election audit fieldwork by FEC staff, and over $7,500 was never reimbursed. The timing of the advances and economic situation of the campaign suggest that it was pressed for resources. Nevertheless the matter was closed without a finding of probable cause to believe a violation of § 116.5 had occurred. *See* MUR 3947.

In addition, we note that 11 C.F.R. §103.3 provides a political committee 60 days during which it may refund excessive contributions. There is no justification for treating an "excessive contribution" resulting from an inadvertent "staff advance" more strictly than actual excessive contributions, thereby denying a reasonable opportunity to cure the unintentional violation. The remedy of a prompt reimbursement should be available for staff advances considered contributions under §116.5. The staff member in question was always promptly reimbursed, and Perot '96 received no excessive contribution.

B. <u>Perot '96 obtained and filed supplemental information regarding occupation and employer in compliance with the FEC regulations and instructions.</u>

The Exit Memorandum notes that audit staff during fieldwork found that occupation and employer information received through best efforts contacts after December 5, 1996 had not yet been submitted by amendment. The memorandum states "...Committee officials stated that as a result of communication with the Federal Election Commission Reports Analysis Division staff during the 1992 campaign, they were under the impression that they should not file amended reports for the 1996 election cycle as frequently as they had during the 1992 election cycle."

Perot '96 was under this impression for good reason. Representatives of the Reports Analysis Division instructed employees of Perot '96 while they were employed by Perot '92 not to submit regular amendments to provide supplemental occupation and employer information. The FEC informed the campaign it was being "overwhelmed" by the filing of amendments disclosing employer and occupation. (Affidavit of Janice Estes included as Attachment 1.) This was confirmed repeatedly by Perot '92 over the course of many filings and conversations with the FEC over several years, including in its responses to MUR 3721, MUR 3734, MUR 3741, MUR 3748, MUR 3763, and MUR 3779. For example, the following letter was submitted to the FEC in 1993 (a copy of which is included as Attachment 2):

PEROT '92

October 11, 1993

Federal Election Commission
c/o Pat Sheppard
999 E Street, N.W.

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Washington, D.C. 20463

Dear Ms. Sheppard:

Enclosed is the Cumulative Amendment of Perot '92 for the period from March 1, 1992 through December 31, 1992. Information that requires explanation has been footnoted with numeric or alpha explanations and explained on the back pages of this document.

As you will recall, Perot '92 began filing regular amendments to its FEC reports shortly after its organization in March 1992. This practice continued through June 1992, when Perot '92 agreed, at your request, to discontinue regularly submitting amendments to its FEC reports and to instead file one cumulative amendment at a later date.

Your preference for this cumulative amendment procedure has since been reconfirmed numerous times, including a telephone conversation between you and Mr. Chris Wimpee of Ernst & Young in January 1993, a subsequent telephone conversation between you and Ms. Shannon Story of Ernst & Young, and a letter to you from Mr. Daniel G. Routman, Associate General Counsel of Perot '92, dated April 8, 1993. This arrangement has also been referenced in responses filed with the FEC with respect to MUR 3721, MUR 3734, MUR 3741, MUR 3748, MUR 3763, and MUR 3779.

If you have any questions regarding this Cumulative Amendment, please contact Daniel G. Routman at 214-450-8883.

Sincerely,

/s/ Mike Poss
Mike Poss
Treasurer

Enclosures

The individuals who received the Commission's request for a cumulative amendment were also responsible for filing reports for Perot '96. In spite of regular and frequent conversations between the FEC Reports Analysis Division and the Perot '96 staff member, no one ever suggested the preference for a cumulative amendment had changed. (Affidavit of Estes.) Consequently, a cumulative amendment was filed on December 5, 1996, again without comment by FEC staff. It was not until the audit staff questioned the practice in the course of the audit in March 1997 that Perot '96 was advised that this preference may have changed. Upon learning of the change in the FEC's preference, Perot '96 promptly filed an amendment reflecting the occupation and employer information it had received since December 5, 1996. (Affidavit of Estes.)

Perot '96 was meticulous in complying with record-keeping and reporting requirements, including with respect to information obtained through the campaign's best efforts regarding contributor occupation and employer. The sole reason for not following the regular amendment approach followed in 1992 was due to the instruction and for the convenience of the FEC.

10440.0001:0290786.01

ATTACHMENT 1
Page 13 of 39

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C. <u>Perot '96 is entitled to incur and pay legal costs related to matters under review before the Commission as qualified campaign expenses and winding down costs</u>.

Legal expenses in the resolution of matters initiated as qualified campaign expenses that continue beyond the reporting period due to action or inaction by the Commission are qualified campaign expenses and proper winding down costs. Outstanding matters under review include only those with respect to which the Commission has not acted. Had the FEC acted with respect to complaints involving Perot '96 during the expenditure report period, legal expenses, including associated litigation expenses, would have been qualified campaign expenditures. The campaign conserved funds because the FEC had not resolved these matters. To deny Perot '96 opportunity to continue to represent itself in matters arising during the campaign simply because the campaign ended before the FEC acted is inappropriate and without legal basis. Perot '96 is entitled to retain and expend amounts necessary for legal services related to matters under review involving it.

The audit report places emphasis on the pending MUR involving Perot '96 and the Commission on Presidential Debates ("CPD"). The FEC has not questioned that legal expenses incurred in relation to the complaint filed by Perot '96 with the FEC against the CPD was a qualified campaign expense incurred during the expenditure report period. Had the FEC acted on the complaints filed with the FEC by or against Perot '96 during the expenditure report period, including the one involving the CPD, legal expenses related to them would without question have been qualified campaign expenditures. It is a strange twist of logic to suggest such categorization is now inappropriate when the sole reason the period during which they would so qualify has passed without their incurrence is a delay in FEC action on those matters.

In fact, Perot '96 sought to avoid the delay the FEC could impose in reaching resolution with respect to the MUR filed against the CPD through court action. In an effort to prevent Perot '96 from pursuing the MUR at that time during the expenditure report period, the FEC stated to the Federal District Court that the campaign's action would not be mooted by FEC review and expiration of the period during which the FEC asserted exclusive jurisdiction over the matters subject to the MUR. To now say expenditures may no longer be made which are necessary to prevent the ongoing matter from being moot in practical effect, expenditures budgeted and conserved for by the campaign in reliance on the FEC position, is wholly inconsistent and without legal basis. The anticipated expenses are directly related to, are an integral part of and cannot be separated from the expenditures during the period when such expenditures are unquestionably qualified campaign expenses.

That position is consistent with prior conclusions by the Commission. In the Dukakis/Bentsen Final Audit Report the Commission determined that printing and postage costs for 125,000 holiday cards sent after the election and as late as the following March were qualified campaign expenses as winding down costs. Such expenses have far less a nexus as winding down costs than do legal expenses related to outstanding MURs and litigation ongoing since the expenditure report period.

In addition, the Final Audit Report of the Dukakis/Bentsen Committee notes that legal services were initiated related to the electoral college during the expenditure report period. Although the electoral college meets after the close of the expenditure report period and legal services were provided after the close of the expenditure report period, the Commission correctly determined that the expenses were qualified campaign expenses because they involved legal services related to activities undertaken during the expenditure report period. The Commission did not and should not attempt to replace the judgment and decisions of the campaign. The question is simply whether properly incurred legal

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ATTACHMENT 1
Page 14 of 39

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expenses for a legitimate campaign purpose are at issue. If so, they are properly qualified campaign expenses.

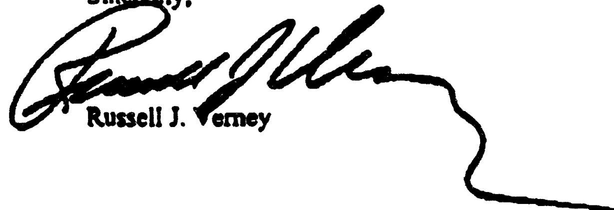
Similarly, in the Addendum to the Final Audit Report-National Unity Campaign for John Anderson, amounts set aside as legal expenses concerning a matter under review were approved by the Commission as winding down costs. The Addendum stated that 11 C.F.R. §9004.4(a)(4) allows public funds to be used for winding down costs which include but are not limited to legal services related to ongoing MURs.

Moreover, Addendum #2 to the Final Audit Report of the National Unity Campaign, dated July 19, 1984, discusses possible attorney fee awards for ballot access litigation. Audit staff sought refund of the attorney fee award, because the funds awarded under the Presidential Election Fund Act were used to pay attorneys for the Supreme Court litigation. Since the majority of the activity in the case, Anderson v. Celebrezze, occurred several years after the close of the 1980 general election expenditure report period, the audit division claim suggests that all such spending constitutes qualified campaign expenses.

The Exit Memorandum also considers legal expenses incurred by Perot '96 in connection with its amicus brief in *Arkansas Education Television Commission v. Ralph P. Forbes*, currently before the Supreme Court. The proposed amicus brief expense and relevancy of the *Forbes* case was presented to and approved by members of the audit staff prior to the payment in question. We were informed only at the exit conference that the position of the Commission had changed following a staff review in Washington. The staff's initial judgment was correct. The Perot '96 expenditure was necessary in relation to the ongoing MUR related to the CPD. The CPD recognized the relationship to the pending MUR and also filed an amicus brief. These expenses are qualified campaign expenses, because they relate directly to issues underlying a MUR involving Perot '96. In making the expenditures, Perot '96 also relied on FEC representation that such incurrence was acceptable.

Perot '96 urges the Commission to recognize that Perot '96 violated neither the purpose nor the intent of §116.5, fully complied with the FEC's instructions regarding filing supplemental information on contributors, and is entitled to reserve for and incur legal fees related to MURs and associated legal claims as qualified campaign expenses and winding down costs, including those associated with the *Forbes* case. We also wish to compliment the Commission audit staff who worked with us, both for their cooperation in obliging our request for an audit as early as possible, and for the professional way in which the audit was handled.

Sincerely,



Russell J. Verney

Attachments

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ATTACHMENT 1
Page 15 of 39

ID:

AFFIDAVIT OF JANICE ESTES

State of Texas)
)
County of Dallas)

Before me, a notary public, appeared Janice Estes, who, being duly sworn, deposed as follows:

1. My name is Janice Estes. I am over eighteen (18) years of age. I have never been convicted of any crime of moral turpitude or a felony and am fully competent to make this affidavit.

2. I was employed by Perot '92 and am employed by Perot '96. My responsibilities for both Perot '92 and Perot '96 included preparation of letters to demonstrate good faith efforts to establish identification of contributors of $200 or more, and preparation and filing of amendments to our reports related to that information.

3. In 1992 I began filing amendments containing updated contributor occupation/employer information under instructions from Perot '92 campaign staff, filing them every 10 days.

4. During the 1992 election campaign we were informed by the FEC that it was being "overwhelmed" by our amendments and requested that we file only one master, cumulative amendment.

5. My responsibilities as a Perot '96 staff member included these same functions. During the course of the 1996 election campaign I had numerous telephone conferences with the audit and reporting staff. No one ever questioned our approach or suggested that anything had

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changed from the procedures followed at the request of the FEC during the 1992 election. An amendment containing all the contributor occupation/employer information obtained through best efforts was filed on December 5, 1996.

