BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of	)	
	)	MUR 5573
Westar Energy Inc.	)	Pre-MUR 416
	)	

STATEMENT OF REASONS
OF
VICE CHAIRMAN MICHAEL E. TONER

I. Introduction

On October 19, 2004, the Commission voted, 5 to 1[1], to accept the Office of General Counsel's ("OGC") recommendation to find reason to believe that Westar Energy Inc. ("Westar"), acting through its officers and agents, violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f) by facilitating the making of contributions and violated 11 C.F.R. § 110.6(b)(2)(ii) by acting as a conduit for earmarked contributions to candidates. Additionally, the Commission voted 5 to 1[2] to accept OGC's recommendation to find reason to believe that Douglass Lawrence and Carl Koupal violated 2 U.S.C. § 441b(a) and 11 C.F.R. § § 110.6(b)(2)(ii) and 114.2(f) by participating in and/or consenting to the corporate facilitation and improper conduit activity committed by Westar. Finally, the Commission voted 4 to 2[3] to accept OGC's recommendation to find reason to believe that Westar's outside lobbyists, Richard Bornemann and Governmental Strategies, Inc., violated 11 C.F.R. § 114.2 by assisting the corporate facilitation as the agents of Westar.

Although I was prepared to find reason to believe and investigate whether corporate facilitation of campaign contributions took place, and whether the contributions

[1] Chairman Bradley A. Smith, Vice Chair Ellen L. Weintraub, and Commissioners Danny L. McDonald, Scott E. Thomas, and David M. Mason voted in favor of the motion. Commissioner Michael E. Toner voted against the motion.
[2] Id.
[3] Vice Chair Weintraub and Commissioners McDonald, Thomas and Mason voted in favor of the motion. Chairman Smith and Commissioner Toner voted against the motion.

that occurred were made voluntarily, I did not believe it was appropriate to find a violation of law and enter into conciliation based on the record at hand. Accordingly, I voted against OGC's recommendations.

II. Background

On November 24, 2003, Westar made a *sua sponte* submission to the Commission concerning certain activities by some of its former officers. The alleged activities involved Westar executives soliciting earmarked contributions from other executives, collecting the contribution checks, and sending them to targeted federal candidates who were reportedly in a position to assist Westar in obtaining an exemption from certain federal regulatory requirements. Specifically, Westar executives allegedly developed a political strategy to elevate its profile among congressional members affiliated with passage of energy legislation.

On April 23, 2002 a memorandum was sent from Westar's outside lobbyist, Richard Bornemann, to Doug Lawrence, the Vice President of Government Affairs at Westar. The memorandum listed members of Congress who should be targeted for contributions and stated a recommended total amount of contributions. After the Bornemann memorandum was received by Lawrence, a formula was devised by which executives at Westar would be solicited for federal contributions based upon pay grade. This list ("Lawrence memo") was sent to the individuals who were asked to give contributions.

The record indicates that beginning in late May 2002, the first set of checks was disbursed in accordance with the Lawrence memo—the lobbyists requested the checks, Lawrence notified the designated Westar executives of their requested amounts, checks were delivered to Lawrence, and his assistant, Kathy Volpert, shipped the checks via Federal Express to Bornemann, who then distributed the checks to the designated candidates. This check disbursement system apparently continued through November 2002. Most of the activities described in the *sua sponte* submission occurred during the 2002 election cycle, though some of the activities occurred during the 2000 election cycle. During the 2002 election cycle, the contributions made by Westar executives totaled $26,900. During the 2000 election cycle, the contributions made by Westar executives totaled $13,500. Importantly, it was unclear based on the factual record at hand what amount of corporate resources, if any, were used in taking these steps. See First General Counsel's Report at 19 (acknowledging that the "value of the corporate resources and facilities used may have been de minimus").

