



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT 27 2004

Governmental Strategies, Inc.
Timothy Smith, President
11803 Wayland Street
Oakton, Virginia 22124

RE: MUR 5573

Dear Mr. Smith:

On October 19, 2004, the Federal Election Commission found that there is reason to believe Governmental Strategies, Inc., violated 11 C.F.R. § 114.2(f), a provision of the Commission's regulations. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Enclosed is a conciliation agreement that the Commission has approved.

If you are interested in expediting the resolution of this matter by pursuing preprobable cause conciliation, and if you agree with the provisions of the enclosed agreement, please sign and return the agreement, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

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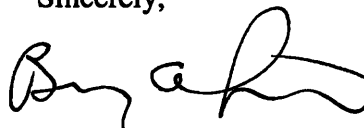
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For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Elena Paoli, the attorney assigned to this matter, at (202) 694-1548.

Sincerely,

A handwritten signature in black ink, appearing to read "Bradley A. Smith". The signature is fluid and cursive, with a large initial "B" and a long, sweeping underline.

Bradley A. Smith
Chairman

Enclosures

Factual and Legal Analysis

Procedures

Designation of Counsel Form

Conciliation Agreement

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Governmental Strategies, Inc.
Richard Bornemann

MUR: 5573

I. INTRODUCTION

This matter was generated by the Federal Election Commission ("Commission") pursuant to information ascertained in the normal course of carrying out its supervisory responsibilities.

II. FACTUAL SUMMARY

A. Background

Westar Energy, Inc. ("Westar"), formerly known as Western Resources, Inc., is a Kansas public corporation headquartered in Topeka.¹ It is the largest electricity provider in Kansas, serving more than 600,000 customers and employing more than 2,000 people.

Westar has been politically active since the late 1980s, mostly as an advocate for public utility deregulation. The company's political activities have included direct corporate contributions to state and local candidates (permitted under state law), contributions from Westar's separate segregated fund, most recently known as the Western Resources Political Action Committee ("Westar PAC"), to federal candidates, and earmarked contributions from Westar executives to federal candidates, primarily within the Kansas congressional delegation.

Notably, after 1998, employee contributions to the Westar

¹ Two utility companies dating to the early 1900s merged to form Western Resources in 1992. In 2002, Western Resources, Inc., changed its name to "Westar Energy."

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PAC declined significantly and individual earmarked contributions from Westar executives increased in their place.²

B. 2002 Contribution Activity

In late 2001, Congress considered a major energy deregulation bill that had significant consequences for Westar. The press reported that an early version of the Energy Bill, proposed by Rep. Joe Barton, would have exempted any subsidiary or affiliate of a utility holding company from Securities and Exchange Commission oversight under the Investment Company Act of 1940 ("ICA").³ Along with a widely accepted effort to repeal the Public Utility Holding Company Act of 1935, the ICA exemption provision would have allowed utility companies to create and own investment companies that would not be subject to any federal regulatory oversight.⁴ Westar was interested in getting this legislation enacted.⁵

Because of strong opposition from several congressional members and the SEC, neither the Senate nor House versions of the Bill contained the industry-wide exemption.⁶

Consequently, Westar and its outside lobbyist, Richard Bornemann of Virginia-based

² On March 29, 2001, the PAC notified the Commission that it was terminating effective December 31, 2000. Westar has resurrected a PAC, the Westar Energy Employees Political Action Committee, which filed its Statement of Organization with the Commission on October 3, 2003.

³ See Michael Schroeder, *House Power Bill Allows for Host of Exemptions*, Wall. St. J., Feb. 15, 2002, at A4.

⁴ *Id.*

⁵ In the early 1990s, at a time of public utility deregulation, Westar began to diversify the company business by increasing its electric utility holdings as well as acquiring non-regulated businesses unrelated to traditional energy services.

⁶ See, e.g., *Testimony Concerning H.R. 3406 and Repeal of the Public Utility Holding Company Act of 1935 and Testimony Concerning The Enron Bankruptcy, the Functioning of Energy Markets and Repeal of the Public Utility Holding Company Act of 1935: Hearings Before the House Comm. on Energy and Commerce, Subcomm on Energy and Air Quality* (Dec. 13, 2001, and Feb. 13, 2002) (statements of Isaac C. Hunt, Jr., Commissioner, U.S. Securities and Exchange Commission).

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Governmental Strategies, Inc., apparently devised a political strategy to try to preserve the exemption in the legislation. This strategy included the making of contributions to the political committees of key legislators behind the Bill. Toward this end, on April 23, 2002, Bornemann submitted a memorandum to Douglass Lawrence, Westar's then-Vice President of Government Affairs, outlining a plan to have Westar make contributions to Rep. W.J. "Billy" Tauzin, Rep. Joe Barton, Rep. Michael G. Oxley, Rep. Richard Burr, Sen. Richard C. Shelby, House Majority Leader Tom DeLay, and to these legislators' designees. The memo recommended that Westar executives or Westar PAC give \$31,500 to these specific candidates and that Westar make a \$25,000 contribution in nonfederal funds to Rep. DeLay's Texans for a Republican Majority PAC. The stated purpose of the proposed contributions was "to develop a significant and positive profile for the Company's federal presence."

