MINORITY VIEWS
FERC and its Oversight of Enron Corp.

I. INTRODUCTION

In January 2002, the Senate Committee on Governmental Affairs began reviewing the collapse of Enron Corp., then this country's seventh largest corporation. The Committee's goal was to investigate the regulatory entities – both public and private – charged with overseeing and monitoring the business activities of companies such as Enron. This Committee, along with its Permanent Subcommittee on Investigations ("PSI"), spent months reviewing hundreds of thousands of documents, interviewing or deposing hundreds of witnesses, and holding a series of hearings. The overall objective has been to identify what went wrong, to inform the public, to initiate changes to laws and regulations as necessary to attempt to prevent a recurrence, and to ensure that lawbreakers are brought to justice.

The Committee and PSI have investigated: (1) the Enron Board of Directors that, among its many missteps, waived the Company's conflict of interest rules which opened the door to a series of highly questionable transactions; (2) the company's auditors who "pushed the envelope" beyond the boundaries of "generally accepted accounting principles;" (3) the securities analysts and credit rating agencies who were unwilling or unable to tell the world that "the emperor has no clothes", some of which was caused by the fact that these entities truly did not understand Enron's financial reports; (4) the financial institutions that readily jumped on the Enron bandwagon and proposed and structured transactions that they knew allowed Enron to paint a false and misleading financial picture for the public and, in exchange for millions of dollars in fees, ignored the holes in its flatbed and the nails in its tires as it hurtled downhill, and (5) the Securities and Exchange Commission ("SEC") that obviously abandoned its efforts to promote "plain language" reporting when it accepted Enron's infamous "footnote 16" as an adequate explanation of its conflict-of-interest transactions.

Each of these "watchdog" actors asked some of the right questions, but each ultimately abandoned its responsibility to insist on *getting appropriate answers* in the face of Enron's cast of persuasive and ethically-challenged executives.

Finally, the Committee undertook an extensive investigation of the Federal Energy Regulatory Commission ("FERC"), which is charged with regulating the wholesale energy markets. As the Majority Staff Memorandum, dated November 12, 2002 (the "Majority Report") points out, the Committee staff spent months investigating and preparing for the hearing held on November 12, 2002. The Minority staff would, at this point, like to express its appreciation for the timely and cooperative responses from everyone at FERC, in the face of voluminous and repeated requests for information and documentation.

Unlike the other entities investigated by the Committee, FERC has no responsibility for reviewing the overall fiscal activity of companies such as Enron.[1] FERC's primary responsibility is to ensure that the rates charged by wholesale energy sellers such as Enron are just, reasonable, and not discriminatory. Thus, even had FERC, as suggested by the Majority Report, questioned Enron's sale of the "Qualifying Facilities" or monitored Enron Online more closely, there is no evidence that Enron's collapse could or would have been avoided or even brought to light sooner.

This does not mean that FERC deserves a clean bill of health. As the Majority Report so clearly portrays, the Commissioners who held office in 2000 and early 2001, during the critical energy crisis in California "displayed a striking lack of thoroughness and determination . . . a shocking absence of regulatory vigilance."[2] On this point there is no disagreement.

The Majority is right in its general assertion that FERC allowed energy market problems to arise and fester by its lack of action and oversight. There is almost universal agreement that FERC had significant problems in

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[1] "The FERC didn't have much jurisdiction over Enron," according to Sen. Jeff Bingaman (D-N.M.), chairman of the Energy and Natural Resources Committee. This comment came during the hearing in which the Committee approved the nominations of Commissioners Wood and Brownell (both of whom Chairman Bingaman supported: "I supported both of them strongly and I think they've been doing a good job." Quoted in The Hill, Feb. 6, 2002).