6. We were holding information received after December 5, 1996 for a second cumulative contributor occupation/employer amendment. In March 1997, I learned by discussion with audit staff during the FEC audit of Perot '96 that the FEC's preference for cumulative amendments may have changed. I therefore promptly prepared an amendment containing all the information that we had obtained since December 5, 1996, and that amendment was filed a few days thereafter.

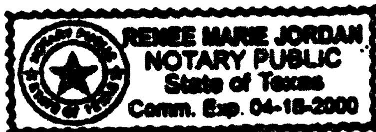
7. I swear under penalty of perjury that the foregoing is true and correct.

Janice Estes

State of Texas)
)
County of Dallas)

Subscribed and sworn to me, a Notary Public, by Janice Estes, known to me to be the person whose name is subscribed to the foregoing instrument.

Given under my hand and seal this 6th day of October, 1997



Notary Public in and for the State of Texas

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ID:

PEROT '92

1700 Lakeside Square
12377 Merit Drive
Dallas, Texas 75251

Mike Poss
Treasurer

October 11, 1993

By Federal Express

Federal Election Commission
c/o Pat Sheppard
999 E Street, N.W.
Washington, D.C. 20463

Dear Ms. Sheppard:

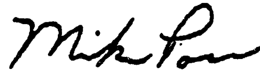
Enclosed is the Cumulative Amendment of Perot '92 for the period from March 1, 1992 through December 31, 1992. Information that requires explanation has been footnoted with numeric or alpha explanations and explained on the back pages of this document.

As you will recall, Perot '92 began filing regular amendments to its FEC reports shortly after its organization in March 1992. This practice continued through June 1992, when Perot '92 agreed, at your request, to discontinue regularly submitting amendments to its FEC reports and to instead file one cumulative amendment at a later date.

Your preference for this cumulative amendment procedure has since been reconfirmed numerous times, including a telephone conversation between you and Mr. Chris Wimpee of Ernst & Young in January 1993, a subsequent telephone conversation between you and Ms. Shannon Story or Ernst & Young, and a letter to you from Mr. Daniel G. Routman, Associate General Counsel of Perot '92, dated April 8, 1993. This arrangement has also been referenced in responses filed with the FEC with respect to MUR 3721, MUR 3734, MUR 3741, MUR 3748, MUR 3763, and MUR 3779.

If you have any questions regarding this Cumulative Amendment, please contact Daniel G. Routman at 214-450-8883.

Sincerely,



Mike Poss
Treasurer

Enclosure

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AFFIDAVIT OF JAMIN RASKIN

DISTRICT OF COLUMBIA)

Before me, a notary public, appeared Jamin Raskin, who deposed as follows:

1. My name is Jamin Raskin. I am over eighteen (18) years of age.

2. I am an attorney of record in connection with the Perot '96 claims involving the Commission on Presidential Debates. I was retained by Perot '96 to pursue this litigation under a commitment by the Committee made in September 1996. I have continued to represent the Committee in this matter under that commitment to this day.

3. I swear under penalty of perjury that the foregoing is true and correct.

Jamin Raskin

DISTRICT OF COLUMBIA)

BEFORE ME, A Notary Public, on this day personally appeared Jamin Raskin, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal this 25 day of February, 1998

Notary Public in and for the District of Columbia

My Commission Expires April 14, 1999

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AFFIDAVIT OF SAMUEL W. LANHAM, JR.

STATE OF MAINE }
COUNTY OF PENOBSCOT }

Before me, a notary public, appeared Samuel W. Lanham, Jr., who deposed as follows:

1. My name is Samuel W. Lanham, Jr. I am over eighteen (18) years of age.

2. I am an attorney of record in connection with the Perot '96 claims involving the Commission on Presidential Debates. I was retained by Perot '96 to pursue this litigation under a commitment by the Committee made in September 1996. I have continued to represent the Committee in this matter under that commitment to this day.

3. In the October 30, 1997 issue of USA Today an article on page 10A entitled "Perot Asks for Ruling on Debate Exclusion" contains the following statement: "Perot lawyer Sam Lanham, without commenting on Perot's plans, conceded the court action is aimed towards the next presidential election. He said it is designed to protect all third parties."

4. The statement is not a quote from me; is not reported as a quote from me; the statement misrepresents my words and intentions, as well as the motives of Perot '96 in pursuing this litigation. The statement is merely the reporter's interpretation of my response to a hypothetical question about the conceivable consequences, but not the motive, purpose or subject matter of the litigation. I would not have said the litigation is "aimed towards the next presidential election" because it is not. The purpose of the litigation was then, and remains the pursuit of the claim of Perot '96 for the failure of the Commission on Presidential Debates to comply with the legal requirement that

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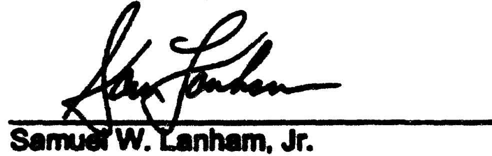
incorporated debate sponsors use objective criteria in selecting participants. Any other reported expression was solely the result of a reporter's misinterpretation.

5. I swear under penalty of perjury that the foregoing is true and correct.



Samuel W. Lanham, Jr.

99•07•025•1871

STATE OF MAINE
Penobscot, ss.

BEFORE ME, a Notary Public, on this day personally appeared the above-named Samuel W. Lanham, Jr., known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal this 25th day of February, 1998.

Notary Public in and for the State of Maine

Judith B. Wight-Notary Public-Maine
My Commission Expires May 15, 2003

must attend then any debate that is then held, or I would rule eventually, I suppose, on the other hand there can be no debates until they redo the criteria, which obviously could not happen in this presidential election cycle.

Weighing that against the plaintiffs not being able to partake in the debate or the remedy they may still pursue in their complaints to the FEC and may have a right to come back to this Court later on in the process that is provided by the Federal Election Commission Act, under 437g(a)(8), the Federal Election Commission lawyer asserted they would not be mooted out if they came back to court. What they would have lost if the FEC doesn't agree with them and they have to come to court is the opportunity to debate, but they still may be able to cure any defects in the criteria they allege the Debate Commission has used so that the next cycle would not have these defects and thereby have some relief, although not total relief.

But weighing the interference of the Court -- and I'm going not only to likelihood of success on the merits and irreparable injury, but balancing the equities and the public interest -- the harm that could occur by the Court's interference in this process and the reaching that the Court must make to grant the preliminary injunction that it would have the right to set the criteria or choose which criteria already out there are appropriate and disallow other criteria, overriding the FEC's opportunity to do that as the agency assigned to do that by

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TRANSCRIPT OF PEROT '96, INC. AUDIT HEARING BEFORE THE FEDERAL ELECTION COMMISSION
December 4, 1997

MS. AIKENS: Roman Numeral Number II under Audit Matters, Item C as in "Charles", the Perot '96 audit, this is Agenda Document Number 97-81 and we are going to have Tom, is Tom coming, Rick Halter?

HALTER: I think he is stuck in the elevator.

MS. AIKENS: Then who will present this particular matter for ...?

HALTER: I will.

MS. AIKENS I'm sorry?

HALTER: I will.

MS. AIKENS Yes. And we have from the Office of General Counsel, Lorenzo Holloway, and ....

HALTER Mr. Chairman, we can proceed now, if you like.

MS. AIKENS: So, with that, Rick Halter, the Chair recognizes Rick Halter.

HALTER: Thank you very much.

MS. AIKENS: Would you pick that mike up, Rick, and speak right into it, please?

HALTER: Tom Hintermister, who is the lead auditor on this job, will be here shortly. I would like to mention that Marty Favon, who was the audit manager on this job, who played a big part in the field work, could not be here today. He sends his regrets; however, he is recovering very nicely from open heart surgery, had about six weeks ago, and he plans to return to work on doctor's orders on schedule a little bit later this month. So he sends his regrets, he wishes he could be here. If I may then proceed with the report. As the report contains three findings, one of which has a recommendation, I would like to briefly summarize the first two findings which do not have recommendations, they begin at page 3 of the report and end at page 8. The first finding identified as Finding 2A involves 11 CFR 116.5 advances made by an individual and it closes by stating that "although it appears the committee did not gain any material financial advantage from the practice of using an individual's personal credit card to defray the expenses of other committee staff and the vice presidential nominee under the provisions of

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11 CFR 116.5, this activity resulted in an apparent excessive contribution of $26,293.00. The second finding involves ...

MR. THOMAS: Rick?

MS. AIKENS: Mr. Thomas?

MR. THOMAS Excuse me, just to be sure. To what extent were these situations, where the individual's credit card was being paid off before the due date by the committee?

HALTER: In almost every case it was paid off within about 30 days or less.

MR. THOMAS By the committee?

HALTER: Yes.

MR. THOMAS: This wasn't something where the individual was paying the credit card and then being reimbursed? In most cases ...

HALTER: Well, no. Excuse me. The individual was being reimbursed in approximately 30 days.

MR. THOMAS: Thirty days from ...?

HALTER: Thirty days from the incurrence dates. Thirty days from ... well, let me put it this way. Thirty days from the close of, that's, well, no, it was thirty days from the incurrence date. So if they went to the hotel on the 15th of the month, then the reimbursement generally occurred within 30 days from then.

MR. THOMAS: How was the individual paying the credit card? Were they getting a bill on the 29th day or something and then ...?

MS. ELLIOTT: Excuse me, Mr. Chairman, doesn't the report say that, that it sometimes was paid before they got the bill, before he got the bill?

HALTER: The transaction, I just checked with Tom, the transaction was that the individual would submit the reimbursement request and would receive a check from the committee to cover that and then the individual in turn would to and pay their own bill to the credit card company. And of course the problem is, is that, had all of this been for the individual's own personal travel and subsistence, then everything would have been OK. The fact that this individual's card was being used to defray other committee staff expenses is where the rub.

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Page 24 of 39

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MS. AIKENS: Commissioner Ms. Elliot?

MS. ELLIOTT: I have a terrible time with this conclusion, and I cannot support it. When you have a committee that cannot get credit cards, you have to go to the use of personal ones unless they are carrying cash. It is not possible to use electronic fund transfers like you do checks. That requires an agreement between banks and you have to know account numbers and all kinds of things. It's a complicated procedure unless people are doing it all the time and repeatedly, and I do not think that that is an alternative. The fact that if ... I think they make a good point when they say that treating an excessive contribution resulting from an inadvertent staff advance more strictly than an actual excessive contribution thereby denying a reasonable opportunity to cure the unintentional violation. It seems to me that they had to act prudently and that is not to give cash around, that they paid it before the bills came in sometimes and certainly before they were due. I don't see this as an excessive contribution. I think that cash advances are very unrealistic here for staff, and I understand that if he had been paying for his own, but the point is made, you can't expect a candidate for President and a Vice President to stand in a long line to check out of a hotel in order to use their own credit card. You have to have staff help. You just must have staff doing some of these things. So I will not accept that as excessive.

MS. AIKENS: Thank you, Commissioner Ms. Elliot. We have now at the table Mr. Thomas Hintermeister, who ... good morning, Tom.

TOM: Good morning.

MS. AIKENS: And Larry Noble.

LARRY: Well, the only response we would give to that is under the regulations, it is a staff advance, it is a contribution, and the answer can't be that they couldn't do it any other way, therefore, they had to do it in violation of the law, because there are alot of campaigns that could come in and say, well, we could not get enough money to fund our campaign but for doing it a certain way. If that way is illegal, you can't do it.