Shortly thereafter, Lawrence devised a payment schedule for thirteen Westar executives at the Vice President level or above to make individual contributions to the targeted legislators. Based on their salaries, Lawrence asked executives to give specific amounts to specific candidates. Lawrence made these solicitations by internal office memoranda and email. In one such inter-office memorandum dated May 17, 2002, and entitled "Suggested Campaign Contributions," Lawrence tied the solicitation to the pending Energy Bill and its impact on Westar's financial restructuring plan. The memorandum had three attachments: the first attachment showed the total amount of Westar contributions as outlined by Bornemann and each executive's pro rata "suggested" share; the second attachment outlined the "first round" of contributions and listed the recipient committees and the amount each executive should contribute; the third attachment spelled out to whom each executive should write a check (or checks) and the specific amount. Lawrence asked the executives to "Please forward your

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personal check as soon as possible to my attention.” Lawrence sent similar solicitations in July and late-October/early November 2002.

In response to these solicitations, each executive made the requested contributions, though some gave more or less than the requested amount. Chart 1 below sets forth the total amounts requested from and contributed by the executives who participated in the plan. Chart 2 below sets forth the committees that received contributions pursuant to the contribution plan.

CHART 1
Westar Executives’ Contribution Schedule
May 31, 2002 – Dec. 19, 2002

NAME	TITLE	TOTAL AMOUNT REQUESTED	TOTAL AMOUNT CONTRIBUTED
David Wittig	President and CEO	\$9,450	\$10,000
Doug Lake	Executive VP Corporate Strategy	\$6,300	\$ 6,300
Doug Sterbenz	Sr. VP Generation & Marketing	\$3,150	\$ 4,200
Paul Geist	Sr. VP and CFO	\$2,677.50	\$ 425
Richard Dixon	Sr. VP Customer Operations	\$1,890	\$ 950
Anita “Jo” Hunt	VP Risk Management	\$1,417.50	\$ 1,700
Douglass Lawrence	VP Government Affairs	\$ 945	\$ 3,300
Leroy Wages	VP, Controller & International Generation	\$ 945	\$ 800
Bruce Akin	VP Business Services	\$ 945	\$ 800
Larry Irick	VP, General Counsel & Corporate Secretary	\$ 945	\$ 850
Peggy Loyd	VP Financial Services	\$ 945	\$ 850
Caroline Williams	VP Customer Care	\$ 945	\$ 1,600
Kelly Harrison	VP Regulatory	\$ 945	\$ 925
Total:		\$31,500	\$32,700

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CHART 2
Recipients of Westar Contributions
May 31, 2002 – Dec. 19, 2002

COMMITTEE	TOTAL
The Congressman Joe Barton Committee	\$2,000
Bayou Leader PAC (Tauzin)	\$2,800
Shelley Moore Capito for Congress	\$1,000
Tom DeLay Congressional Committee	\$2,400 ⁷
Graves for Congress	\$1,000
Hayes for Congress	\$1,500
Latham for Congress	\$1,000
Leadership PAC 2004 (Oxley)	\$1,000
Next Century Fund (Burr)	\$1,000
Northup for Congress	\$ 850
NRCCC	\$1,150
Oxley for Congress	\$1,000
Volunteers for Shimkus	\$1,000
Simmons for Congress	\$1,000
Team Sununu	\$2,000
Texas Freedom Fund (Barton)	\$2,000
Tom Young For Congress	\$10,000
Total:	\$32,700

After the executives submitted the contribution checks, Lawrence reportedly collected the contributions and sent them as a bundle to the recipient committees. In at least some cases, Lawrence forwarded the contribution checks to Bornemann to be hand-delivered to the candidates at fundraising events. Contributions were delivered to the targeted legislators at varying times through late 2002.

C. The Special Report

In September 2002, the U.S. Attorney's Office in Topeka served subpoenas on Westar seeking information about Westar's business practices.

⁷ In addition, in May 2002, Westar gave a \$25,000 contribution to Rep. DeLay's Texans for a Republican Majority.

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On April 29, 2003, the Special Committee presented the Westar Board of Directors with the results of its investigation in an almost 400-page report ("Special Report").¹⁰

¹⁰ See http://media.corporate-ir.net/media_files/nys/wr/reports/custom_page/WestarEnergy.pdf.

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The Special Report describes organized efforts by Lawrence and Lawrence's predecessor, Carl Koupal, between 2000 and 2002 to make contributions to state and federal candidates who were in positions to benefit Westar. Special Report, at 341-344.

