

United States Senate

WASHINGTON, DC 20510

July 14, 2004

The Honorable Patrick Henry Wood, III
Chairman
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Dear Chairman Wood:

Public Utility District No. 1 of Snohomish County, Washington (“Snohomish”) recently submitted to the Federal Energy Regulatory Commission (“FERC” or “Commission”) excerpts of recordings made of Enron Corp. electricity traders during the height of the 2000-2001 energy crisis in the Western United States. This submission, which covers only a small portion of Enron’s trading activities, indicates that Enron’s traders engaged in an extensive and deliberate effort to manipulate these markets and to take unfair advantage of other market participants and their customers. This new evidence of abusive practices raises significant questions about the thoroughness of FERC’s own investigation into the trading practices of Enron and other market participants during this period, as well as FERC’s actions with regard to the many related issues which arose as a result of market problems, such as the refund of unjust and unreasonable prices, the validity of long-term contracts entered into by Enron and other market participants, and enforcement actions against market participants who engaged in abusive practices. We are writing to request a detailed explanation of how FERC intends to respond to this new evidence.

We are aware that, on June 17, 2004, the Commission directed its staff “to expeditiously review recently submitted materials regarding Enron’s behavior during the 2000-2001 energy crisis, as well as all Enron proceedings currently pending before the Commission,” and to make recommendations on what additional procedural steps the Commission should take with respect to these pending proceedings.¹ While this response by the Commission at least acknowledges the potential significance of the new evidence Snohomish has submitted, it clearly falls far short of the full inquiry this matter demands.

As Snohomish points out in its May 17, 2004 filing, it has had access to and submitted to FERC only a limited portion of the Enron tapes in the Justice Department’s custody. Snohomish filed selected excerpts of audio recordings of Enron Corporation electricity traders for selected days during the period January 1, 2000 to June 20, 2001. Snohomish was constrained by the scope of the pending FERC proceeding, as well as “delays in the identification and production of the recordings, the voluminous nature of the recordings, and the large expense associated with

¹ Press Release, FERC, “Commission Directs Staff to Review Enron Materials, Recommend Procedural Steps in Pending Enron Proceedings” (June 17, 2004).

obtaining and reviewing” the recordings.² Consequently, the evidence of Enron’s trading activities the Commission has directed its staff to review – only those recordings provided by Snohomish – represents but a fraction of the evidence the Government possesses concerning Enron’s trading activities.

We also note that although the tapes obtained by Snohomish were in the possession of the Justice Department, FERC appears to have neither sought access to them from the Justice Department, nor independently obtained copies of these tapes from Enron directly. In the investigation it initiated in February 2002 of Enron and Western market trading practices,³ FERC repeatedly issued investigative requests for information from Enron on its trading practices and those of other market participants. In response to those requests, Enron produced the now infamous internal legal memos outlining its deceptive trading practices and other participants produced tapes and transcripts of their own traders’ activities, but FERC appears to have failed to obtain – or perhaps even sought – tapes or transcripts of Enron’s routinely recorded trading activities. FERC’s review should extend to encompass all of the material in the Government’s hands related to Enron’s trading practices.

We are deeply concerned that FERC concluded its investigation of Enron and other market participants in March 2003 when it issued its “Final Report on Price Manipulation in Western Markets” without ever examining these recordings. Even more disconcerting is the admission by the Justice Department, in FERC staff’s December 9, 2003 motion to quash Snohomish’s subpoena for these recordings, that “these audiotapes have not been restored due to the expense.”⁴ In other words, prior to Snohomish’s efforts to obtain access to potentially critical evidence of criminal conduct by Enron traders, neither FERC nor the Justice Department even converted these tapes into a form in which they could be reviewed to ascertain the relevance to their respective investigations into trading abuses. This is simply unacceptable.

² Motion of Public Utility District No. 1 of Snohomish County, Washington for Leave to File Limited Supplemental Testimony and Exhibits Related to Audio Recordings of Enron Phone Conversations at 8 n.28, *Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, Docket No. EL03-180 (May 17, 2004).

³ See *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 F.E.R.C. ¶61,165 (February 13, 2002) (Order Directing Staff Investigation).

⁴ Motion to Quash Issuance of Subpoena, *Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, Docket No. EL03-180 (Dec. 9, 2003) (Declaration of Matthew J. Jacobs in Support of Motion to Quash).

As it demonstrated when it initiated its investigation into Enron's trading abuses in the Western market in February 2002, FERC has authority under section 206 of the Federal Power Act to investigate this entire body of Enron's trading recordings. It should now move to reopen its Enron investigation and review these recordings in their entirety and not simply review those submitted by Snohomish.