[2] Majority Report, page 2.

overseeing the rapidly developing energy markets of the 1990's. That record is abundantly clear. That record of failure ended, however, approximately 18 months ago, when the current Commission took shape. As the committee's expert witness, Paul L. Joskow testified,

> "I believe that FERC has made a lot of progress in the last 18 months under Chairman Patrick Wood's leadership and has responded positively to the criticisms that I made in mid-2001."[3]

Unfortunately, while the Majority Report correctly identifies FERC's regulatory failures as they relate to Enron, in the judgment of the minority, it fails to give appropriate recognition to everything that has occurred since Mr. Wood became Chairman and purports to "paint" both Mr. Wood and his fellow Commissioner, Nora Brownell with the "tainted Enron brush." This Minority Report is intended to put FERC's faults into proper historical perspective, to provide "the rest of the story," and to put aside unfair inferences that otherwise could be drawn about the current administration, Commissioner Wood or Commissioner Brownell. In coming to FERC, Chairman Wood inherited a sizable set of challenges and has implemented a formidable plan. Fairness dictates the need to report on FERC, as it exists today, to provide appropriate credit where due, and to recognize the positive developments on several fronts involving a new department of market oversight and investigation and a number of rule-making proposals designed to prevent a recurrence of the problems highlighted by the Enron debacle.

I. FERC OVERSIGHT OF ENRON: *A Perspective on Failure*

A. Windfarm Transactions:

In 1997, Enron became the owner of a number of a number of windfarm projects, all of which were certified "qualifying facilities" (QFs). This means that they were eligible for preferential rate treatment, among other benefits. Seven months later, Enron acquired Portland General Electric (PGE), an Oregon public utility. This created a problem: QF's cannot be more than 50 percent owned by a public utility or its holding company. Therefore, in order for the wind farms to retain their QF status and associated benefits, Enron, either had to (1) divest itself of at least 51 percent of its ownership of the QF's, or (2) obtain an appropriate exemption under the Public Utility Holding Company Act ("PUHCA").[4] Enron, in its characteristically aggressive approach, attempted to do both, and with questionable validity

Enron's first approach was to "divest" itself of the windfarms. As the Majority Report points out, Enron transferred majority ownership in at least three of these windfarms to an entity (RADR) created by Enron Chief Financial Officer, Andrew Fastow, and his associate, Michael Kopper. It is now known that the complex documents Enron sent to FERC effectively hid the fact that Enron retained beneficial interests in the windfarms. The SEC and the Department of Justice ("DOJ") recently filed civil and criminal complaints, respectively, against the two Enron executives (Fastow and Kopper) alleging, in part, that they devised a scheme to allow Enron to maintain secret control over the QF windfarms while preserving QF benefits for the windfarms.

For some reason, during 2000-2001, Enron decided to "repurchase" the windfarms including the three RADR projects. Since Enron still owned Portland General, the repurchase put the QF status of the windfarms back in jeopardy. Desiring to continue to receive favorable QF treatment for these windfarms, Enron applied to the SEC for a *second seemingly redundant* PUHCA exemption.[5] Under FERC rules, merely *applying* for this exemption in good faith meant that Enron was no longer an electric utility holding company and could own these QFs without causing them to lose QF status and the related benefits. Therefore, Enron was able immediately to file notices of self-certification of QF status for the windfarms.

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[3] Joskow Testimony before the Governmental Affairs Committee, Nov. 12, 2002, page 8.

[4] Enron already was exempt from the requirements of PUHCA under an SEC interpretation of what constituted "interstate" activity. However, FERC regulations issued pursuant to the Public Utility Regulatory Policy Act ("PURPA") recognize only certain of the PUHCA exemption categories for QF ownership. Only those utility holding companies exempt from PUHCA under section 3(a)3 or 3(a)5 may own QFs. Enron filed for a second "exemption" under these sections.

[5] The saga of Enron's PUHCA exemption application is detailed in a prior report of the Committee. See *"Financial Oversight of Enron: The SEC and Private Sector Watchdogs, Report Prepared by the Staff of the Committee on Governmental Affairs,"* S. Prt.107-75 (October 7, 2002).

There is nothing inherently wrong with any business applying to take advantage of an exemption to some rule or regulation. However, the Committee, through its previous Report, did raise a valid concern over the manner in which FERC and the SEC interacted – or failed to interact -- with respect to a public utility *obtaining* such an exemption. FERC apparently accepted that any application submitted for such an exemption is made was in "good faith." The SEC, however, also did not question the "good faith" of a filing; it simply processes the application in the normal course of events. The SEC had no sense of urgency with respect to Enron's application. In this instance, Enron applied for this particular exemption two and half years ago, and the SEC did not act on the application until October 7, 2002 (coincidentally the same day that the Committee issued its report that criticized the handling of Enron's PUHCA exception application), when it scheduled a hearing on that application.

