



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

Adam S. Hoffinger
Hank Bond Walther
Piper Rudnick Gray Cary
1200 Nineteenth St., N.W.
Washington, D.C. 20036

SEP 1 2005

**RE: MUR 5657
David Wittig**

Dear Messrs Hoffinger and Walther:

Based on a complaint filed with the Federal Election Commission on November 24, 2003, and other publicly available information, the Commission, on October 19, 2004, found that there was reason to believe your client, David Wittig, violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 110.6(b)(2) and 114.2(f)

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a violation has occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief that you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

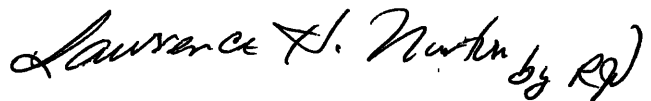
If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Elena Paoli, the attorney assigned to this matter, at (202) 694-1548.

Sincerely,

A handwritten signature in cursive script that reads "Lawrence H. Norton" followed by a stylized flourish.

Lawrence H. Norton
General Counsel

Enclosure
Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4) MUR 5657
5 David Wittig)
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7 **GENERAL COUNSEL'S BRIEF**

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9 **I. INTRODUCTION**

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11 On October 19, 2004, the Federal Election Commission ("Commission") found reason to
12 believe that David Wittig, a former officer of Westar Energy, Inc., violated the Federal Election
13 Campaign Act of 1971, as amended ("the Act") by facilitating or consenting to the facilitation of
14 making earmarked corporate contributions.¹ Specifically, the Commission found that Westar,
15 Wittig, and others violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 110.6(b)(2) and 114.2(f). *See*
16 MUR 5573.² The Commission subsequently severed respondent Wittig, opened this matter,
17 MUR 5657, as to him, and authorized an investigation.

18 The Commission's investigation confirms that Wittig solicited Westar executives to make
19 political contributions, decided how much each executive should contribute, and directed
20 subordinates to collect the contribution checks and forward them to candidate committees. Thus,
21 Wittig spearheaded much of Westar's facilitation of corporate contributions and consented to all
22 aspects of it, including the forwarding of earmarked contributions by Westar representatives in
23 2000 and 2002, totaling \$39,900.

¹ Documents from MUR 5573, including conciliation agreements and certain other documents cited herein, were placed on the public record on August 18, 2005.

² On May 10, 2005, the Commission approved conciliation agreements with Westar, Carl M. Koupal, Jr., and Douglass Lawrence, and on June 23, 2005, the Commission accepted a conciliation agreement with outside lobbyist Richard Bornemann, took no further action as to lobbying firm Governmental Strategies, Inc., and closed MUR 5573.

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Based on the foregoing, and on the following factual and legal analysis, the General Counsel is prepared to recommend that the Commission find probable cause to believe that Wittig violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 110.6(b)(2) and 114.2(f) by facilitating and consenting to the facilitation of earmarked contributions.

II. SUMMARY OF FACTS

Westar is an electric utility company incorporated in Kansas and headquartered in Topeka, Kansas. *See* Westar Energy, Inc., Conciliation Agreement ("Westar CA"), Part IV, ¶ 1. David Wittig was the Vice President of Corporate Strategy at Westar from 1995 to 1998 and its President and CEO from 1998 through November 7, 2002. *See id.* Douglas Lake was Westar's Vice President for Corporate Strategy from 1998 through December 6, 2002. *See id.* Douglass Lawrence was Westar's Vice President of Government Affairs from late 2001 until he voluntarily resigned at the end of 2002. *See* Douglass Lawrence Conciliation Agreement ("Lawrence CA"), Part IV, ¶ 1. Carl M. Koupal, Jr., was employed at Westar from March 16, 1992 through October 31, 2001, and served as Executive Vice President and Chief Administrative Officer at the times relevant herein. *See* Carl M. Koupal, Jr., Conciliation Agreement ("Koupal CA"), Part IV, ¶ 1.