We are also concerned that FERC's June 17 charge to its staff, calling for a review of "all Enron proceedings currently pending before the Commission," was unjustifiably narrow in its scope. Some of the evidence contained in Enron's traders' recordings could shed light on market abuses related to proceedings that could be deemed by FERC to no longer be pending,⁵ or that have been completed, such as the long-term contract cases in which the Commission issued final decisions last fall.⁶ FERC's order may therefore allow some of those involved in these matters to escape review altogether.

⁵ See, e.g., FERC's March 4, 2004 order regarding its settlement with Reliant arising out of the Commission's so-called "Gaming Order" (*American Electric Power Service Corp., et al.*, 103 F.E.R.C. ¶61,345 (Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior, June 25, 2003)). In this settlement, FERC determined that the settlement resolved all issues concerning Reliant related to the Gaming Order and terminated the proceeding with regard to Reliant over the objections of other parties. *Reliant Energy Services, Inc.*, 106 F.E.R.C. ¶61,207 (Order Approving Contested Settlement Agreement).

Other proceedings in this category involve those companies determined by FERC to no longer be subject to the "Withholding Investigation" – a staff investigation ordered by the Commission in the wake of the March 2003 "Final Report on Price Manipulation in Western Markets" to determine if generators engaged in physical withholding of their capacity. On August 1, 2003, FERC staff issued a report notifying a number of entities that they were no longer the subject of this investigation ("Staff's Initial Report on Physical Withholding by Generators Selling into the California Market and Notification of Companies").

⁶ On November 10, 2003, the Commission issued orders in a series of proceedings concerning the validity of long-term contracts entered into during the 2000-2001 Western energy crisis. See *Public Utilities Comm'n of the State of California v. Sellers of Long Term Contracts*, 105 F.E.R.C. ¶61,182; *PacificCorp v. Reliant Energy Services, Inc.*, 105 F.E.R.C. ¶61,184; *Nevada Power Co. v. Enron Power Marketing, Inc.*, 105 F.E.R.C. ¶61,185. The Commission upheld its earlier orders denying complaints that the prices, terms and conditions of the contracts were not just and reasonable and that respondents, such as Enron, "obtained the prices, terms and conditions in the contracts through the exercise of market power in violation of the Federal Power Act." *Public Utilities Comm'n of the State of California v. Sellers of Long Term Contracts*, 105 F.E.R.C. ¶61,182.

Beyond the question of which proceedings will be subject to review, we are also concerned that neither the Commission nor the FERC staff will engage in the necessary reexamination of the issues in the individual proceedings which are reviewed. In many of the proceedings in question, FERC and FERC staff have sought to limit the scope of the proceedings and the introduction of evidence of market manipulation – limits which, if they continue to be applied, would preclude new evidence and new issues contained in the Enron recordings from truly being considered. For example, the Commission has sought to strictly limit the range of issues that administrative law judges (ALJs) could consider in hearing the cases arising out of the abuses in the Western energy markets. As recently as its January 22, 2004 “Order Denying Rehearing” in the consolidated Gaming Order and Partnership Order⁷ proceedings, the Commission blocked efforts to expand the scope of these proceedings to examine a wider range of abusive behavior, concluding that it had exercised its “prosecutorial discretion to pursue certain activities and not to pursue others.”⁸ Similarly, FERC has also repeatedly sought to limit the introduction of evidence of market abuses. In the California refund proceeding, for example, petitioners had to seek relief in federal court to allow introduction of evidence of market abuses. The U.S. Court of Appeals for the Ninth Circuit overruled FERC and directed FERC to allow this evidence to be included.⁹ Even then, FERC allowed parties only a limited 100-day discovery period.¹⁰

For its part, FERC’s trial staff has followed suit by moving directly to exclude evidence of egregious market abuses, such as the Snohomish materials, from proceedings before the ALJs, as was done in the trial staff’s motion to strike and subsequent motion to appeal the ALJ’s denial to strike in the Enron market abuse case. In this instance, FERC trial staff repeatedly sought to exclude the very type of evidence of trading abuses by Enron and other market participants contained in these recordings, arguing that FERC has limited the scope of the two proceedings and introduction of new evidence would improperly expand them to embrace new matters

⁷ *Enron Power Marketing, Inc.*, 103 F.E.R.C. 61,346 (June 25, 2003) (Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior Through the Use of Partnerships, Alliances or Other Arrangements and Directing Submission of Information).

⁸ *American Electric Power Service Corp.*, 106 FERC 61,020 (January 22, 2004) (Order Denying Rehearing).