This issue points out a serious regulatory gap that is caused, in large part, by the overlapping and conflicting responsibilities created under PUHCA. Both the SEC and FERC have been urging Congress to repeal PUHCA and Congress is giving the matter serious attention.

With respect to the fraudulent filings, Chairman Wood testified that the FERC self-certification system has a built-in system of checks and balances. Since the burden of paying for the benefits granted to QF's is borne by the public utilities, they have a natural financial interest in monitoring the validity of QF certification. Therefore, affected utilities are notified of all pending QF certifications. Chairman Wood testified that FERC has handled approximately 9,000 applications for QF status and that public utilities or other similar parties of interest have challenged at least twenty of those filings. Indeed, Southern California Edison Company currently is challenging Enron's self-certification of the windfarms by opposing Enron's application to the SEC for exemption under 3(a)3 and 5 of PUHCA.

The Majority Report, not unreasonably, wants FERC to have a process in place whereby fraudulent filings such as those submitted by Enron would be discovered before approval by FERC. For FERC to be able to examine each of the filings to the extent that would have been necessary to uncover Enron's fraudulent documentation may not be cost-effective or indeed, even possible, given FERC's mandate and resources. The better way for FERC to prevent such actions in the future is to have a much stronger system in place to monitor market activities and much stronger civil and criminal penalties in place as a deterrent. Under Chairman Wood's leadership, FERC has begun implementing these changes, which are discussed more fully in Section III of this Minority Report.

B. Affiliated Transactions

The Majority Report's concern about affiliated transactions involves two loans totaling approximately $1 billion issued by JP Morgan Chase and Citigroup to Enron's subsidiaries, Northern Natural Gas Company and Transwestern Pipeline. Enron announced the commitment for the loans on November 1, 2001. The loans were secured by the assets of the two companies—primarily, their natural gas pipelines.

The problem arose when the proceeds of the loans, through Enron's overall cash management program, were "swept" to the accounts of their parent company, Enron. These proceeds became unsecured "loans" from the subsidiaries to Enron, the parent. Enron's interstate pipeline companies are directly regulated by FERC; Enron is not. When Enron declared bankruptcy a few weeks later, it made no payments of these monies to its subsidiaries, and the pipeline companies have been left to pay off the entire amount of the obligations to the banks – potentially at the expense of their customers. [6]

FERC has rules in place prohibiting this kind of affiliated financial activity, and within a short time, FERC reacted. On March 1, 2002, the FERC instituted a formal non-public investigation into these transactions. In August 2002, pursuant to that investigation, FERC directed Northern Natural and Transwestern to demonstrate why the costs and indebtedness associated with these loans were not "imprudently incurred" and therefore unrecoverable from ratepayers. In response, Northern Natural executed a consent agreement whereby it would not include the costs associated with the loan in any future rate proceedings before FERC. Currently, FERC is engaged in similar settlement discussions with Transwestern.

[6] It should not be lost that at least one of the financial institutions involved, through these pipeline loans, essentially "converted" unsecured debt owed by the parent, Enron, into secured debt owed by the pipeline subsidiary. This occurred when the pipeline loan proceeds were swept to Enron and used by Enron to pay down existing unsecured indebtedness at that institution.

In addition to a timely prosecution of this violation, the investigation of Enron's subsidiary transactions has led the Commission to propose amending its Uniform Systems of Account to supplement the rules with respect to administering and reporting cash management agreements. On August 1, 2002, the Commission issued a Notice of Proposed Rulemaking (NOPR) on Regulation of Cash Management Practices. The proposed rules include specific documentation requirements and conditions precedent for participation in cash management arrangements between regulated and non-regulated affiliated companies. These rule changes are designed to make such arrangements more transparent and to prevent the abuse of cash management or money pool arrangements that could affect the financial health of regulated entities. FERC recently held a technical conference on the proposed rules and comments are under consideration.