III. Analysis and Conclusions

Corporations are prohibited from acting as conduits for contributions earmarked to candidates or their authorized committees. 11 C.F.R. § 110.6(b)(2)(iii). In addition, the prohibition against corporate contributions embodied in 2 U.S.C. § 441b(a) includes the facilitation of earmarked contributions by a corporation and its officers, directors, or

agents. 11 C.F.R. § 114.2(f)(1). Facilitation may include directing subordinates to plan, organize, or carry out a fundraising project as part of their work responsibilities, using corporate resources and providing materials for the purpose of transmitting or delivering contributions, and using coercion to urge individuals to make contributions. 11 C.F.R. §§ 114.2(f)(2)(ii) and 114.2(f)(2)(iv).

It is unclear whether Westar's action or the actions of any of the other respondents here constituted corporate facilitation. In the First General Counsel's Report, OGC claimed that there was reason to believe facilitation occurred because they believed the available information showed that Lawrence and Koupal acted in their corporate capacities for the benefit of Westar. See First General Counsel's Report at 13-14. OGC's standard is an overly broad theory of corporate facilitation. The fact that the corporation may benefit from the fundraising is irrelevant, as is the fact that the executives may personally benefit**.** For example, under OGC's facilitation standard, if a trial lawyer employed by a corporation gave money to a group committed to stopping tort reform, the trial lawyer would be guilty of facilitation because he and the corporation derived a benefit from the donation. The key to a facilitation finding is the use of unreimbursed corporate resources to underwrite the making of contributions to federal candidates. I was prepared to find reason to believe and investigate whether facilitation occurred under this objective test, but I was not prepared to enter into pre-probable cause conciliation under the broader theory of facilitation advanced by OGC.

It is not disputed that Lawrence and Bornemann acted as conduits or intermediaries by virtue of their collection and forwarding of earmarked contributions. However, I was not persuaded that their actions were undertaken at the direction of the corporation. For example, the information available at the reason to believe stage indicated that executives contributed more or less than requested and contributions were not always made to the targeted candidates. *See sua sponte* submission at 10. Additionally, there was no information that executives were contacted by superiors about their contributions or that those who contributed less than the requested amount received reprisal. Moreover, there is no evidence of corporate reimbursement, direct or indirect, in connection with the contributions.

Commission rules specifically allow employees of a corporation to make occasional, isolated, or incidental use of the facilities of a corporation for individual volunteer activity in connection with a Federal election. See 11 C.F.R. § 114.9(a). Such corporate employees are only required to reimburse the corporation if their volunteer campaign activity increases the overhead or operating costs of the corporation. Id. Commission regulations further provide a safe harbour that any activity which does not exceed one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours, shall be considered as occasional, isolated, or incidental use of the corporate facilities. Id.

The actions of the respondents here may fall under the safe harbor provision in 11. C.F.R. § 114.9(a). First, the record indicates that the total amount of time expended by Lawrence and Volpert was less than ten hours. See *sua sponte* submission at 12. As

mentioned previously, the activity at issue took place from the month of May through November. This level of activity on its face is well within the de minimus standard. Additionally, the use of company resources was limited to the use of the company's computers to send emails requesting checks and to approximately $40 worth of Federal Express charges. Id.

OGC appears to rely on the fact that because the executives were officers of the corporation, their involvement could not be voluntary. OGC stated that there is no indication that Lawrence and Koupal would have solicited the funds from Westar executives absent their employment. However, there is nothing in the record to support this claim, nor do I believe it is the correct legal standard. In addition, OGC emphasized that the executives stood to profit from the making of the contributions if the legislation passed. Regardless of whether this is true, it is irrelevant to whether a FECA violation has occurred. Individuals frequently raise funds for candidates with policy and legislative positions that benefit the individuals and/or their companies; that does not mean unlawful corporate facilitation has taken place.

For the foregoing reasons, I voted against entering into conciliation in this matter.

July ___, 2005

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Michael E. Toner, Vice Chairman