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August 8, 2003

VIA HAND DELIVERY

Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5378

Dear Sir/Madam:

This firm serves as counsel for Respondent the Commission on Presidential Debates (the "CPD") in connection with MUR 5378, which involves a complaint filed by John Hagelin, Ralph Nader, Patrick Buchanan, Howard Philips, Winona LaDuke, the Natural Law Party, the Green Party of the United States, and the Constitution Party (the "Complainants"). We are enclosing an executed Statement of Designation of Counsel Form for your files.

In MUR 5378, Complainants assert that the CPD is not nonpartisan and, therefore, is not a proper "staging organization" eligible to sponsor presidential debates under federal election law. The FEC and the courts already have heard and rejected this claim, as discussed further below. As such, the CPD respectfully asks that the FEC follow its decisions in earlier MURs and the decisions of several federal courts and reject Complainants' attempt to re-visit these issues.

I. The Previously Dismissed Claims

Complainants' allegations about purported partisanship on the part of the CPD are very similar to claims made in 2000 by Complainants John Hagelin, the Natural Law Party and Patrick Buchanan in MURs 4987 and 5004. In those complaints, complainants alleged (1) that the CPD was not a proper staging organization under 11 C.F.R. §110.13(a) because it was not nonpartisan, and (2) that the CPD adopted candidate selection criteria that were "subjective" and thus did not satisfy 11 C.F.R. §110.13(c). We enclose for your convenience a copy of the First General Counsel's Report on those matters (attached at Tab A). In that report, which includes a detailed review and discussion of the issues presented, the General Counsel concluded (1) "the CPD satisfies the requirement of a staging organization that it not endorse, support or oppose political candidates or political parties," and (2) "CPD's criteria for participation in the candidate debates appear to be pre-established, objective criteria as required by 11 C.F.R. §110.13(c), and not designed to result in the selection of certain pre-chosen participants." *Id.* at 15. The FEC

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adopted the General Counsel's report on July 19, 2000, and thus found no reason to believe that the CPD's activities violated the federal election laws. See copy of Federal Election Commission Certification for MURs 4987, 5004, and 5021 (attached at Tab B).¹

The FEC's decision in MURs 4987 and 5004 finding no reason to believe a violation had occurred was affirmed by both the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. See Buchanan v. Federal Election Comm'n, 112 F. Supp. 2d 58, 2000 U.S. Dist. LEXIS 13448 (D.D.C. Sept. 14, 2000) (copy attached at Tab D), aff'd, No. 00-5337 (D.C. Cir. Sept. 29, 2000) (copy attached at Tab E); Natural Law Party of the United States of America v. Federal Election Comm'n, Civ. Action No. 00CV02138 (D.D.C. Sept. 21, 2000) (copy attached at Tab F), aff'd, No. 00-5338 (D.C. Cir. Sept. 29, 2000) (copy attached at Tab G).

In light of the fact that Complainants' latest complaint urges the FEC to revisit its prior determination that the CPD is a proper staging organization, the CPD, by way of response, respectfully refers the FEC to CPD's May 2, 2000 detailed response submitted in connection with MUR 4987 (attached at Tab H). That response includes a declaration by Janet Brown, the CPD's Executive Director, and other supporting materials. The enclosed response to MUR 4987 also addresses the CPD's service since 1987 as a general election debate sponsor, its educational purposes, and the specific nonpartisan reasons underlying the adoption of its Candidate Selection Criteria for 2000.

II. The Latest Complaint

Undoubtedly recognizing that their complaint deals with issues that previously have been resolved by the FEC -- although they fail to so note in their complaint -- Complainants cite supposed "new evidence" to support their assertion that the CPD is not nonpartisan. However, the "new evidence" is neither "new" nor is it "evidence" of any violation of the federal election laws. The evidence is not "new" insofar as it involves events that occurred in 2000 and which were the subject of discovery well over two years ago in a purported civil rights lawsuit Ralph Nader filed against the CPD and others shortly after the first presidential debate in 2000. The "new evidence" is not evidence of a violation of the federal election laws because it does not relate either to CPD's candidate selection criteria or to CPD's nonpartisanship.²

¹ The Federal Election Commission made similar findings in 1998, in connection with complaints filed by The Natural Law Party and Perot '96, Inc. See Statement of Reasons in connection with MURs 4451 and 4473 (copy attached at Tab C) (finding "no reason to believe the CPD violated the law by sponsoring the 1996 presidential debates or failing to register and report as a political committee").