According to the Special Report, "management had a practice of soliciting individual officers for recommended political contributions earmarked for particular candidates." *See id.*, at 342. The Special Committee interviewed many of the executives who were asked to make contributions and reviewed relevant documents, including email communications.

the Special Report noted that "employees indicated in interviews that they could refuse to make contributions to a particular candidate" and "none of the officers we spoke to reported having been told that his or her job would be in jeopardy or that there would be any other form of retribution if he or she did not contribute." *Id.* In conclusion, the Special Committee recommended that Westar hire election counsel to further analyze the events. *Id.*, at 348-349.

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In May 2003, Westar posted the Special Report and the accompanying 246 exhibits on Westar's website. Soon thereafter, news stories and editorials began appearing in the media about the Special Report's revelations; most of the articles focused on the 2002 political contribution activity that seemed directly tied to the Congressional assistance Westar received during negotiations on the Energy Bill.¹² Consequently, many of the legislators who received Westar contributions faced allegations by public interest groups and other legislators that they were bribed for their votes and should be investigated for ethics violations.¹³ Public attention also fell upon Westar's lobbyist, Richard Bornemann, for devising the contribution plan.¹⁴ Some legislators disgorged their Westar contributions by donating an equivalent dollar amount to charity.¹⁵

¹² See, e.g., Thomas B. Edsall and Juliet Eilperin, *Democrats, Group Seek Probe of GOP, Westar*, The Wash. Post, June 7, 2003, at A2; Thomas B. Edsall and Juliet Eilperin, *Agency Questions Westar Provision; Executives Called Real Beneficiaries*, The Wash. Post, June 14, 2003, at A4; *Westar Drops Former V.P.-Turned-Lobbyist, Finds Itself in Growing Public Political Scandal*, Electric Utility Week, June 16, 2003, at 1.

¹³ See, e.g., Charles Babington and Dan Morgan, *Ethics Truce Frays in House*, The Wash. Post, March 17, 2004, at A1; Thomas B. Edsall, *Westar a Saga of Money's Role on Hill; Some Demand Probe as GOP Lawmakers Say No Legislative Deals Were Made*, The Wash. Post, June 23, 2003, at A5. For example, Public Citizen filed a complaint with the Department of Justice's Office of Public Integrity and posted the complaint on its website. In a June 2003 document posted on its website, Public Citizen said that it "requests" the FEC to investigate Westar and the legislators' potential breaches of campaign finance laws. Public Citizen never filed a complaint with the Commission.

¹⁴ See, e.g., Juliet Eilperin, *Westar Lobbyist's Role Detailed; Firm's Representative Attended 2 GOP Lawmakers' Fundraisers*, The Wash. Post, June 10, 2003, at A4; Pete Yost, *Who Solicited Westar Donations – Tauzin and Barton or Utility's Lobbyist?*, Associated Press, June 10, 2003; Pete Yost, *Tauzin, Barton Raised Money for 7 Republicans Who Later Got Donations from Westar*, Associated Press, June 10, 2003.

¹⁵ See, e.g., Thomas B. Edsall, *Westar a Saga of Money's Role on Hill; Some Demand Probe as GOP Lawmakers Say No Legislative Deals Were Made*, The Wash. Post, June 23, 2003, at A5. Research of FEC disclosure report databases revealed no refunds to Westar executives. Research also revealed that Rep. Burr's Next Century Fund and Team Sununu appear to have disgorged \$1,000 Westar contributions to charitable organizations, and Rep. Dennis Moore appears to have disgorged \$1,800 out of \$2,750 he received from Westar.

III. LEGAL ANALYSIS

Corporations are prohibited from acting as conduits for contributions earmarked to candidates or their authorized committees. *See* 11 C.F.R. § 110.6(b)(2)(ii). 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. *See* 11 C.F.R. § 114.2(f)(1).

Westar created an agency relationship with GSI and Bornemann when they contracted for lobbying and governmental affairs consulting services. *See* Restatement (Second) Agency § 15 (agency relationship exists if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent to so act). As Westar's agents, GSI and Bornemann were prohibited from engaging in corporate facilitation of individual earmarked contributions on behalf of Westar. *See* 11 C.F.R. § 114.2(f)(1)(the prohibition against corporate facilitation extends to agents of a corporation). Nevertheless, in addition to devising the plan for the 2002 contributions, Bornemann received the individual contributions directly from Westar and delivered them to the recipient committees.

There is information indicating that Bornemann also knew the contributions had been collected and bundled by Westar. Indeed, Douglass Lawrence's administrative assistant reportedly mailed the bundled contributions in Federal Express envelopes directly from Westar to Bornemann. As recipients of mailings from the corporation, rather than from the individual donors, it appears that Bornemann knew that Westar facilitated the transmittal or delivery of the contributions. By delivering the contributions to the recipient committees, with the knowledge that the contributions had been collected, bundled and forwarded by the corporation, Bornemann

and his firm played a substantial role in the prohibited corporate facilitation as the agents of Westar.

IV. CONCLUSION

Accordingly, there is reason to believe that Governmental Strategies, Inc., and Richard Bornemann violated 11 C.F.R. § 114.2(f)(1) by forwarding individual earmarked contributions to political committees on behalf of Westar.

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