MS. AIKENS: Thank you, Larry. Rick Halter?

HALTER: Thank you. The second finding involves the reporting of occupation, name of employer and the committee in response to discussions during field work filed all of the appropriate amendments necessary to correct the public record.

MS. AIKENS: Thank you, Rick. Any comment? Mr. Halter?

HALTER: OK. The last finding which contains involves recommendation for repayment to United States Treasury centers around the use of federal funds to defray litigation expenses. Briefly, the committee believes that these estimated costs are directly related to the candidate's '96 general election efforts and should be permitted to be paid with federal funds. It is our position with the concurrence from the Office of General Counsel that since no documentation has been provided to show these expenses were incurred prior to the close of the expenditure report period or to establish that these expenses are valid winding-down costs pursuant to 11 CFR 9004.4A, that they cannot be defrayed with federal funds. Accordingly, none of the expenses are reflected in the net outstanding qualified campaign expense statement prepared by the audit division that is presented on page 10 of the report and this results in a surplus of $2,385,081.00. Accordingly, audit staff therefore recommends at page 17 of the report that the commission make a determination that $2,310,127.00 in surplus funds is repayable to United States Treasury pursuant to 26 USC 9007.B1.

MS. AIKENS: Thank you, Rick Halter. Commissioner Elliot?

MS. ELIOTT: This report of course has to be limited or we would never get through them all, but do I understand that these legal expenses was incurred, or were incurred, because of the '96 Presidential debates?

HALTER: Well, the way we understand it, there were certain legal expenses incurred during the expenditure report period by Perot '96 having to do with the Commission on Presidential Debates and the candidate's exclusion from those debates. The expenses related to that activity were viewed as qualified campaign expenses and are not in contention here. The expenses that we are, that we do contend are not qualified campaign expenses are expenses that are estimated, some of which have been already incurred but these activities occurred in 1997, some of them are occurring right now having to do with other litigation that we have just been notified of. It is our position that even though, let's say an argument, or let's say an argument can be made that some of these expenses have some relationship simply because of the subject matter, the fact that these expenses were not incurred during the expenditure report period, that is enough for us to say that they cannot be defrayed with federal funds. If that litigation, if the candidate wants to pursue that litigation, he is free to pursue that litigation.

MS. ELLIOTT: Let me ask you this. If the argument between the Perot Committee and the Debate Committee had occurred earlier in the campaign so that there was more time for the attorneys' bills to accrue, if those bills had come in for

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Page 26 of 39

work done during the reporting period, you would have allowed these same expenses if they had come in at a different time, is that correct?

HALTER: I would say, just as we allowed other expenses related to it, I would say, yes, although maybe counsel would like to add something to that.

MS. ELLIOTT: But, my point is, if you are in litigation and it doesn't end for whatever reason before the report period ends, for the same work and for the same cause, we're not allowing it to continue using the funds. That doesn't make any sense to me. If you start litigation, it seems to me everything under that litigation ought to be covered if it is allowable at any time.

HALTER: All I can say, and I think Lorenzo wants to say something, the litigation, or the expenses that we consider qualified campaign expenses that occurred back in the Fall of '96, that litigation effectively at least ended then. We are talking here about proposed litigation, some of which has already occurred. And that's all I'm going to say, and I think Lorenzo is going to say something.

MS. ELLIOTT: But the litigation, all of it, any of it, has to do with the '96 campaign, and is not for any peripheral issues that they made develop, it was all done for the campaign, right?

HALTER: I don't want to answer it that simply. I'll let Lorenzo respond ...

HOLLOWAY: That's a critical issue because we don't believe in fact it is being done for the '96 campaign. The '96 campaign is over. Nothing decided here can now impact on the '96 campaign. It may be being done for future issues, but that is not for the '96 campaign.

ELLIOTT: Well, let me ask you this. If the Perot campaign was suing somebody, I'm not sure just who, because they felt that they were irreparably harmed by a decision, they could go for damages, could they not, up for the Presidential election?

HOLLOWAY: Possibly not, I'm not sure under what situation ... there might be a situation where they could go for tort damages against somebody for something that happened during the election, I'm not sure in this case.

MS. ELLIOTT: No, but the point of it is, if they feel that the debate, that the exclusion from the debate was responsible in large measure for the defeat or the inability to raise money or do any number of other things, then that had to do with their '96 campaign.

MS. AIKENS: Lorenzo Holloway.

10440.0001:0318676.01
ATTACHMENT 1
Page 27 of 39

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HOLLOWAY: In responding to that, I think we need to look it, we need to look at the issue in two parts. One, we need to look at the time element, and that is what Rick is talking about. It must be incurred during an expenditure report period. But even if this is incurred during that period, we have another element that is set forth in the regulations in the definition of qualified campaign expense, and that is, it must be in furtherance of the candidacy. So even if it was incurred and there is a question, there is a question about, well, what about any other type of litigation. Well, we would like at that litigation to see whether or not it was in fact incurred in furtherance of the campaign. Because it could have been in an expense report period but it may not have been in furtherance of the campaign. Those are the two critical issues that we look at. So what we are saying here, one, it was not incurred during an expenditure report period. It fails that test. And secondly, it probably was not related to the ... it was not related to the 1996 campaign. If you look at what the court said in the initial litigation, they did not, the injunction, it said that any relief that could be ... the court pretty much said, any relief that could be fashion would not be fashion for the 1996 election. Therefore, it only could be for a future election. And so, not only does it fail the time element of an expense report period but it also fails the furtherance of the 1996 campaign element of qualified campaign expense.

MS. AIKENS: Commissioner Ms. Elliot.

MS. ELLIOTT: Did we deny any legal costs during the reporting period of the Perot campaign?

MS. AIKENS: Rick Halter.

HALTER: Any legal costs incurred during the expenditure report period relative to the Commission on Presidential Debates or anything else, we did not deny and we viewed them all as being qualified campaign expenses.

MS. ELLIOTT: So every one that was in the report period met both criteria. The timing and the purposes.

HALTER: That is correct.

HOLLOWAY: But, I would like to respond to that directly. The prayer for relief that the campaign started at that time was an injunction to either, I believe it is to order his participation in the debate and for the court to review the debate criteria. Therefore, had the court actually granted that injunction, he could have ... I guess he would have been, the court would have reviewed the debate criteria, and he would have been allowed to participate in the

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ATTACHMENT 1
Page 28 of 39

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debate. Therefore, it would have been enfurbished under the 1996 election. However, in denying that injunction, the court went on to say that anything, any relief that could be fashioned later on, would not be for the 1996 election. Therefore, admission of, yes, he satisfied the criteria for incurring within an expenditure report period and the relief that he sought would have been related to the 1996 election in that initial litigation.

MS. AIKENS: Thank you, Lorenzo. Any further comment? Commissioner Thomas.

MR. THOMAS: I'm still trying to work out this image in my mind of Ross Perot suing for intentional infliction of emotional distress because he didn't get into the debate and didn't win the election so he could get money damages. Ha, ha, ha. I don't think he'll do that. It's an interesting question, obviously. We have in other contexts come up with the same kind of issue. We all recall in the Buchanan audit, there was a question of estimated legal expenses that we batted back and forth. They were hoping that we would give them credit for a much larger estimate of wind-down for legal expenses and ultimately we disagreed with them. And I think that that's the nature of the beast. We can just tend sometimes to disagree with the estimates for the claims of expenses that would in fact be wind-down. And in my view, that's, if anything, that's the better argument for the committee to make is that somehow these legal expenses might qualify as wind-down because at least that is a clearly authorized opportunity to put on an estimate for future legal expenses and have the commission grant it. But as I understand it, from what you are telling me, these estimated legal expenses relate either to the recent suit filed by the committee against the Commission for having not acted in a timely fashion on the complaint filed regarding the Presidential Debates or for the other suit filed, I gather, challenging the constitutional ... constitutionality of the commission structure and so on. Additionally, I gather there is some sort of possibility that if somehow later on the commission does a certain action with regarding to the complaint that was filed involving exclusion from the debates, there might be some sort of new suit at that point challenging whatever action the commission did take there for having for some reason been contrary to law. So I suppose ... but, is there any other kind of potential litigation that we can think of that they are arguing for? Is there ... I think I covered three different possibilities. Lorenzo?

HOLLOWAY: I think Arkansas Educational Television Commission v. Forbes, I think a amicus brief in that case. So, if they participated in that litigation we are also saying that would be nonqualified campaign expense.

MR. THOMAS: OK. But none of those, I don't think in my mind, fit the winding-down concept and as you have noted they weren't incurred during the period, so ... I just wanted also to be clear on one thing. When we were dealing with

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the Buchanan campaign I know I asked this question but I forgot what the answer was. If it turns out for some reason that there are some additional wind-down litigation expenses that they can demonstrate are legitimate, do they have any possibility of getting the commission to adjust the repayment determination or does it become final to the point where even those expenses, even though they would otherwise clearly be wind-down, they just can't get that.

HALTER: I would like before Lorenzo answers, one of the things we did is, we put in a $100,000 contingency and allowed for that. And of course that contingency is for valid winding-down expenses of the legal nature.

MS. AIKENS: Commissioner Ms. Elliot?

MS.ELLIOTT: I have two questions, Mr. Chairman. First of all ...

MR. THOMAS: I'm sorry, could I get an answer first, before we move on?

MS. ELLIOTT: I'm sorry, I thought you had finished.

HOLLOWAY: What the committee could do, if they dispute the repayment determination, they could file as a part of their legal factual materials disputing their repayment determination to actually state that that is the case.

MR. THOMAS: But, at some point the record closes, the matter is over. They can't come back after everything is resolved and say, oh, now we have new litigation stemming from 1996 that we want to undertake or new expenses from 1996.

And that point would be after we finish any sort of rehearing?

HOLLOWAY: On the repayment determination, right, the final repayment determination. The administrative review of determination.

THOMAS: OK, could they raise that opportunity for a rehearing?

HOLLOWAY: Well, the rehearing, they would actually have to establish that the facts could not have ... that the issue could not have been raised earlier.

It's possible, it sounds like if this situation arises.

MS. AIKENS: It was the impression of the chair Commissioner Ms. Elliot wanted to make a point. We will go now to Commissioner Ms. Elliot.

10440.0001:0318676.01
ATTACHMENT 1
Page 30 of 39

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MS. ELLIOTT: If these expenses are not viewed as qualified campaign expenses, can Mr. Perot raise money outside the prohibitions and the limitations of the act and pay for his legal expenses from anybody who wants to contribute anything to him since they are not seeming to be connected to the campaign?

LARRY; We would have to look at a case-by-case basis because as is noted there are two reasons something would not be ... fall into the category. One is that it fell outside the expenditure report period. Now that could still be for the purpose of influencing an election even though it fell outside the expenditure report period. The other reason would be if it is not in fact in connection with his campaign. If it is not in connection with his campaign, then yes it could be ... you can take money from any source to pay for it. But there may very well be, and I don't want to speculate at this point until all the facts are in, but there may very well be in that area where some are used for the campaign but it falls outside getting federal funds for.

MS. ELLIOTT; The second question I have is that if I do not accept the analysis about the credit card use, does that affect the table on page 10?

HALTER: You mean, does it affect the committee's remaining entitlement or the amount of surplus?

MS. ELLIOTT; Right.

HALTER: No, it does not.

ELLIOTT: Thank you.