² Unlike Complainants John Hagelin, the Natural Law Party and Patrick Buchanan, Complainant Ralph Nader and his supporters chose not to file a complaint against the CPD with

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Complainants' claim here hinges, rather oddly, on the following allegation: "The CPD decided to exclude all third party candidates from even sitting in the audience of the debates, and it distributed a 'face-book' of prominent third-party candidates to CPD personnel at the first presidential debate so they could recognize and deny the candidates access to the debate hall if they had a ticket." Complaint at ¶ 2. This, Complainants assert, reveals that the CPD is a "partisan" organization, ineligible to serve as a staging organization. This strained proposition is without merit.³

First, there is, of course, nothing in the FEC's regulations bearing on the sponsorship of candidate debates that even suggests that eligibility to sponsor such debates should turn on the question of who is admitted to sit in the audience to watch the debate. Yet that proposition is critical to Complainants' latest claim. For this reason alone, Complainants' complaint fails to state a cognizable claim and should be dismissed.

Second, Complainants seem to allege that CPD has some sort of *obligation* under the federal election laws to provide candidates who do *not* properly qualify under lawful criteria for inclusion as debate participants with access to site of the live broadcast of the debate as audience

(continued from previous page)

the FEC in 2000, and instead brought two lawsuits directly in federal court. In Nader v CPD, et al., Case No. 00-12145-WGY (D.Mass.) ("Nader suit"), Mr. Nader asserted federal and state civil rights claims in connection with his failed attempt to enter the site of the first presidential debate. (It is undisputed he did not have a ticket to enter the debate hall, where he appeared to be attempting to enter.) After comments by the presiding federal judge on April 2, 2002 that Mr. Nader's claims were "notably thin" and "exceedingly weak," Mr. Nader entered into a settlement agreement with the defendants under which the CPD's insurance carrier made a nominal, nuisance value settlement payment. The supposedly "new" evidence in MUR 5378 was the subject of discovery in the now-dismissed Nader suit.

In Becker v. Federal Election Comm'n, Mr. Nader and the Green Party challenged the FEC's debate regulations as *ultra vires*. The United States District Court for the District of Massachusetts upheld the FEC's regulations, and the decision of the District Court was affirmed by the First Circuit Court of Appeals. See Becker v. Federal Election Comm'n, 112 F. Supp. 2d 172 (D. Mass. 2000), aff'd, 230 F.3d 381 (1st Cir. 2000).

³ Although it likely is self-evident, Complainants resort to attacking the CPD on issues such as the one described in the complaint since the FEC and the courts already have found their attacks on CPD's candidate selection criteria to be without merit. In this regard, CPD notes that although no nonmajor party candidate qualified in 2000 under CPD's criteria for participation in the debates, that has not always been the case. In 1992, Ross Perot and his running mate were included in the CPD-sponsored debates.

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members so that those candidates may engage in unspecified campaigning. Complaint at ¶ 10 (alleging that third party candidates require access to the debates so they can gain access to media coverage). Complainants cite no statute, regulation or case law to support this claimed obligation on the part of a debate sponsor and, of course, there is none.

Third, Complainants' complaint is highly misleading due, *inter alia*, to its failure to provide any context whatsoever for the circumstances alleged in the complaint. *Even if* there were some theoretical set of facts where the question of who sits in the audience were relevant to an organization's eligibility to serve as a staging organization, the circumstances presented here do not even suggest that a violation of the federal election laws has occurred.

It is a matter of public record that, in the period leading up to the first presidential debate in 2000, Mr. Nader and his supporters engaged in conduct that reasonably led CPD to be concerned about the risk of disruption of the live debate. In the period leading up to the first debate, Mr. Nader held numerous large rallies, including a rally attended by some 12,000 people at the FleetCenter just two days before the Boston debate, at which the rallying cry was "Let Ralph Debate."⁴ Mr. Nader made public statements indicating, or at least strongly suggesting, that he sought to disrupt the Boston debate.⁵ Less publicized were the weekly street protests by supporters of Mr. Nader on the sidewalk outside the CPD's offices in Washington, D.C., and a break-in by his supporters into the CPD's offices in Washington, D.C. just days before the Boston debate.⁶ Immediately before and during the debate itself, thousands of protesters, many

⁴ Yvonne Abraham, "Nader Rally Draws 12,000 to FleetCenter," Boston Globe, October 2, 2000, at A1. See copy attached at Tab I.