C. Enron Online.

Enron's Internet trading system, Enron Online (EOL), was generally acknowledged to be the dominant Internet –based platform for trading both physical energy (electricity and natural gas products) and energy derivatives during its short-lived existence (1999-2001).[7] The structure of this new energy-trading platform was unique at the time it was created. Unlike any other trading system in existence, one company (Enron) was a party to every trade. Moreover, EOL was not subject to the extensive regulation of a commodity exchange by the Commodity Futures Trading Commission ("CFTC") because these were bi-lateral transactions not made through an exchange and all of the transactions took place between sophisticated parties.[8]

Nonetheless, all commodity futures transactions are subject to regulation for 'fraud and abuse.' And since FERC has the authority and obligation to regulate where such trades are creating market power and result in prices that are not just or reasonable, FERC had a responsibility to understand quickly how this new market functioned and to ensure that EOL was not exercising market power or in some way adversely affecting the price of energy.

As the Majority Report notes, however, from 1999 well into 2001, FERC did not have a system in place that could react to emerging issues such as those presented by EOL trading. It was not until May 2001, that FERC staff initiated an informal review into EOL and electronic trading in natural gas and electric energy markets. The staff report was completed in August 2001 but never formally presented to the Commissioners. This initial report recommended that FERC continue to monitor EOL and electronic trading of natural gas and electric power, but determined that there was no reason for concern about EOL at that time. At approximately the same time, the FERC staff informally began to analyze whether FERC could assert jurisdiction over the derivative trades and the trading platform itself.

As we have ultimately learned, the biggest problem created by EOL was that it did such voluminous business, it became a source of price discovery for natural gas products – despite the system's lack of transparency. In January 2002, in response to allegations that certain practices engaged in by EOL (such as wash trades) may have distorted electric and natural gas markets in the West, FERC initiated a fact-finding investigation into EOL and other trading practices engaged in by Enron and FERC staff has recommended that the FERC not approve a price index based on EOL transactions.

Recently, FERC has implemented several organizational changes that will positively affect trading oversight. The primary change is FERC's creation of a new Office of Market Oversight and Investigations (OMOI). This new office is discussed more fully in Section III of the Minority Report.

D. California Energy Crisis.

The California energy crisis receives more coverage, by far, than any of the other three issues covered by the Majority Report, and it remains the most significant example of FERC's ineffectiveness during a critical period of time. Part of the problem is jurisdictional. The extent of FERC's jurisdiction and the extent to which FERC elects to exercise its jurisdiction continue to be a source of controversy, particularly as the deregulation of the

[7] Enron OnLine was taken over by UBS Warburg Energy following Enron's December 2001 bankruptcy filing, and currently the trading platform operates under the name of UBSWenergy.com

[8] Minority staff met with representatives of the CFTC on several occasions; this is very much an oversimplification of the complex rules that govern CFTC's jurisdiction.

electricity market evolves. Jurisdiction over energy regulation is split between FERC (wholesale) and the states (retail), thus making cooperation between the regulators essential. In California, any cooperation that may have existed evaporated at the first sign of trouble.

Disagreements over the design of California's deregulation model arose early, as FERC quickly urged the State to reinstate the use of long-term contracts, while the State immediately asked FERC to implement price controls.[9] FERC did take steps to control the control the California energy crisis as early as December 2000, when it issued an extensive order for changes to the market. However, most would agree that this order did not go far enough or quickly enough, and it wasn't until April 2001 that FERC provided the help California needed. Indeed, many of the problems that California experienced in early 2001 emanated from FERC's December 2000 order.

While there is a great deal that can be – and has been – said about the California energy crisis, the best thing that can be said is that the crisis is over and has not reoccurred. One of the expert witnesses, Paul Joskow, that the Majority requested testify at the Committee's November 12, 2002 hearing, said it best:

> "A lot has happened in 18 short months. The extraordinarily high wholesale electricity market prices and power supply emergencies that plagued California and the rest of the West during the second half of 2000 and the first several months of 2001 subsided by the summer of 2001, and these extraordinary conditions have not reappeared since then."

Since President Bush's appointment of Patrick Wood and Nora Brownell in May and June 2001, and Mr. Wood's ascension to the chairmanship of FERC in August 2001, a number of important steps have been taken. The new FERC Commissioners have taken action: (1) to understand and implement some new rules and a basic structure for the new deregulated market-based system so that a California-type crisis will not reoccur, and (2) to investigate the charges of market manipulation in order to ensure that appropriate refunds will be made to anyone who has been subject to unjust or unreasonable rates for wholesale energy. These efforts are detailed more fully in Section III, below.