MS. AIKENS: Thank you, Rick Halter. Mr. Thomas.

MR. THOMAS: Would you like a motion?

MS. AIKENS: I think that would be appropriate.

MR. THOMAS: Are we there, Rick. Can we ...?

HALTER: Yes. Yes, yes, yes.

MR. THOMAS: Well, as I indicated I agree with the recommendation as it stands now and based on the arguments that we have been presented with thus far, so Mr. Chairman, I move approval of Recommendation 1 that is set forth on page 17 of the audit report for . . . .

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MS. AIKENS: You have heard the motion. If there is no further comment, and there appears to be none, the vote will occur on the Thomas Motion. All in favor say aye.

GROUP: AYE.

MS. AIKENS: All opposed. It appears to the chair the vote is 5 to 0. Anything further, Rick.

HALTER: No.

MS. AIKENS: I would announce before I take a very brief 5 minute break, and I hope we can hold it to 5 minutes recognizing that we agreed that we are going to conclude the morning session before 12:30, that in view of some time constraints, the chair if there is no objection is going to adjust the agenda and we will go next to Roman Numeral VI, Establishment of Filing Requirements For the Pennsylvania Special Election in the First Congressional District. We will follow that with Roman Numeral Number IIII, Draft Advisory Opinion 97-18, which will be followed by Roman Numeral Number III, Pete Wilson for President Committee, Inc., and we go to Roman Numeral Number V, Regulations only to move Item C to the front of that list ahead of A, the Year-End Status Report, and B, the Self-Coding Approach for SEC Disclosure Report. With all of that, the staff will gather the appropriate staff people in that order and will now and hopefully we'll hold til 5 and we can possibly even conclude everything before 12:30. That is our hope.

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ATTACHMENT 1
Page 32 of 39

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AFFIDAVIT OF ROSS PEROT

STATE OF TEXAS)
)
COUNTY OF DALLAS)

Before me, a notary public, appeared Ross Perot, who deposed as follows:

1. My name is Ross Perot. I am over eighteen (18) years of age.

2. I am not a candidate for any office in the year 2000. I have not considered becoming a candidate for any office in the year 2000. I have made no attempt to further my or anyone else's election to any office in the year 2000.

3. My 1996 general election committee, Perot '96, Inc. ("Perot '96"), continues the litigation *Perot '96, Inc. v. Federal Election Commission* solely to pursue its claims for a violation of law requiring debate sponsors who accept corporate contributions to use objective criteria in candidate selection.

4. Perot '96 filed the litigation against the Republican and Democratic National Committees to pursue its claims, including damages, resulting from improper acts. It is my belief that such actions damaged Perot '96 through the use of the taxpayer funds to support their candidates in addition to accepting contributions and making expenditures I believe to be illegal.

5. I swear under penalty of perjury that the foregoing is true and correct.

Ross Perot

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ATTACHMENT 1
Page 33 of 39

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STATE OF TEXAS)
)
COUNTY OF DALLAS)

BEFORE ME, a Notary Public, on this day personally appeared Ross Perot, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal this 25th day of February, 1998.

RENEE MARIE JORDAN
NOTARY PUBLIC
State of Texas
Comm. Exp. 04-18-2000

Renee Marie Jordan
Notary Public in and for the State of Texas

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ATTACHMENT 1
Page 34 of 39

FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

July 19, 1984

MEMORANDUM

TO: THE COMMISSIONERS

THROUGH: JOHN C. SURINA
STAFF DIRECTOR

FROM: BOB COSTA

SUBJECT: ADDENDUM #2 TO THE FINAL AUDIT REPORT ON THE NATIONAL UNITY CAMPAIGN FOR JOHN ANDERSON

I. Summary of Issue and Recommendation

On July 14, 1983, the Commission approved Addendum #1 to the final audit report on the National Unity Campaign For John Anderson ("the Committee"). The Commission approved the return of approximately $291,000 to Committee contributors which would include a solicitation for funds for the National Unity Committee. 1/ Further, all monies remaining in the Committee's accounts at the conclusion of the wind down period (11/30/83) which are in excess of those needed to defray qualified campaign expenses are to be repaid to the U.S. Treasury in accordance with the Commission's determination of March 10, 1982.

Based on audit fieldwork performed for the period April 1, 1983 through December 14, 1983, the Audit staff calculated the amount repayable to the U.S. Treasury as $50,905.58. On November 30, and December 22, 1983 the Committee presented checks to the Audit staff, totaling $29,075.06, for delivery to the U.S. Treasury. As of this date, $21,830.52 has yet to be repaid (see discussion at II.B.(1)).

1/ According to correspondence accompanying a statement of organization amendment received by the Commission on July 28, 1983, the National Unity Committee "has always been intended to be the successor to the National Unity Campaign for John Anderson and the nucleus for a new party. We had been told that NUCJA could not raise additional money until wind-down had been approved, nor should new funds be commingled with NUCJA accounts. Accordingly, the National Unity Committee was created to permit modest fund raising to support the newsletter and other similar activities which could not be undertaken by NUCJA and could not be considered a proper wind-down expense."

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II. Background

A. The Refund Effort

Pursuant to the Commission's determination of July 14, 1983, the Committee sent refund checks, totaling $290,909.90, to approximately 15,700 past contributors. The checks were dated August 1, 1983 and carried a negotiation restriction of 90 days (i.e., "void after 90 days"). The Audit staff reviewed bank records and associated documentation pertaining to the refund effort.

The breakdown of refund checks is as follows:

Value of checks cashed with funds retained by contributors	$115,498.51
Value of checks endorsed to the National Unity Committee	116,088.02
Value of checks voided	59,323.37
Total Amount Issued	$290,909.90

It should be noted that included in the breakdown are 88 checks (totaling $1,911.04) which were paid by the bank after October 31, 1983 (the last day a check could have been presented and paid within the language of the negotiation restriction). Of this amount, $958.83 in funds were retained by the contributors and $952.21 in checks were endorsed to the National Unity Committee.

B. Amount Repayable to U.S. Treasury

The Audit staff calculated the amount remaining in Committee accounts in excess of that necessary to defray qualified campaign expenses. At Exhibit A, the financial position of the Committee as of 12/14/83 is presented. The Treasurer of the Committee disputes several of the figures used by the Audit staff in arriving at the amount repayable to the U.S. Treasury.

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(1) Cash in Escrow - $21,830.52

The Treasurer disputes the inclusion of $21,830.52 which was in a Committee account referred to as the non-federal funds account. 2/ The Treasurer stated that since the account has never contained any federal funds, the monies therein are not subject to repayment. It is the opinion of the Audit staff that the Commission's decision with respect to the refund effort expressly requires the repayment of funds remaining in <u>all</u> Committee accounts. 3/

(2) in regard to footnotes 2/ and 3/

The Statement of Financial Position prepared by the Audit staff for inclusion in Addendum #1 contained footnotes similar to footnotes 2/ and 3/ in the financial statement at Exhibit A. The Treasurer is of the opinion that the litigation at issue does not involve the Committee, but rather is on behalf of the candidate, John B. Anderson, and any funds relative to awards for attorneys' fees are not subject to inclusion in a financial statement of the Committee. Inclusion by the Audit staff is predicated upon the fact that monies have already been expended by the Committee or its agent in payment of legal fees relating to the litigation at hand. Therefore any funds awarded resulting from a settlement of this case are to be used for the payment of bona fide legal fees with the surplus being repayable to the U.S. Treasury.

A letter was sent to the Treasurer of the Committee on ______________ requesting a complete financial history of the ballot access litigation, including evidence of all court awards for legal fees or monies awarded over and above the fees charged. A revised statement of financial position wil be prepared, if appropriate, after analysis of information pertaining to the court awards.

2/ See Agenda Document 82-114 considered on July 29, 1982 for a discussion of the use of funds in the non-federal funds accounts to pay civil penalties and make repayments to the U.S. Treasury.

3/ See Addendum #1 to Final Audit Report on the National Unity Campaign For John Anderson, page 1.

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National Unity Campaign For John Anderson
Statement of Financial Position
As of 12/14/83

Assets:		
Cash in Escrow	$21,030.52	1/
Accounts Receivable	-0-	2/
Total Assets	$21,[illegible].52	
Liabilities:		
Accounts Payable	$ -0-	3/
Repayment Due U.S. Treasury	21,[illegible].52	
Total Liabilities	$21,[illegible].52	

Notes

1/ This amount is being held in escrow by Committee counsel pending resolution of repayment question.

2/ A receivable may exist relating to recovery of attorney fees concerning litigation considered by the U.S. Supreme Court. No estimate is included.

3/ A payable may also exist (see footnote 2/). No estimate is included.

FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

December 17, 1997

MEMORANDUM

TO: RON M. HARRIS
PRESS OFFICER
PRESS OFFICE

FROM: ROBERT J. COSTA
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: PUBLIC ISSUANCE OF THE AUDIT REPORT ON PEROT '96

Attached please find a copy of the audit report and related documents on Perot '96 which was approved by the Commission on December 4, 1997.

Informational copies of the report have been received by all parties involved and the report may be released to the public.

Attachment as stated

cc: Office of General Counsel
Office of Public Disclosure
Reports Analysis Division
FEC Library

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REPORT OF THE AUDIT DIVISION

ON

PEROT '96

Approved December 4, 1997

FEDERAL ELECTION COMMISSION
999 E STREET, N.W.
WASHINGTON, D.C.

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REPORT OF THE AUDIT DIVISION

ON

PEROT '96

Approved December 4, 1997

FEDERAL ELECTION COMMISSION
999 E STREET, N.W.
WASHINGTON, D.C.

TABLE OF CONTENTS

PEROT '96

	Page
Executive Summary	1
Audit Report	3
Background	3
Findings	5
Legal Analysis	21
Transmittal to Committee	25
Transmittal to Candidate	27
Chronology	29

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FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

REPORT OF THE AUDIT DIVISION ON PEROT '96

EXECUTIVE SUMMARY

Perot '96 (the Committee) registered with the Federal Election Commission on August 15, 1996. The Committee was the principal campaign committee of Ross Perot, the 1996 Reform Party candidate for the office of President of the United States.

The audit was conducted pursuant to 26 U.S.C. §9007(a), requiring the Commission to audit committees authorized by candidates who receive Federal Funds. The Committee received $29,055,400 from the Presidential Election Campaign Fund.

The findings of the audit were presented to the Committee at an exit conference held on August 7, 1997 and in the Exit Conference Memorandum. The Committee responses to those findings are contained in the audit report.

The following is an overview of the findings contained in the audit report.

<u>APPARENT EXCESSIVE CONTRIBUTIONS RESULTING FROM STAFF ADVANCES</u> — 2 U.S.C. §441a(a)(1)(A) and 11 CFR §116.5(b). The Audit staff identified one individual who advanced funds on behalf of the Committee in excess of the $1,000 contribution limitation. This individual paid the transportation, travel, and other campaign expenses incurred by other individuals, including the Vice Presidential candidate, using a personal credit card. The highest excessive balance for this individual was $26,293. In response to the Exit Conference Memorandum, the Committee stated they were unable to locate a credit card company willing to offer credit cards and, therefore, the use of this individual's personal credit card was the only alternative. Furthermore, the Committee contended that it would have been impractical for the presidential and vice-presidential nominees to stand in hotel cashier lines to pay their bills.