⁹ *Public Utilities Comm’n of the State of California v. FERC*, No. 01-71051 (9th Cir. August 21, 2002) (Order)

¹⁰ *San Diego Gas & Electric Co. v. Sellers of Energy*, 101 FERC 61,186 (November 20, 2002) (Order on Motion for Discovery Order, also known as the “100-Day Discovery Order”).

outside of those set for hearing by the Commission.¹¹

If the Commission and the FERC staff continue to take such a narrow view of the issues that may be raised and the significance of the continuing stream of evidence about Enron's abusive market practices, any review of current proceedings may well be merely perfunctory. The additional evidence of market abuses uncovered by Snohomish, and likely contained in the remaining Enron recordings, warrant a thorough reassessment of the Western market proceedings and the relevance of Enron's abusive practices to those markets. FERC should take this opportunity to comprehensively reexamine the full range of issues and proceedings arising from the manipulation of the California and Western electricity markets, including refund, long-term contract, and market abuse proceedings, in light of the new information contained in the Enron trading recordings. FERC should make a formal commitment to do so. Simply instructing the staff to review pending proceedings in the limited manner proposed is not such a commitment.

Please respond to the following questions no later than July 30, 2004:

- 1) Please provide a copy of each subpoena or written request for information that FERC has issued to Enron Corp. or any of its affiliated entities since February 2002. In your opinion, would any of these subpoenas or requests for information have required production of the recordings of energy trades submitted by Snohomish? Were any such recordings produced by Enron to FERC? If the subpoenas or requests for information did not seek tapes of energy trades, why not?
- 2) Did FERC at any point seek access from the Department of Justice to the Enron recordings and other trading records seized by the Department? If so, please indicate the date and circumstances under which FERC or its staff first sought such materials, when any such materials were received, and whether any such materials have been reviewed by FERC or its staff. If FERC has not sought access to such materials, why not? When, and under what circumstances, did FERC first learn that the Department of Justice possessed recordings of Enron trades or other Enron trading records?
- 3) The Commission has directed the staff to review "recently submitted materials regarding Enron's behavior during the 2000-2001 energy crisis," *i.e.*, the Snohomish materials. The materials submitted by Snohomish represent only that subset of the recordings Snohomish gained

¹¹ See Motion to Strike of the Commission Trial Staff, *Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, Docket No. EL03-180 (April 13, 2004); Motion of Commission Trial Staff's Motion Seeking Permission of the Presiding Judge to Permit an Appeal to the Commission of His Ruling Denying a Motion to Strike, *Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, Docket No. EL03-180 (May 19, 2004).

access to and deemed relevant to the specific proceeding in which Snohomish filed them. Snohomish, for reasons it explains in its motion to submit the Enron recordings, appears to have had only a limited ability to examine the recordings and materials relevant to its own case, much less to submit material relevant to the full range of "Enron proceedings currently pending before the Commission." Now that the Commission is aware of the types and significance of the information contained in the recordings, why is the Commission restricting its review to the material submitted by Snohomish? What steps, if any, is the Commission taking to examine the full set of Enron trader recordings in light of its stated interest in reexamining Enron-related proceedings?

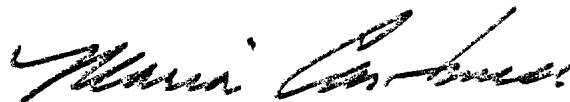
- 4) According to the press release issued by the Commission, the Commission's June 17 charge to the staff is to examine "all Enron proceedings currently pending before the Commission." The press release identifies some of those proceedings, but not all. In addition, the FERC trial staff has argued that material, such as that submitted by Snohomish, should be excluded from the record because it would potentially impact settlements already reached with market participants in those proceedings. Please identify all of the Enron-related proceedings the Commission believes should be reviewed in light of this new evidence and explain whether or not settlements already reached between FERC and market participants in those proceedings will be subject to review.
- 5) In light of the evidence that is likely contained in the Enron recordings, will the Commission reexamine prior proceedings, such as the long-term contract cases, that are no longer pending?

Thank you in advance for your cooperation. If you or your staff have any questions concerning this request, please have your staff contact David Berick or Beth Grossman of the Governmental Affairs Committee's minority staff at 202-224-2627 or Angela Becker-Dippman of Senator Cantwell's staff at 202-224-3441.

Sincerely,



Joseph I. Lieberman
Ranking Minority Member
Committee on Governmental Affairs



Maria Cantwell
Member
Committee on Energy and Natural Resources

cc: Hon. Susan Collins, Chairman
Committee on Governmental Affairs