II. FERC ACTS TO IMPROVE

A. New Rules for Regulating a Deregulated, Market-Based System of Electric Energy Production and Delivery: Standard Market Design

On July 31, 2002, FERC published a Notice of Proposed Rulemaking (NOPR) on Standard Market Design (SMD). The NOPR seeks comment on a series of rules on market design, including a comprehensive plan for mitigating market power and market manipulation. The proposed rules are intended to provide certainty to all market participants, encourage new infrastructure investment, promote fair competition and prevent a repeat of the mistakes made previously in California.

This is a sweeping rulemaking that attempts to deal with many of the problems with wholesale markets that have been identified, including efforts to respond to many of the "lessons learned" from the California crisis and emerging energy market issues. Energy expert, Paul Joskow, said this in his testimony:

> "I recognize that many of the proposals in the SMD are controversial. And while I agree with many of them, I also believe that there are several aspects of the SMD NOPR that need significant improvement and revision. <u>Nevertheless, this is a serious, even courageous effort by FERC to facilitate wholesale market competition and improve market performance.</u> Market monitoring and mitigation proposals are fully integrated into the SMD and the potential for exercising market power and the need to mitigate it has influenced important aspects of the proposals." (emphasis added).

For whatever reason, the Majority Report did not discuss this important rulemaking.

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[9] The extent of the discord between FERC and California may be best typified by the State's continued refusal to abide by FERC's Dec. 15, 2000 order requiring the California ISO to have an independent governing board. Indeed, on August 19, 2002, FERC actually filed suit against the CAISO seeking a declaratory judgment and injunctive relief to *force* the ISO to appoint a new and independent Board of Directors

FERC has extended the time period for filing comments on the SMD NOPR and has initiated various outreach efforts to better explain certain aspects of the SMD proposals and to receive advice from interested parties about problems with the SMD and potential improvements to its proposals.

B. Investigating Market Manipulation.

In January 2002, in response to allegations that Enron may have used its market position to distort electric and natural gas markets in the West, FERC initiated a fact-finding investigation into whether any entity, including any affiliate or subsidiary of Enron Corp., had manipulated electric energy or natural gas prices in the West since January 1, 2000. The investigation was formally announced on February 13, 2002. In conducting this investigation, FERC has coordinated closely with DOJ, SEC, the CFTC, and the Department of Labor.

On August 13, 2002, FERC released an initial report of its investigation. The report concludes that published indices of electricity and natural gas prices in or near California during the recent crisis may not be sufficiently reliable to be used in setting refunds for wholesale power buyers in California. Based on this staff finding, FERC requested comments on whether it should change the method for determining the cost of natural gas in calculating the refunds for power sales in California from October 2000 to June 2001, and if so, what method should be used. FERC recently received comments on this issue and the comments are currently under consideration.

Also based on the staff report, FERC initiated formal enforcement proceedings under section 206 of the FPA regarding possible misconduct by three corporate affiliates of Enron (Enron Power Marketing, Inc., Enron Capital and Trade Resources Corporation, and Portland General), and two investor-owned utilities that did business with Enron (Avista Corporation and El Paso Electric Company). If these investigations result in findings that FERC orders or regulations were violated, possible sanctions include loss of market-based rate sales authority.

FERC's investigations continue.[10] FERC, with the assistance of outside consultants, is conducting a comprehensive investigation of a variety of factors and behaviors that may have influenced electric and natural gas prices in the West during 2000-2001. FERC's final report proposes to be comprehensive, and will include an explanation of EOL operations and the role EOL played in the energy markets and an analysis of the so-called wash trades in electricity and natural gas markets in the West and the concern that these trades drove pries higher. The targeted date for completion of the investigation is January/February 2003. As soon as the investigation is complete, FERC intends to provide a thorough and timely report to Congress.

C. Ongoing Market Monitoring and Investigation: Creation of FERC's Office of Market Oversight and Investigation.

Perhaps the single most significant effort being undertaken at FERC is the creation and staffing of a new Office of Market Oversight and Investigation. Created in response to an obvious and glaring need, the OMOI is an idea that experts such as Paul Joskow have been promoting for many years. The director of OMOI was appointed in April, and many of the new positions have already been filled – at least 90 of the new hires coming from outside the government, and offering the agency access to new and different areas of expertise.