GSI is a lobbying and consulting firm incorporated in Virginia with its principal place of business in Oakton, Virginia. *See* Richard Bornemann Conciliation Agreement ("Bornemann CA"), Part IV, ¶ 2. GSI has worked as one of Westar's lobbyists since March 1, 2000. *See id.* Richard Bornemann, one of GSI's lobbyists, provided lobbying and consulting services to Westar during times relevant herein. *See id.*

A. SEPTEMBER 2000 SOLICITATIONS

Shortly after the August 2000 primary election in Kansas, Wittig asked Koupal to create a proposed list of candidates for the top Westar executives (the "Executive Council") to support in

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1 the upcoming general election. *See* Koupal Affidavit, ¶ 4. Wittig also asked Koupal to propose
2 suggested contribution amounts for the six executives. *See id.* At around the same time, at a
3 regularly held weekly staff meeting of the Executive Council, Wittig announced that Koupal
4 would be creating such a chart and that it was Wittig's desire for Westar to support these
5 candidates.³ *See id.*, ¶ 6. Wittig said that Koupal would be giving the executives information
6 about their suggested contributions and that they should give their contribution checks to Koupal.
7 *See id.*

8 At Wittig's direction, Koupal created a chart in the form of a grid, with the executives on
9 one axis and the candidates on the other. *See* Chart, Westar Special Report, Exh. 239. The chart
10 listed four federal candidates – Jim Ryun, Dennis Moore, Todd Tiahrt, and Jerry Moran – and
11 five local and state candidates. *See id.* Koupal listed the six Executive Council members by
12 their initials, including Wittig, and wrote in a proposed contribution amount for each executive to
13 give to the candidate committees. *See id.* Koupal showed the chart to Wittig, and Wittig
14 changed some of the proposed contribution amounts. *See* Koupal Affidavit, ¶ 5. After Koupal
15 incorporated Wittig's changes, Koupal distributed the chart to the six executives and, except for
16 Lake, communicated in person or over the phone with the executives to tell them how and when
17 to write their checks. *See id.*, ¶ 8. Pursuant to a request by Lake, who was often away from
18 Westar's headquarters, on September 20, 2000, Koupal sent him a memorandum with the four
19 federal candidate committee names written out in full. *See id.*, ¶ 11 and Koupal Memorandum,
20 Westar Sua Sponte, Attachment 10. Koupal's memorandum to Lake said, "Please return these
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³ The Westar PAC was not active at this time.

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checks and we'll deliver them together." See Koupal Memorandum and Koupal Affidavit, ¶ 11.

On or about September 26, 2000, Lake wrote contribution checks, one after the other, to the federal candidate committees listed in Koupal's September 20 memorandum for the exact amounts requested. Lake forwarded the checks, totaling \$3,000, to Koupal. See Koupal Affidavit, ¶ 12.

Wittig and the other executives, except for Koupal, wrote contribution checks to all the federal candidates listed on the chart in the amounts suggested. According to Westar's internal investigation, "some officers felt pressured to contribute, and were of the view that Mr. Wittig had let it be known that he wanted officers to contribute when Mr. Koupal came to ask." See Westar Special Report, p. 344.

As part of the September 2000 solicitation effort, Koupal collected the contribution checks and sent or delivered them to the candidate committees. See Koupal CA, Part IV, ¶ 9.

Disclosure reports show that Westar executives and/or their spouses made the following contributions in accordance with the 2000 contributions schedule:

DATE OF CONTRIBUTION	AMOUNT	RECIPIENT COMMITTEE
10/16/00	\$1,000	Jim Ryun for Congress
10/16/00	\$2,000 ⁴	Jim Ryun for Congress
10/16/00	\$ 750	Jim Ryun for Congress
10/16/00	\$ 500	Jim Ryun for Congress
10/24/00	\$ 500	Dennis Moore for Congress
10/24/00	\$1,000	Dennis Moore for Congress
10/24/00	\$ 750	Dennis Moore for Congress
10/24/00	\$ 500	Dennis Moore for Congress
10/26/00	\$ 500	Jim Ryun for Congress
10/27/00	\$ 500	Tiahrt for Congress
10/27/00	\$ 500	Tiahrt for Congress
10/27/00	\$1,000	Tiahrt for Congress
10/27/00	\$ 500	Tiahrt for Congress
11/04/00	\$ 250	Moran for Kansas

⁴ This \$2,000 contribution from Wittig on October 16 exceeded contribution limits by \$1,000; on November 1, it was recast by the recipient committee as a \$1,000 contribution from Wittig and a \$1,000 contribution from Wittig's wife.