<u>DISCLOSURE OF OCCUPATION AND NAME OF EMPLOYER</u> — 2 U.S.C. §§434(b)(3)(A), 431(13)(A), and 432(i). The Committee did not disclose the donor's occupation and employer for a material number of itemized contributions. All of the missing information was in the Committee's records but had been received after the Committee filed its regularly scheduled disclosure report. During fieldwork, the Audit staff questioned why amended Schedules A-P (Itemized Receipts) disclosing this information had not been filed. In response, the Committee stated that it was instructed

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in 1992 by the Federal Election Commission Reports Analysis Division to hold the contributor information and file a cumulative amendment. The Committee continued this practice during the 1996 election cycle. In 1994, the Commission revised the regulation governing the filing of amendments containing the aforementioned contributor information which specified that any contributor information received after the contribution has been disclosed on a regularly scheduled report, should be disclosed on or before the due date of the next regularly scheduled report. See 11 CFR §104.7. The Committee filed amended Schedules A-P which corrected the public record.

AMOUNT RECEIVED IN EXCESS OF ENTITLEMENT — 26 U.S.C. §9007(b)(1), 11 CFR §§9007.2(a)(2), 9007.2(b)(3), and 9004.9(b). The Audit staff calculated that the Candidate received Federal funds in excess of his entitlement totaling $2,310,127. This amount resulted primarily from the exclusion of $1,447,000 in projected litigation expenses from the Committee's Statement of Net Outstanding Qualified Campaign Expenses. The Committee had included $1,447,000 in expenses related to possible litigation and other legal services to challenge the debate criteria used for the 1996 Presidential debates. In its response to the Exit Conference Memorandum, the Committee contended that the aforementioned expenses were directly related to the Candidate's 1996 campaign and should be viewed as qualified campaign expenses payable with Federal funds.

The Audit Report concluded that these projected litigation expenses were not incurred prior to the close of the expenditure report period nor were they valid winding down costs pursuant to 11 CFR §9004.4(a), and accordingly were not viewed as qualified campaign expenses. On December 4, 1997, the Commission made a determination that $2,310,127 in surplus funds is repayable to the United States Treasury.

FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

REPORT OF THE AUDIT DIVISION ON PEROT '96

I. BACKGROUND

A. AUDIT AUTHORITY

This report is based on an audit of Perot '96 (the Committee). The audit is mandated by Section 9007(a) of Title 26 of the United States Code. That section states that "after each presidential election, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of the candidates of each political party for President and Vice President."

Also, Section 9009(b) of Title 26 of the United States Code states, in part, that the Commission may conduct other examinations and audits as it deems necessary to carry out the functions and duties imposed on it by this chapter.

In addition to examining the receipt and use of Federal funds, the audit seeks to determine if the campaign has materially complied with the limitations, prohibitions, and disclosure requirements of the Federal Election Campaign Act of 1971 (FECA), as amended.

B. AUDIT COVERAGE

The audit of the Committee covered the period from its inception through December 31, 1996.[1] The Committee reported an opening cash balance of $-0-; total receipts of $31,027,107; total disbursements of $27,898,651; and a closing cash balance of $3,128,456.[2] In addition, a limited review of the Committee's transactions through September 30, 1997 was conducted to calculate the amount of expenditures subject to the spending limitation and the amount of unspent Federal funds remaining in the Committee's accounts.

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[1] The Committee's initial deposit was a $29,055,400 payment from the Presidential Election Campaign Fund, deposited on August 22, 1996

[2] Figures in this report are rounded to the nearest dollar.

C. CAMPAIGN ORGANIZATION

The Committee maintains its headquarters in Dallas, Texas. The Treasurer of the Committee, from inception to date, is J. Michael Poss.

The Committee registered with the Federal Election Commission on August 15, 1996 as the principal campaign committee of Ross Perot, Reform party candidate for the office of President of the United States. To handle its financial activity, the Committee utilized three bank accounts. From these accounts the Committee made approximately 2,900 disbursements. In addition, the Committee received approximately 20,300 contributions from 19,300 individuals. These contributions totaled approximately $962,000.

On August 22, 1996, the Federal Election Commission determined that Mr. Perot, based on the votes he received in the 1992 general election, was eligible to receive pre-election funding from the Presidential Election Campaign Fund; the Committee received $29,055,400 from the United States Treasury on that same date. This amount represented 47% of the $61,820,000 maximum entitlement received by each major party candidate.

D. AUDIT SCOPE AND PROCEDURES

In addition to a review of expenditures made by the Committee to determine if they were qualified or non-qualified campaign expenses, the audit covered the following general categories:

1. The receipt of contributions from prohibited sources, such as those from corporations or labor organizations;
2. the receipt of contributions or loans in excess of the statutory limitations (Finding II.A.);
3. proper disclosure of contributions from individuals, political committees and other entities, to include the itemization of contributions when required, as well as, the completeness and accuracy of the information disclosed (Finding II.B.);
4. proper disclosure of disbursements including the itemization of disbursements when required, as well as, the completeness and accuracy of the information disclosed;
5. proper disclosure of campaign debts and obligations;

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6. the accuracy of total reported receipts, disbursements and cash balances as compared to campaign bank records;

7. adequate recordkeeping for campaign transactions;

8. accuracy of the Statement of Net Outstanding Qualified Campaign Expenses filed by the Committee to disclose its financial condition (Finding III.A.);

9. the Committee's compliance with spending limitations; and.

10. other audit procedures that were deemed necessary in the situation.

As part of the Commission's standard audit process, an inventory of campaign records is conducted prior to the audit fieldwork. This inventory is conducted to determine if the auditee's records are materially complete and in an auditable state. Based on our review of records presented, it was concluded that the records were materially complete and fieldwork began immediately.

Unless specifically discussed below, no material non-compliance was detected. It should be noted that the Commission may pursue further any of the matters discussed in this report in an enforcement action.

II. AUDIT FINDINGS AND RECOMMENDATIONS: NON-REPAYMENT MATTERS

A. APPARENT EXCESSIVE CONTRIBUTIONS RESULTING FROM STAFF ADVANCES

Section 441a(a)(1)(A) of Title 2 of the United States Code states, in part, that no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.

Section 116.5(b) of Title 11 of the Code of Federal Regulations states that the payment by an individual from his or her personal funds, including a personal credit card, for the costs incurred in providing goods and services to, or obtaining goods or services that are used by or on behalf of, a candidate or a political committee is a contribution unless the payment is exempted from the definition of contribution under 11 CFR §100.7(b)(8). If the payment is not exempted under 11 CFR §100.7(b)(8), it shall be considered a contribution by the individual unless; the payment is for the individual's transportation expenses incurred while traveling on behalf of a candidate or political committee of a political party or for usual and normal subsistence expenses incurred by an individual, other than a volunteer, while traveling on behalf of a candidate or political committee of a political party; and, the individual is reimbursed within sixty days after

the closing date of the billing statement on which the charges first appear if the payment was made using a personal credit card, or within thirty days after the date on which the expenses were incurred if a personal credit card was not used. For purposes of this section, the closing date shall be the date indicated on the billing statement which serves as the cutoff date for determining which charges are included on that billing statement. In addition, "subsistence expenses" include only expenditures for personal living expenses related to a particular individual traveling on committee business, such as food or lodging.

The Audit staff reviewed the travel expense reimbursements and contributions relative to one individual who apparently advanced funds on behalf of the Committee in excess of the $1,000 limitation. In order to calculate the amount of a contribution resulting from an advance made by an individual on behalf of the Committee, payments made by the Committee were applied against those expenses that had been incurred the earliest. The Audit staff notes that this individual paid the transportation, travel, and other campaign expenses incurred by other individuals, including the Vice Presidential candidate, using a personal credit card. This individual also contributed $500.00 to the Committee on September 5, 1996. The highest excessive balance for this individual was $26,293 on 10/16/96. The number of days outstanding before reimbursement of the expenses included in this balance ranged from 21 to 36 days.

The Audit staff provided to the Committee a list of the relevant expenses and contributions associated with this individual. In response, the Committee provided a photocopy of an internal Committee memorandum, dated August 8, 1996, from the Committee's National Coordinator to all campaign staff which stated that the Committee was unable to locate any credit card companies willing to offer credit cards to a political entity. The memorandum also informed the campaign staff that they could apply for individual credit cards for travel expenses.

In addition, the Committee provided a statement from a staff member of the Committee's Accounts Payable Department, dated April 22, 1997, which explained that the Committee was rejected by three different credit card companies because current policy prevented the companies from extending a line of credit to political entities.

The Committee officials also provided the following rationale for the manner in which they handled travel expenses. The Committee stated that they did not want to risk violating the regulations by having expenditures made by the Vice Presidential candidate count towards the Presidential candidate's $50,000 expenditure limit at 11 CFR §9003.2(c). The Committee also stated that:

> "...it was simply impractical in certain instances for the presidential and vice-presidential nominees to stand in hotel cashier lines to pay their bills when, for example, cars to take

them to television interviews or campaign functions were waiting."

Notwithstanding the above, the Audit staff maintained that this individual apparently made contributions in excess of the $1,000 contribution limit resulting from staff advances.

In the Exit Conference Memorandum, (the Memorandum) the Audit staff recommended that the Committee provide evidence to support that the staff advances noted above were not excessive contributions, as well as any additional comments it believed relevant.

In its response to the Memorandum, the Committee restated the points outlined above, and put forth additional arguments in support of its position that the Committee was at all times in compliance with the purpose and intent of 11 CFR §116.5.

The Committee noted that all such expenses were promptly reimbursed, most within 30 days after the expense was incurred and before the individual actually issued payment to the credit card company. Since the Committee experienced no financial difficulties during this period, to suggest that the situation is equivalent to an attempt to circumvent contribution limitations is completely inaccurate. If any violation occurred it was merely technical and inadvertent, and quickly corrected.

Given the Committee was unable to locate any credit card company willing to offer credit cards, it is then asserted by the Committee that the use of this individual's personal credit card was the only alternative since it would be unrealistic to expect presidential and vice-presidential nominees to stand in hotel cashier lines in all instances, or to expect all staff members, especially young or college age individuals working on political campaigns, to meet credit requirements necessary to qualify for personal credit cards. The Audit staff acknowledges that traveling with large quantities of campaign cash would not be appropriate, and would not solve the requirement of certain vendors who require credit cards to guarantee payment.

The Committee then concludes its discussion by citing a closed Commission compliance matter involving staff advances where the Commission closed the matter without a finding of probable cause to believe a violation of 11 CFR §116.5 occurred. (See MUR 3947). The Committee also notes that 11 CFR §103.3 provides a political committee 60 days during which it may refund excessive contributions. There is no justification, according to the Committee, for treating an excessive contribution resulting from an inadvertent staff advance more strictly than an actual excessive contribution, thereby denying a reasonable opportunity to cure the unintentional violation.

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As to the Committee's first point, the Audit staff agrees that the individual was reimbursed in a prompt manner; however, since the expenses at issue were not for his transportation and/or subsistence, reimbursement even within 30 days from the date of incurrence does not negate a contribution having been made. The Committee's financial condition also does not negate a contribution having been made.

The Committee's second point relating to the use of this individual's personal credit card as the "only alternative" does not consider the use of electronic fund transfers, or other appropriate means of guaranteeing or effecting payment of expenses when the vendor payee is known in advance.