OMOI is providing FERC with the needed sophistication to monitor the new market-based energy industry and to implement immediate and effective investigation and enforcement efforts. The office encompasses both of these functions that must work closely together. The Market Oversight and Assessment unit reviews developments in the market on a real-time and longer-term basis, and spots irregularities. As problems arise and are identified, OMOI's Investigations and Enforcement unit brings swift, decisive and effective enforcement. OMOI serves as an

[10] Indeed, two days after the hearing, as part of this investigation, FERC submitted staff's "Statement of Asserted Violations" to the Administrative Law Judge. This filing charged that Enron Power and Marketing in concert with its public utility affiliate (Portland General Electric) (i) "misrepresented the nature and amount of power Enron intended to sell into the California market, as well as the load it intended to serve," (ii) "developed a scheme under which it created false congestion and received payment for relieving the same false congestion," and (iii) "set up sleeves using Washington Water Power in order to shield its false congestion scheme from scrutiny," all in violation of the market rules of the California ISO and of sections 205 and 206 of the Federal Power Act.

early warning system to alert FERC when market problems develop, such as the California energy crisis or the collapse of Enron, and allows FERC to intervene and correct the problems more quickly.

Finally, OMOI has begun an aggressive program of outreach to a wide variety of entities including: other federal, state and provincial regulatory agencies, state consumer advocates, industry participants, academic institutions and think tanks, financial institutions (such as ratings agencies), and Market Monitoring Units (MMUs) at Regional Transmission Organizations and Independent System Operators. The purpose of the outreach is to let these entities know that FERC is developing a clear market oversight capability and to obtain their input for how best to develop that capability. Market monitors presented their evaluations of the ISO regional electricity markets at a FERC Open Meeting in June 2002, and participated in a FERC market monitoring technical conference on October 2, 2002.

III. THE "PROPRIETY" OF CONTACTS BETWEEN ENRON & CERTAIN FEDERAL OFFICIALS

We believe the current record and the Majority's report must be supplemented to provide a more complete picture of the contacts between Enron and FERC commissioners. Contacts between regulators and the companies that they regulate not only are normal – indeed, they are to be expected. Given the sometimes limited resources of government agencies, the input of companies and their representatives can be invaluable. The difficult question is when do those contacts become improper. In today's world, unfortunately, the mere suggestion of a contact sometimes raises, in the public's mind, the specter of impropriety. That is why if these contacts are raised, with the public left to draw whatever inferences are to be drawn, the individual or institution raising the issue is duty bound to do so fairly and even-handedly. This is where the Majority Report unfortunately falls short. Once the issue of political influence is raised, however, we have a duty to present a fair and balanced picture.

The Majority Report, in raising the issue of Enron's use of its political clout, refers to meetings with the current administration as well as Enron's past promotion of the candidacies of Commissioners Wood and Brownell to serve on FERC. References to these matters, however, in no way relate to the substantive matters that the Committee investigated or that are detailed in the Majority Report.

In addition, on May 31, 2001, Senator Lieberman requested the U.S. General Accounting Office (GAO) Office of Special Investigations to review a telephone call between Curt Hébert, a Republican appointee and then-Chairman of FERC, and Kenneth Lay, Chairman of Enron. During this conversation, Mr. Hébert reportedly asked Mr. Lay to endorse his remaining as FERC's Chairman. Senator Lieberman appropriately expressed concern that this communication may have violated federal criminal statutes or ethics regulations.

After GAO completed its investigation, finding no evidence that federal criminal statutes or ethics regulations were violated, Senator Lieberman, along with Senator Dianne Feinstein, wrote incoming FERC Chairman Patrick Wood, referencing the GAO investigation. In this letter, the Senators wrote, "while GAO concluded that it found no evidence that either Mr. Hébert or Mr. Lay violated criminal statutes or ethics regulations the fact remains that GAO confirmed that the Chairman of the Federal Energy Regulatory Commission discussed support for his continued appointment as Chairman with the senior official of a major energy company regulated by that Commission."[11] The letter went on to request that FERC review its ethics and record-keeping regulations to "ensure that communications between the Commissioners and the regulated community are conducted in a manner that leaves no question in the public's mind about the objectivity and independence of the Commission."