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DATE OF CONTRIBUTION	AMOUNT	RECIPIENT COMMITTEE
11/04/00	\$ 500	Moran for Kansas
11/04/00	\$ 250	Moran for Kansas
11/04/00	\$ 250	Moran for Kansas
11/04/00	\$ 250	Moran for Kansas
TOTAL	\$11,500	

In response to the September 2000 solicitation, Wittig and his wife forwarded earmarked checks totaling \$3,500 to Koupal. In total, the September 2000 solicitation resulted in \$11,500 in political contributions from Westar executives that Koupal collected and forwarded as earmarked contribution checks to federal candidate committees.

B. 2002 SOLICITATIONS

In an April 23, 2002, memorandum to Governmental Affairs Vice President Douglass Lawrence, Koupal's successor at Westar, titled "Federal Elections Participation," lobbyist Richard Bornemann outlined a proposal "to develop a significant and positive profile for the Company's federal presence." *See* Bornemann Memorandum, *available at* http://www.house.gov/ethics/DeLay_pdfs/Exhibit%20K.pdf (April 23, 2002). In the memorandum, he recommended that Westar employees contribute specific amounts to certain federal political committees. *See id.* In total, Bornemann recommended that Westar employees, through individual contributions, contribute \$31,500 in federal funds. Bornemann also recommended that Westar contribute \$25,000 in nonfederal funds. *See id.*

Using the Bornemann memorandum as a guide, Wittig created a contributions schedule that called for 13 Westar executives, including himself, to make specific contributions to specific federal candidate committees. *See* Lawrence CA, Part IV, ¶ 9. The suggested contribution amounts were based on the executive's pay grade, with higher-salaried executives requested to contribute proportionally more than lower-salaried executives. *See id.* On

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1 company letterhead, Wittig wrote a memorandum dated May 3, 2002, to the other 12 executives.
2 Wittig said, "We are going to enter the donation season (particularly political), which will
3 require us to write some checks. The attached Donation Schedule is a guideline of how we
4 might share the responsibility."

5 Thereafter, Lawrence, at Wittig's direction, communicated via email, internal mail and
6 orally with the solicited executives to let them know how much and to whom they should write
7 contribution checks and the specific amounts within the monetary framework set by Wittig. *See*
8 Lawrence CA, Part IV, ¶ 10. In a June 25, 2002, memorandum to "Officers," which listed
9 suggested contribution amounts, Lawrence detailed how the contribution checks delivered up to
10 that time had successfully resulted in favorable legislative action for Westar and why "the next
11 round of checks" were important to the company's financial restructuring plans.⁵ *See* Lawrence
12 Memorandum, *available at* http://www.house.gov/ethics/DeLay_pdfs/Exhibit%20N.pdf (June
13 25, 2002).

14 At least through October 18, 2002, Lawrence (and/or his assistant at his direction)
15 collected the executives' contributions, including Wittig's checks. *See* Lawrence CA, Part IV, ¶
16 11. Lawrence then forwarded the checks to the recipient committees, sometimes directly by
17 mail and other times through Bornemann, who then would deliver them to the recipient
18 committees in person or by mail. *See id.* After October 18, 2002, on the advice of counsel,
19 Westar executives, including Wittig, began sending their contributions directly to candidate
20 committees by Federal Express, U.S. mail, or other mail service at Westar's expense. *See id.*

21 Westar executives and the spouses of two of the executives made the following
22 contributions from May 31, 2002, through December 19, 2002, which were either collected and

⁵ According to Bornemann's memorandum, most of the suggested contribution recipients were either members of or had ties to leaders of the Senate and House energy committees.

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- 1 forwarded to candidates by Lawrence and/or Bornemann, or sent by the executives by Federal
- 2 Express or U.S. mail at Westar's expense:

DATE OF CONTRIBUTION	AMOUNT	RECIPIENT COMMITTEE
05/31/02	\$1,000	Tom Young for Congress
05/31/02	\$1,000	Tom Young for Congress
05/31/02	\$1,000	Tom Young for Congress
05/31/02	\$ 300	Tom Young for Congress
05/31/02	\$ 300	Tom Young for Congress
05/31/02	\$1,000	Tom Young for Congress
05/31/02	\$ 400	Tom Young for Congress
06/06/02	\$ 300	Tom DeLay Congressional Committee
06/06/02	\$ 300	Tom DeLay Congressional Committee
06/06/02	\$1,000	Tom DeLay Congressional Committee
06/06/02	\$ 300	Tom DeLay Congressional Committee
06/06/02	\$ 200	Tom DeLay Congressional Committee
06/06/02	\$ 300	Tom DeLay Congressional Committee
06/10/02	\$ 500	Northup for Congress
06/10/02	\$ 350	Northup for Congress
06/20/02	\$1,000	Volunteers for Shimkus
06/28/02	\$1,000	Graves for Congress
06/30/02	\$ 350	Shelley Moore Capito for Congress
06/30/02	\$ 650	Shelley Moore Capito for Congress
07/31/02	\$1,000	Bayou Leader PAC
07/31/02	\$ 300	Bayou Leader PAC
07/31/02	\$1,000	Bayou Leader PAC
07/31/02	\$ 500	Bayou Leader PAC
10/18/02	\$1,000	Next Century Fund
10/23/02	\$ 500	NRCCC
10/23/02	\$ 425	NRCCC
10/23/02	\$ 225	NRCCC
10/25/02	\$ 500	Simmons for Congress
10/28/02	\$1,000	Oxley for Congress
10/28/02	\$ 500	Texas Freedom Fund
10/28/02	\$ 500	Texas Freedom Fund
10/28/02	\$ 500	Hayes for Congress
10/29/02	\$ 500	Hayes for Congress
10/29/02	\$ 325	Leadership PAC
10/29/02	\$ 675	Leadership PAC
10/29/02	\$ 500	Latham for Congress
10/29/02	\$ 250	Latham for Congress
10/29/02	\$ 250	Latham for Congress
10/30/02	\$ 500	Simmons for Congress
10/30/02	\$1,000	Team Sununu

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DATE OF CONTRIBUTION	AMOUNT	RECIPIENT COMMITTEE
10/31/02	\$1,000	The Congressman Joe Barton Committee
11/03/02	\$1,000	Team Sununu
11/04/02	\$1,000	Team Sununu
11/05/02	\$1,000	The Congressman Joe Barton Committee
12/19/02	\$1,000	Texas Freedom Fund
TOTAL	\$28,400	

When considered with the \$11,500 in contributions forwarded in 2000, *see supra* p. 4, contributions solicited and delivered by Westar executives and agents or sent using Westar resources totaled \$39,900 between September 2000 and December 2002.

III. ANALYSIS

Corporations are prohibited from making contributions or expenditures from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a). In addition, section 441b(a) prohibits any officer or director of any corporation from consenting to any contribution or expenditure by the corporation. Corporations (including officers, directors or other representatives acting as agents for the corporation) also are prohibited from facilitating the making of contributions. 11 C.F.R. § 114.2(f)(1). Facilitation means using corporate resources or facilities to engage in fundraising activities that go beyond certain limited exemptions. *Id.* Examples of facilitation include ordering or directing subordinates who, therefore, are not acting as volunteers, to plan, organize or carry out the fundraising project as a part of their work responsibilities using corporate resources. 11 C.F.R. § 114.2(f)(2)(i). Facilitation also includes, *inter alia*, providing materials for the purpose of transmitting or delivering contributions, such as stamps, envelopes or other similar items. 11 C.F.R. § 114.2(f)(2)(ii).

In 2000 and 2002, Westar embarked on two organized efforts to make contributions to federal candidate committees. These efforts went beyond permissible communications to its

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1 restricted class concerning recommended candidates and/or contribution suggestions. Acting by
2 and through Wittig and other corporate officers and agents, Westar collected earmarked
3 contributions and forwarded them to federal candidate committees. In doing so, Westar
4 facilitated the making of prohibited corporate contributions.

5 Wittig, Westar's top corporate officer during the relevant time period, violated 2 U.S.C.
6 § 441b(a) and 11 C.F.R. § 114.2(f) because he consented to the prohibited corporate facilitation
7 of contributions to federal candidates. Wittig not only knew that Westar employees or agents
8 were collecting executives' contribution checks and forwarding them to candidate committees,
9 he directed his subordinates, Koupal and Lawrence, to do so as part of their jobs. He, in fact,
10 made contributions himself and gave his earmarked checks to Koupal or Lawrence for them to
11 forward to the candidate committee or to Bornemann. In addition, Wittig forwarded his own
12 contribution checks to candidate committees using Westar's mailing resources.

13 Accordingly, the General Counsel is prepared to recommend that the Commission find
14 probable cause to believe that Wittig violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(f).

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1 **IV. RECOMMENDATION**

2 Find probable cause to believe that David Wittig violated 2 U.S.C. § 441b(a) and 11
3 C.F.R. § 114.2(f).
4

5 9/1/05
6 Date

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