As to the Committee's concluding arguments, it should be noted that the matter referred to in the closed compliance matter was also first addressed in the audit report and was characterized as an apparent excessive contribution resulting from staff advances in a manner similar to the issue at hand. With respect to the timing of the reimbursements, the Commission's policy in previous election cycles and its current policy is not to apply the provisions of 11 CFR §103.3 to excessive contributions resulting from staff advances. Included in the provisions of 11 §CFR 116.5 are its own set of time limitations separate and apart from those in 11 CFR §103.3.

Although it appears that the Committee did not gain any material financial advantage from the practice of using an individual's personal credit card to defray the expenses of other Committee staff and the vice-presidential nominee, under the provisions of 11 CFR §116.5 this activity resulted in an apparent excessive contribution of $26,293.

B. DISCLOSURE OF OCCUPATION AND NAME OF EMPLOYER

Section 434(b)(3)(A) of Title 2 of the United States Code states, in part, that each report shall disclose the identification of each person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of any such contribution.

Section 431(13)(A) of Title 2 of the United States Code defines the term "identification" as, in the case of any individual, the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer.

Section 432(i) of Title 2 of the United States Code states, in part, that when the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act.

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The Audit staff reviewed a sample of contributions received from individuals to determine if the identification of each contributor was itemized as required. The sample results indicated that for a material number of the reported entries, the Committee did not disclose the occupation and name of employer. For these items, the report entries contained the annotation "Information Requested."

The Audit staff located all of the missing information in the Committee's contribution files and noted that the Committee had sent letters to each contributor requesting the information shortly after the Committee's receipt of the contributions. The Audit staff presented this matter to Committee officials. A Committee representative explained that they were waiting to make sure that all of the information had been received before submitting amended Schedules A-P (Itemized Receipts). In addition, Committee officials stated that as a result of communications with the Federal Election Commission Reports Analysis Division staff during the 1992 campaign, they were under the impression that they should not file amended reports for the 1996 election cycle as frequently as they had during the 1992 election cycle. Therefore, the Committee officials stated that they decided to hold the contributor information and file a cumulative amendment at a later date.

The Committee filed amended Schedules A-P which included all of the missing information noted during our review.

In the Memorandum, the Audit staff recommended no further action and stated that the Committee could provide any additional information or explanation regarding this matter in its response to the Memorandum.

In its response to the Memorandum, the Committee explained that "[t]he sole reason for not following the regular amendment approach followed in 1992 was due to the instruction and for the convenience of the FEC." In support of this position, an affidavit from the Committee's Chief Accountant was submitted. She was the individual responsible for preparation of letters to contributors requesting their occupation and name of employer and the subsequent preparation and filing of amendments to reports filed by both Perot '92 and Perot '96 committees.

The affidavit states that during the 1992 campaign, amendments containing updated contributor occupation and name of employer information were initially filed every 10 days; however, "[d]uring the 1992 election campaign we were informed by the FEC that it was being 'overwhelmed' by our amendments and requested that we file only one master, cumulative amendment." This individual followed the same procedure in 1996, and was not questioned about the timeliness of the amendments until March, 1997 during a discussion with members of the Audit staff.

It appears that some type of miscommunication occurred during the 1992 campaign, as evidenced by a letter, dated October 11, 1993, that accompanied a

cumulative amendment for Perot '92 covering the period from March 1, 1992 through December 31, 1992. The letter, signed by the treasurer of Perot '92 (also treasurer of the Committee), discusses the filing of one cumulative amendment, rather than filing amendments on a more frequent basis.

Although it appears clear that the Committee strongly believes that it has followed the instructions received in 1992, it should be noted that the Commission's Regulations at 11 CFR §104.7 were revised in 1994. In relevant part, this revised regulation requires that if any contributor information is received after the contribution has been disclosed on a regularly scheduled report, the political committee shall either file with its next regularly scheduled report, an amended memo Schedule A listing all contributions for which contributor identifications have been received during the reporting period covered by the next regularly scheduled report ... or file on or before its next regularly scheduled reporting date, amendments to the report(s) originally disclosing the contribution(s) ... Given this change to the Commission's regulations occurred in 1994, the Committee's practice in 1992 and the continuance into 1996 is not relevant.

As stated in the Memorandum, the Committee filed amended Schedules A-P which included all of the missing information noted during our review.

III. AUDIT FINDINGS AND RECOMMENDATIONS: AMOUNTS DUE TO THE U.S. TREASURY

A. AMOUNT RECEIVED IN EXCESS OF ENTITLEMENT

Section 9007(b)(1) of Title 26 of the United States Code states that any portion of the payments made to the eligible candidates of a political party under section 9006 was in excess of the aggregate payments to which candidates were entitled under section 9004, it shall so notify such candidates, and such candidates shall pay to the Secretary of the Treasury an amount equal to such portion.

Section 9007.2(a)(2) of Title 11 of the Code of Federal Regulations states that the Commission will notify the candidate of any repayment determinations made under this section as soon as possible but not later than three years after the day of the presidential election. The Commission's issuance of the audit report to the candidate under 11 CFR §9007.1(d) will constitute notification for purposes of this section.

Section 9007.2(b)(3) of Title 11 of the Code of Federal Regulations states that if the Commission determines that a portion of payments from the Fund remains unspent after all qualified campaign expenses have been paid, it shall so notify the candidate, and such candidate shall pay the United States Treasury that portion of surplus funds.

Section 9004.9(b) of Title 11 of the Code of Federal Regulations requires that within 30 calendar days after the end of the expenditure report period, the candidate shall submit a statement of net outstanding qualified campaign expenses which contains, among other items, all outstanding obligations for qualified campaign expenses and estimated necessary winding down costs as of the end of the expenditure report period.

The end of the expenditure report period for the 1996 General election was December 5, 1996 as set forth by 11 CFR §9002.12. The Audit staff reviewed the Committee's financial activity through September 30, 1997 and prepared the following Statement of Net Outstanding Qualified Campaign Expenses (NOQCE):

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Perot '96

STATEMENT OF NET OUTSTANDING QUALIFIED CAMPAIGN EXPENSES

As of December 5, 1996
As Determined September 30, 1997

ASSETS

Cash on Hand	700	
Cash in Bank	3,295,644	
Accounts Receivable	639,235 [a]	
Total Assets		$ 3,935,579

OBLIGATIONS

Accounts Payable for Qualified Campaign Expenses	301,416	
Actual Winding Down Costs (December 6, 1996-Sept. 30, 1997)	764,332 [b]	
Estimated Winding Down Costs (October 1, 1997-April 30, 1998)	384,750 [c]	
Contingency for Legal Services	100,000 [d]	
Total Obligations		$ 1,550,498
Net Outstanding Qualified Campaign Expenses (Surplus)		$ 2,385,081

FOOTNOTES TO NOQCE

(a) This figure includes a $10,000 reimbursement for consulting services initially paid by the Committee and later determined to be an expense of the Perot Reform Committee (Perot's 1996 primary committee). Since the amount was reimbursed, no repayment is warranted.

(b) Litigation expenses, totaling $32,842, paid through 9/30/97 are not included

(c) This estimate is subject to audit verification. Committee records and disclosure reports will be reviewed and changes will be made as necessary

(d) A $100,000 contingency for legal costs related to complying with the post-election requirements of the Act has been included, subject to audit and verification of the actual expenses incurred.

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The Committee included on its NOQCE, filed on 4/16/97,[3] an estimate of $1,447,000 for projected legal expenses related to possible litigation and other legal services to challenge the debate criteria used for the 1996 Presidential debates. A challenge to the tax-exempt status of the Commission on Presidential Debates could also result.

According to a preliminary budget prepared by the Committee titled "Litigation Challenging Debate Criteria of the Federal Election Commission," the projected costs would include legal expenses for litigation activity, witness interviews, discovery, depositions, experts, dispositive motions, trial (including trial, pretrial, and post-trial activities), appeal of issues to DC Court of Appeals, and litigation on *Arkansas Educational Television Commission v. Forbes* (appeal to US Supreme Court from 8th Circuit).[4]

Although the anticipated litigation was related to efforts undertaken by the Committee during the expenditure report period, it did not appear, based on the information provided, that the anticipated litigation costs should be viewed as qualified campaign expenses. The legal expenses incurred during the fall of 1996 relative to Mr. Perot's exclusion from the 1996 Presidential Debates are viewed as qualified campaign expenses since those expenses were incurred within the expenditure report period to further the candidate's campaign for election to the office of President (see 11 CFR §9002.11(a) and (b)).

However, the $1,447,000 in projected litigation expenses apparently were not incurred during the expenditure report period and were not made in furtherance of the candidate's 1996 campaign for election. In addition, these projected costs did not appear to be associated with the termination of the candidate's general election campaign relative to compliance with the post-election requirements of the Act nor did they appear to be necessary administrative costs associated with winding down the campaign pursuant to 11 CFR §9004.4(a)(4).

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3 The Committee's initial NOQCE filed on 1/06/97 contained an estimate of $1,000,000 for legal fees.

4 Expenses totaling $27,208 were incurred for legal services related to preparing the Supreme Court *amicus* brief for the Committee. The Committee issued a check in payment on 7/3/97. Since the entire amount of projected litigation costs has been excluded from the NOQCE, the payment of these expenses would, per force, be viewed as being made with private funds, thus no repayment pursuant to 11 CFR §9007.2(b)(2) is warranted in this instance.

In the Memorandum, these projected litigation expenses were not considered as part of the Committee's outstanding obligations, resulting in a calculated surplus of $2,293,574. Since the campaign was funded by both federal and private funds, a pro rata repayment of $2,221,496 could result[5].

In the Memorandum, the Audit staff recommended that the Committee demonstrate that it was entitled to all or a portion of the $2,221,496 in surplus funds. With respect to the $1,447,000 in estimated litigation expenses, it was further recommended that the Committee provide evidence to support that the expenses are qualified winding down costs under 11 CFR §9004.4(a)(4)(ii) or demonstrate that the expenses were incurred by the Committee prior to the end of the expenditure report period and were in furtherance of the candidate's 1996 campaign for election. The Audit staff's recommendation further stated that absent such a demonstration that the Committee was entitled to all or a portion of the $2,221,496 in surplus funds, the Audit staff would recommend that the Commission determine that $2,221,496, or the appropriate portion thereof, is repayable to the United States Treasury pursuant to 26 U.S.C. §9007(b)(1).

In its response to the Memorandum, the Committee provided several arguments which it believes are supportive of its inclusion of $1,447,000 in estimated legal expenses. The response begins:

> "Legal expenses in the resolution of matters initiated as qualified campaign expenses that continue beyond the reporting period due to action or inaction by the Commission are qualified campaign expenses and proper winding down costs. Outstanding matters under review include only those with respect to which the Commission has not acted. Had the FEC acted with respect to complaints involving Perot '96 during the expenditure report period, legal expenses, including associated litigation expenses, would have been qualified campaign expenditures. The campaign conserved funds because the FEC had not resolved these matters. To deny Perot '96 opportunity to continue to represent itself in matters arising during the campaign simply because the campaign ended before the FEC acted is inappropriate and without legal basis. Perot '96 is entitled to retain and expend amounts necessary for legal services related to matters under review involving it.