The Minority agrees that it is important for government officials to maintain the highest ethical standards in order to maintain the public's trust. We also believe that public officials have an obligation to meet and talk with the public – including members of the public whom they regulate – at an appropriate time and in a proper manner. While it might have been preferable for Commissioner Hebert to refrain from soliciting support from one of the entities regulated by FERC, his integrity[12] and his steadfast adherence to principle are to be congratulated.

Enron Lobbying of Commissioner Breathitt

[11] Letter, September 17, 2001, Senators Lieberman and Dianne Feinstein to The Honorable Patrick Wood III.
[12] GAO found "Mr. Hebert refused to change his position on access [to the electric transmission grid] even though that refusal might have cost him Mr. Lay's support." See GAO Letter to The Honorable Joseph I. Lieberman, dated August 16, 2001, at page 4.

FERC Commissioner Linda Breathitt was appointed to the Commission in 1997 by President Clinton to fill a Democratic slot on the Commission. She is from Kentucky, where she was the Chair of the Kentucky Public Service Commission. Records produced to the Committee by Enron included a set of documents from a Kentucky law firm, of which Ms. Breathitt's father is a partner. One of the firm's other partners was hired by Enron to lobby FERC at least in part because of his close friendship with Commissioner Breathitt. According to the Committee records, it appears that Enron was referred to this firm by Johnny Hayes, a former board member of the Tennessee Valley Authority ("TVA"). Both the lobbyist and Mr. Hayes are close confidants of then Vice President Gore. Mr. Hayes resigned from the Board of Directors of the TVA to be chief of fund-raising for Mr. Gore's 2000 presidential campaign. These records further indicate that Enron paid Mr. Hayes $200,000 and paid the Kentucky law firm another $500,000, a significant part of which was apparently earmarked for Mr. Hayes.[13] Among the documents provided to the Committee were the law firm's billing records for Enron during 2000 – 2001.[14] These billing records revealed a string of more than 40 contacts between Enron representatives and Ms. Breathitt. A chart listing each of these contacts is attached to this Minority Report as Schedule A. The record indicates that during the height of the California energy crisis, Commissioner Breathitt was having as many as five and six contacts a month with Enron representatives.

While each of these payments and contacts may be entirely innocent, the sheer number and frequency of the contacts during a time of enormous significance in the energy industry creates an appearance of impropriety and a need for further inquiry. We cannot say why there is no mention of these matters by the Majority when the evidence is in the Committee's investigation files. We would simply note that the 46 Enron contacts evidenced in the record for Ms. Breathitt are far more frequent than the contacts reported by any other Commissioner for that two-year period. Commissioner Massey, for example, who has been on the Commission since 1993, reported only 11 contacts with Enron representatives during the same two-year period, 2000-2001.[15]

Moreover, there would appear to be an obvious question why Commissioner Breathitt reported only 14 contacts [16] when records clearly indicate that she met or spoke with Enron lobbyists more than three times that often. These are uncomfortable but legitimate questions that deserve answers. As Senator Thompson noted during the November 12, 2002 hearing, "there have been other good people who have suffered from the suggestions or implications that have been made in the public arena, and I think the record ought to be complete." Fairness to all dictates that result.

V. CONCLUSION

As the Majority Report indicates, prior to 2001, FERC failed to adequately regulate the fledgling deregulated electricity market on a number of occasions, four of which are highlighted in the Report. We believe, however, and the record seems to indicate that since that time, much attributable to Chairman Wood's leadership, FERC is to be commended for undertaking bold initiatives to address past failures, including aggressive investigations, proposed and final rulemakings, and internal reorganizations and personnel staffing efforts. Given all that FERC has done in the last 18 months, the Committee now should let FERC do its job and give it support.

Finally, as we close the book on our Committee's and PSI's Enron investigations, let us put aside our differences. There is much that we can be proud of. Many of the recent reform and law enforcement actions can be traced indirectly if not directly to our investigations and hearings. But let us not forget that in any investigation, we have a duty to be fair and even-handed. The public expects and deserves that from Congress.

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[13] Memo detailing money transaction between the law firm and Enron.
[14] Law firm billing records.
[15] Responses to Committee's March 2002 letter and follow up letter dated October 30, 2002
[16] Id.