⁵ Mr. Russert: . . . You will not be there Tuesday night in Boston. If you...
Mr. Nader: Yes, I will.
Mr. Russert: On the stage. On the stage. On the stage.
Mr. Nader: Maybe I'll crawl up on the stage there.

Transcript, "NBC News' Meet The Press," Oct. 1, 2000.

King: . . . As I understand it, are you going to be in Boston tomorrow night? Are you going to be protesting the debates?
Nader: We're going to try to get as close as possible. We're looking for people to give us tickets so I can be right in the audience.

Transcript, "Larry King Live," Oct. 2, 2000. Excerpts from both transcripts are attached at Tab J.

⁶ Manny Fernandez & David Montgomery, "Debate Protest Leads to Arrests; Nader Supporters Block Entrance to Commission's Building," The Washington Post, September 29, 2000, at A4. See copy attached at Tab K.

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of whom urged plaintiff's inclusion in the debate, were demonstrating loudly on the perimeter of the secure area, within earshot of the debate premises.⁷

Against the backdrop of the events described above, it is evident that the decision alleged in the complaint was made for the purpose of preventing disruption of the live international television broadcast of the debate.⁸ It had nothing to do with "partisanship." Indeed, the very testimony cited in the complaint makes plain that the CPD, having determined the participants in its debates by lawful process in accordance with the FEC's regulations, wished to take reasonable measures to ensure that the debate was not disrupted by an audience member who had not properly qualified for inclusion in the debate as participants. See Complaint at ¶ 10, quoting deposition testimony of Lewis K. Loss, Esq. at 100-01.⁹

In sum, the FEC already has determined that the CPD is an appropriate staging organization and that the CPD's candidate selection criteria in 2000 were fully in compliance with applicable FEC regulations. The purportedly "newly discovered" evidence cited in the complaint does not provide reason to believe that a violation of the Act has occurred. Accordingly, CPD respectfully submits that the complaint should be dismissed.

⁷ See "Thousands Stage Rowdy Protest Outside UMass Boston Entrance," Boston.com, at <http://www.boston.com/campaign/2000/protests.htm> (October 3, 2000); Dana Milbank, "Nader Supporters Try to Block Exits," Washington Post, October 4, 2000, at A16. See copies attached at Tab L.

⁸ The complaint (Complaint at ¶ 9) itself reveals that it is not at all clear that the CPD even made the broad decision involving all third party candidates alleged in the complaint, as opposed to more narrow decision limited to Mr. Nader, who, as noted, had made a number of direct threats to disrupt the debates as an audience member. Of course, there were many security measures in place at the debates that had nothing to do with candidates who had not qualified for participation in the debates. Complainants would have the FEC ignore the fact that access to the site of a presidential debate in the modern era necessarily is extremely carefully controlled. Extensive security measures are taken in connection with the debates in light of the very substantial public safety issues surrounding the debates, as well as the extensive security arrangements in place for the debates to ensure the safety of the participants, the safety of the audience members and the event itself from disruption. For a review of the security measures in place in connection with the first presidential debate in 2000, see Responses and Objections to Plaintiff's First Set of Interrogatories to Defendant Commission on Presidential Debates in Nader Suit, responses to Interrogatory Nos. 3-7 (attached at Tab M).

⁹ A complete copy of Mr. Loss's deposition testimony from the Nader suit is attached hereto at Tab N.

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If we can provide any additional information, please do not hesitate to let us know.

Respectfully submitted,

ROSS, DIXON & BELL, L.L.P.

By: 
Stacey L. McGraw

Attachments

cc: Jeff S. Jordan, Esq. (w/attachments)
Supervisory Attorney, Central Enforcement Docket
Janet H. Brown (w/attachments)

STATEMENT OF DESIGNATION OF COUNSEL

Please use one form for each respondent

MUR 5378

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The above-named individual is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

Janet H. Brown

Print Name

8/16/03
Date

Janet H. Brown
Signature

Executive Director,
Commission on Presidential
Debates
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