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[5] Repayment Ratio = $\frac{\text{Total Federal Funds received through December 5, 1996}}{\text{Total Deposits through December 5, 1996}}$

$= \frac{\$29,055,400}{\$29,998,107} = 96.8574\%$

> The audit report places emphasis on the pending MUR involving Perot '96 and the Commission on Presidential Debates ('CPD'). The FEC has not questioned that legal expenses incurred in relation to the complaint filed by Perot '96 with the FEC against the CPD was a qualified campaign expense incurred during the expenditure report period. Had the FEC acted on the complaints filed with the FEC by or against Perot '96 during the expenditure report period, including the one involving the CPD, legal expenses related to them would without question have been qualified campaign expenditures. It is a strange twist of logic to suggest such categorization is now inappropriate when the sole reason the period during which they would so qualify has passed without their incurrence is a delay in FEC action on those matters.
>
> In fact, Perot '96 sought to avoid the delay the FEC could impose in reaching resolution with respect to the MUR filed against the CPD through court action. In an effort to prevent Perot '96 from pursuing the MUR at that time during the expenditure report period, the FEC stated to the Federal District Court that the campaign's action would not be mooted by FEC review and expiration of the period during which the FEC asserted exclusive jurisdiction over the matters subject to the MUR. To now say expenditures may no longer be made which are necessary to prevent the ongoing matter from being moot in practical effect, expenditures budgeted and conserved for by the campaign in reliance on the FEC position, is wholly inconsistent and without legal basis. The anticipated expenses are directly related to, are an integral part of and cannot be separated from the expenditures during the period when such expenditures are unquestionably qualified campaign expenses."

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The Committee's response continues by citing several Commission determinations which in its view are supportive of its position that the Committee is entitled to reserve for and incur legal fees related to MURs and associated legal claims as qualified campaign expenses and winding down costs, including those associated with the Commission on Presidential Debates. Those cases are discussed separately below.

The issue presented to the Committee in the Memorandum concerned the $1,447,000 in estimated litigation expenses and whether these estimated expenses were qualified campaign expenses. It was recommended that the Committee (a) provide evidence to support that the expenses are qualified winding down costs under 11 CFR §9004.4(a)(4)(ii), or (b) demonstrate that the expenses were incurred by the Committee

prior to the end of the expenditure report period and were in furtherance of the candidate's 1996 campaign for election.

The Committee did not provide any contracts, retainer agreements, other written arrangements or commitments to show that these questioned expenses were incurred within the expenditure report period. Rather, as stated above, the Committee argued that if the Commission had acted on this matter during the expenditure report period, any legal expenses related to this matter would have been incurred during the period and would be qualified campaign expenses. The Audit staff agrees that in the hypothetical case cited by the Committee, any legal expenses directly related to the CPD matter pertaining to actions occurring within the expenditure report period, would have been incurred within the period and viewed as qualified campaign expenses. The expenses at issue were not.

In the Audit staff's opinion, these estimated litigation expenses are not costs associated with the termination of the candidate's general election campaign such as complying with the post-election requirements of the Federal Election Campaign Act of 1971, as amended, (the Act) and other necessary administrative costs associated with winding down the campaign including office space rental, staff salaries, and office supplies. See 11 CFR §9004.4(a)(4). However, legal expenses related to the completion of the audit process, such as preparing a response to the Memorandum, or legal expenses directly related to Commission enforcement actions, if any, would fall into the category of complying with the post-election requirements of the Act.

The Committee cited several examples of prior Commission action which it feels are consistent with its position that the anticipated litigation expenses are directly related to, are an integral part of and cannot be separated from the expenditures during the period when such expenditures are unquestionably qualified campaign expenses.

1. Dukakis/Bentsen Committee, Inc. - Holiday/Thank You Notes

The Committee states in its response that printing and postage costs for 125,000 holiday cards sent after the election and as late as the following March were qualified campaign expenses as winding down costs. Such expenses have far less a nexus as winding down costs than do legal expenses related to outstanding MURs and litigation ongoing since the expenditure report period.

In the case of the holiday/thank you cards, the Audit staff notes that a portion of the cards were mailed after the election but before the end of the expenditure report period, and the related expenses were incurred during the expenditure report period. As stated in the Final Audit Report, at page 17, since the expenditures for postage for the cards are a qualified campaign expense, the printing costs are also a qualified campaign expense which must be reimbursed by the General Election

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Committee to the Compliance Fund. The Compliance Fund was reimbursed in January. 1991. These expenses were not characterized as winding down costs in the report.

2. Legal Services Related to Electoral College

The Committee notes that legal services were initiated related to the Electoral College during the expenditure report period, and although the Electoral College meets after the close of the expenditure report period and legal services were provided after the close of that period, the Commission correctly determined that the expenses were qualified campaign expenses because they involved legal services related to activities undertaken during the expenditure report period. The Committee added "[t]he Commission did not and should not attempt to replace the judgment and decisions of the campaign."

In this instance, the issue involved whether the expenses, incurred within the expenditure report period, were as the Dukakis/Bentsen committee maintained exempt from the definition of contribution and expenditure and therefore outside the purview of the Commission. The Final Audit Report concluded that the Electoral College is part of the entire general election process and the expenses incurred by the General Election Committee related to the Electoral College are qualified campaign expenses which are subject to the overall expenditure limitation. Since an agreement was reached between the Dukakis/Bentsen committee and the law firm before the end of the expenditure report period for the purpose of an update to a 1980 Electoral College memorandum, there was no question concerning whether the expenses were incurred within the expenditure report period.

3. National Unity Committee For John Anderson - Legal Services Related to Ongoing MURs

The Committee states that during this audit, "...amounts set aside as legal expenses concerning a matter under review were approved by the Commission as winding down costs. The Addendum [to the Final Audit Report] stated that 11 C.F.R. §9004.4(a)(4) allows public funds to be used for winding down costs which include but are not limited to legal services related to ongoing MURs."

The Audit staff notes that the legal analysis prepared by the Commission's Office of General Counsel which accompanied the Addendum to the Final Audit Report of the National Unity Committee For John Anderson contained a section entitled "AUDIT QUESTION: LEGAL FEES AS WIND DOWN EXPENSES." In this instance, the Audit staff had questioned the amount of fees charged, particularly on the amount of a retainer for the remainder of the winding down period, because a minimal amount of activity was anticipated before the Anderson committee would be in a position to terminate. The Office of General Counsel, in its comments, related that "...the legal services itemized by the Committee's counsel appear to encompass the usual functions

associated with the post-election repayment process and preparation of responses to a MUR investigation." In conclusion, the Office of the General Counsel stated "[t]he Committee is prepared to refund and terminate in due course; there is no question of litigation in the legal fees estimated to complete the winding down. Therefore, the legal services noted by counsel may be considered part of the valid winding down costs contemplated by the Regulations."

4. National Unity Committee For John Anderson - Attorney Fee Awards Resulting From Ballot Access Litigation

As to this issue, the Committee stated "[s]ince the majority of the activity in the case, *Anderson v. Celebrezze*, occurred several years after the close of the 1980 general election expenditure report period, the audit division claim suggests that all such spending constitutes qualified campaign expenses."

With respect to the inference drawn by the Committee, the Audit staff notes that, based on available information, the Anderson committee did make payments to various legal counsel in 1980 to initiate ballot access litigation in a number of states. Apparently, subsequent legal fees for ballot access litigation were offset by court awards won through favorable resolution of the Committee's cases. A law firm in Washington, D.C. which handled the litigation assessed fees and arranged for local counsel in certain states for ballot access work, then apparently received the court awards directly. In most cases, this law firm attributed a portion of the court award to fees charged by local counsel in the particular state and kept the remainder for its own fees or for credit toward future similar litigation in other states. It was not clear at the conclusion of the audit whether Ohio or any other state awarded funds greater than the amount of litigation fees assessed.

In the opinion of the Audit staff, the items cited by the Committee are not persuasive. Items (1) and (2) involved expenses incurred within the expenditure report period and therefore, are not dispositive. Item (3) involved legal expenses incurred after the close of the expenditure report period but directly related to complying with the post election requirements of the Act — post election repayment matters and preparation (not litigation) of responses to a MUR investigation. Lastly, Item (4) concerned the possible recovery of a court award(s) for legal fees resulting form ballot access litigation initiated prior to the close of the expenditure report period. Based on information available, the litigation fees incurred after the close of the expenditure report period were defrayed with funds received from court awards.

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In summary, since no documentation was provided to establish that all or a portion of the $1,447,000 in estimated litigation expenses were incurred prior to the close of the expenditure report period or to establish that these expenses are valid winding down costs pursuant to 11 CFR §9004.4(a), the Audit staff has not included any amount of this estimate[6] in the NOQCE presented above. Thus, a surplus repayment in the amount of $2,310,127 [$2,385,081 surplus x .968574 repayment ratio] is warranted.

Recommendation #1

The Audit staff recommends that the Commission make a determination that $2,310,127 in surplus funds is repayable to the United States Treasury pursuant to 26 U.S.C. §9007(b)(1).[7]

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[6] The Committee also asserts in its response that the $27,208 in legal services in connection with its *amicus* brief in *Arkansas Education Television Commission v Ralph P. Forbes* was necessary in relation to the ongoing MUR related to the CPD. The Committee views these expenses as qualified campaign expenses because they relate directly to issues underlying the MUR. For the reasons stated above, the Audit staff has excluded this expenses from the NOQCE as it is part of the estimated litigation expenses.

[7] On October 29, 1997, the Committee filed a complaint for declaratory and injunctive relief against the Federal Election Commission in the United States District Court for the District of Columbia. *Perot '96, Inc. v. Federal Election Commission*, No. 1:97cv02554, (D.D.C. filed Oct. 29, 1997). On November 5, 1997, the Committee filed suit against the Federal Election Commission, Clinton/Gore General Committee, Inc. and Dole for President, Inc. that, *inter alia*, challenges the constitutionality of the Federal Election Campaign Act. *National Committee of the Reform Party v Democratic National Committee* No. 97-4048, (N.D. Cal. filed Nov. 5, 1997). For the reasons cited in Finding III.A. of this report, any expenses paid by the Committee associated with any of this litigation would be viewed as non-qualified campaign expenses and could be subject to the repayment provisions of 26 U.S.C. §9007(b)(4)

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COMMISSION
AUDIT DIVISION

Nov 10 11 43 AM '97

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

November 10, 1997

MEMORANDUM

TO: Robert J. Costa
Assistant Staff Director
Audit Division

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Bright-Coleman
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

SUBJECT: Proposed Audit Report on Perot '96 (LRA 507)

The Office of General Counsel has reviewed the proposed Audit Report on Perot '96 (" the Committee") which was submitted to this Office on October 22, 1997. This memorandum includes our comments on the proposed report.[1] We concur with the findings in the proposed Audit Report that are not addressed in this memorandum. If you have any questions concerning our comments, please contact Lorenzo Holloway.

As a threshold matter, we note that in your cover memorandum to the proposed Audit Report, you request that the Office of General Counsel review the report's discussion of the finding on the candidate's receipt of excessive entitlement to ensure that it complies with the confidentiality provisions set forth at 11 C.F.R. § 111.21. An Audit Report complies with confidentiality provisions as long as it refers only to "alleged

[1] Because the proposed Audit Report concerns the audit of a publicly-financed general election candidate, the Office of General Counsel recommends the Commission consider the Audit Report in open session. 11 C.F.R. § 9007.1(e)(1).

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complaints" and does not address any information relating to Commission notifications or investigations. *See* AO 1994-32.[2]

The proposed Audit Report includes a Statement of Net Outstanding Qualified Campaign Expenses that shows that the Committee has a surplus of $2,385,081. Since the Committee received private funds, there is a repayment ratio (96.8574%). Therefore, the Audit Report recommends that the Commission make a determination that the Committee repay $2,310,127 ($2,385,081 x .968574) to the United States Treasury for surplus funds. A portion of the surplus funds reflects the fact that the Audit Division did not accept the Committee's estimate of $1,447,000 in litigation costs as qualified campaign expenses on the liability section of the Statement of Net Outstanding Qualified Campaign Expenses. The Audit Division notes that the litigation costs are nonqualified campaign expenses because they were not incurred in the expenditure report period and they were not a winding down cost.

The amount the Committee estimated as litigation expenses was primarily related to the candidate seeking a judicial remedy regarding a complaint he alleges he filed with the Commission concerning the use of objective criteria to select participants for the presidential debates.[3] On September 23, 1996, Mr. Perot filed a complaint in the United States District Court that sought an injunction against the Commission and the Commission on Presidential Debates from violating the Constitution, the Federal Election Campaign Act and the Commission's regulations. The district court denied the request for injunctive relief and granted summary judgment to the Commission and the Commission on Presidential Debates. *Perot v. Federal Election Commission* 1996 WL 566762 (D.D.C), *remanded in part* 97 F.3d 553 (D.C. Cir. 1996), *cert. denied* 117 S. Ct. 1692 (1997).[4] However, the district court noted that Mr. Perot could seek judicial relief after the Commission considered the administrative complaint. *Id.*

The Committee contends that the litigation expenses should be considered qualified campaign expenses. The Committee notes that the litigation expenses would have been qualified campaign expenses if they were incurred during the expenditure report period and that it would have incurred the expenses had the Commission acted on the complaint during the expenditure report period. Therefore, the Committee argues

[2] Since there is no information regarding notifications or investigations in this Office's memorandum, it may be publicly released

[3] The litigation expenses also include the cost the Committee incurred in filing an amicus brief in *Arkansas Education Television Commission v. Forbes*, 93 F.3d 497 (8th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (Mar. 17, 1997)(No. 96-779).

[4] On appeal, the United States Circuit Court of the District of Columbia affirmed the district court decision, but remanded the case on the issue whether the Commission lacked authority to promulgate the debate regulations at 11 C.F.R. §§ 110.13 and 114.4(f) *Perot v. Federal Election Commission*, 97 F.3d 553, 561 (D.C. Cir. 1996), *cert denied* 117 S. Ct. 1692 (1997). The remand instructed the district court to dismiss the complaint without prejudice *Id*

"[t]o deny Perot 96 opportunity to continue to represent itself in matters arising during the campaign simply because the campaign ended before the FEC acted is inappropriate and without legal basis."

The Office of General Counsel believes that the litigation expenses should not be considered qualified campaign expense or winding down costs within the meaning of 11 C.F.R. § 9004.4(a)(4). A qualified campaign expense must, *inter alia*, be incurred to further the candidate's campaign and it must be incurred within the expenditure report.[5] 11 C.F.R. §§ 9002.11(a)(1) and (2). In order to be considered a winding down cost, the expense must be associated with the termination of the general election campaign for such matters as complying with the post-election requirements of the Federal Election Campaign Act and the Presidential Election Campaign Fund Act. 11 C.F.R. § 9004.4(a)(4)(i). An expenditure may also be considered a winding down cost if it was incurred prior to the end of the expenditure report period and there was a written arrangement or a commitment was made prior to the end of the expenditure report period. 11 C.F.R. § 9004.4(a)(4)(ii). In this case, the litigation expenses are not related to the termination of the campaign. Rather, the expenses are related to litigation with the Commission. Furthermore, there is no indication that the expenses were incurred during the expenditure report period nor is there any evidence of a prior written arrangement or commitment for legal services prior to the end of the expenditure report period. *See* Advisory Opinion ("AO") 1988-5 (the Commission noted in reference to general election financing that "the timing of when an expense was incurred, including the dates of the underlying activities which resulted in the expense, is determinative").

There must be a nexus between the expenditure and the 1996 presidential election. At this point it is unclear how any subsequent litigation involving the candidate's participation in a debate would be related to the candidate's campaign for an election that was held on November 5, 1996. Rather, any judicial relief that could be fashioned by a court at this time would be, at best, geared toward a future election.[6] In a newspaper article, the candidate's counsel, Sam Lanham, noted that the litigation is aimed at the next election and it would protect all third parties. John Hanchette, *Perot Asks for Ruling on Debate Exclusion*, USA Today, October 30, 1997. Furthermore, the United States District Court, in denying Perot's request for injunctive relief noted that Perot will lose

[5] The expenditure report period expired 30 days after the general election. 11 C.F.R. §§ 9002.12(a) and (b)

[6] Additionally, the argument that this litigation will create a precedent for future elections is inconsistent with the Commission's position that "[t]he Matching Payment Act negates any notion of a combined campaign, spanning two presidential election cycles, in that the definitions of qualified campaign expense and matching payment periods are limited to particular time periods and a presidential candidacy within those periods." AO 1988-5. It should be noted, however, that the litigation expenses incurred during the initial litigation when Mr. Perot sought an injunction against the Commission and the Commission on Presidential Debates from violating the Constitution, the Federal Election Campaign Act and the Commission's regulations with respect to the 1996 presidential debates was a qualified campaign expense since the expenses related to the 1996 election. *See Perot v Federal Election Commission* 1996 WL 566762 (D.D.C), *remanded in part* 97 F.3d 553 (D.C Cir. 1996), *cert denied* 117 S. Ct. 1692 (1997).

"the opportunity to debate [in the 1996 elections], but [he] still may be able cure any defects in the [debate] criteria [he] allege[s] the Debate Commission has used so that the next cycle would not have these defects and thereby have some relief, although not total relief."[7] *Perot v. Federal Election Commission* 1996 WL 566762 (D.D.C), *remanded in part* 97 F.3d 553 (D.C. Cir. 1996), *cert. denied* 117 S. Ct. 1692 (1997).

The Office of General Counsel does not believe the Committee's citation to previous audit reports (discussed in detail in the Audit Report) support a conclusion that public funds may be used for litigation services incurred after the expenditure report. In the two examples of expenditures cited by the Committee from the Dukakis/Bentsen audit (Holiday/Thank You Notes and Legal Services Related to the Electoral College), both expenditures were incurred by Committee during the expenditure report period. 11 C.F.R. § 9004.4(a)(4)(ii). In the audit of the National Unity Committee for John Anderson, the legal expenses were related to continuing enforcement matters. The National Unity Committee was a respondent in these matters and, therefore, they would not be able completely wind down the campaign until the enforcement matters were resolved. *See* Explanation and Justification for 11 C.F.R. § 9034.4 (parallel provision for primary), 60 *Fed. Reg.* 31865 (June 16, 1995) (The Commission agreed with the comment that "basic fairness requires campaigns to have the resources necessary to defend themselves against enforcement proceedings"). In this case, the Committee is not in a position of defending itself in an enforcement proceeding. Finally, it appears that the attorney fees arising out of the litigation in *Anderson v. Celebrezze* that was referenced in the audit report on the National Unity Committee for John Anderson was not paid with public funds, but with funds available from court awards.

[7] Furthermore, the Committee's participation in the litigation in *Arkansas Education Television Commission v. Forbes* 93 F.3d 497 (8th Cir 1996), cert. granted 117 S Ct 1243 (Mar. 17, 1997)(No. 96-779), through the filing of an amicus brief could only be geared toward a future election cycle. AO 1988-5.

FEDERAL ELECTION COMMISSION

WASHINGTON DC 20463

December 10, 1997

Mr. J. Michael Poss, Treasurer
Perot '96
7616 LBJ Freeway, Suite 505
Dallas, TX 75251

Dear Mr. Poss:

Attached please find the Audit Report on Perot '96. The Commission approved this report on December 4, 1997. As noted on page 3 of this report, the Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 CFR §§9007.2(c)(1) and (d)(1), the Commission has made a determination that a repayment to the Secretary of the Treasury in the amount of $2,310,127 is required within 90 calendar days after service of this report (March 13, 1998).

Should the Candidate dispute the Commission's determination that a repayment is required, Commission regulations at 11 CFR §9007.2(c)(2) provide the Candidate with an opportunity to submit in writing, within 60 calendar days after service of the Commission's notice (February 11, 1998), legal and factual materials demonstrating that no repayment, or a lesser repayment, is required. Further, 11 CFR §9007.2(c)(2)(ii) permits a candidate who has submitted written materials to request an opportunity to address the Commission in open session based on the legal and factual materials submitted.

The Commission will consider any written legal and factual materials submitted within the 60 day period when deciding whether to revise the repayment determination. Such materials may be submitted by counsel if the Candidate so elects. If the Candidate decides to file a response to the repayment determination, please contact Kim L. Bright-Coleman of the Office of General Counsel at (202) 219-3690 or toll free at (800) 424-9530. If the Candidate does not dispute this determination within the 60 day period provided, it will be considered final.

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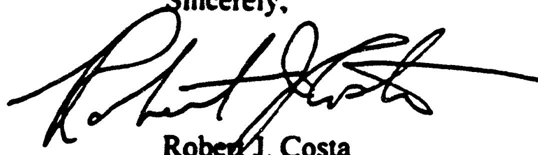
The Commission approved Audit Report and related information will be placed on the public record on December 17, 1997. The documents to be placed on the public record are also attached. Should you have any questions regarding the public release of this report, please contact Ron Harris of the Commission's Press Office at (202) 219-4155.

Any questions you may have related to matters covered during the audit or in the audit report should be directed to Marty Favin or Thomas Hintermister of the Audit Division at (202) 219-3720 or toll free at (800) 424-9530.

Sincerely,



Robert J. Costa
Assistant Staff Director
Audit Division

Attachments as stated

99.07.025.1919

FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

December 10, 1997

Mr. Ross Perot
c/o Perot '96
7616 LBJ Freeway, Suite 505
Dallas, TX 75251

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Sincerely,

Robert J. Costa
Assistant Staff Director
Audit Division

Attachments as stated

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CHRONOLOGY

PEROT '96

Audit Fieldwork	3/17/97 — 5/23/97
Exit Conference Memorandum to the Committee	8/7/97
Response Received to the Exit Conference Memorandum	10/6/97
Audit Report Approved	12/4/97

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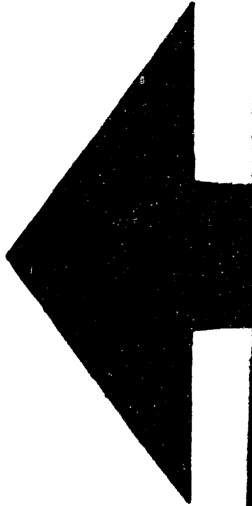

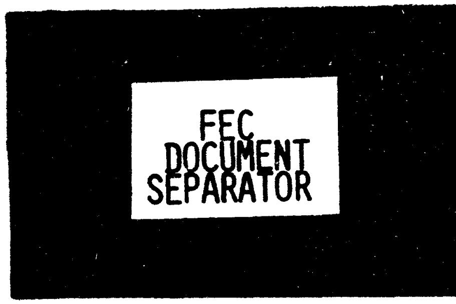
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