Congress of the United States

Washington, DC 20515

June 18, 2004

Patrick Wood, Chairman
Nora Brownell, Commissioner
Joseph Kelliher, Commissioner
Suedeen Kelly, Commissioner
Federal Energy Regulatory Commission (FERC)
888 First Street, NE
Washington, DC 20426

Dear Mr. Chairman and Commissioners:

Thank you for your letter of 4 June in which you responded to our request that the FERC revise the revocation of the market-based rate authority of Enron's power trading arm to a date earlier than June 25, 2003. In your letter, you asserted that the FERC has limited or no authority to set back the date of revocation to when it became clear that Enron was manipulating energy prices, citing Section 206 of the FPA, which restricts FERC action to no earlier than 60 days after the filing of a complaint.

The courts have consistently held, however, that the FERC has the authority to do what was omitted or should have been done, per *Niagara Mohawk Power Corp. v. FERC,* 379 F. 2d 153, 160 (D.C. Cir. 1967). Further, the Fourth Circuit has concluded that "[i]t is manifest" that the FERC may "cancel, rescind or revoke" an order where fraud played a role in FERC's granting the order (*County of Halifax,* 718 F. 2d at 652), and a FERC administrative law judge has already found that Enron materially misrepresented its control over the Western electric generation market when it obtained renewed authority to charge market-based rates in early 2000. Accordingly, there appears to be clear authority for FERC to revoke Enron's market-based rates at least back to the date of this misrepresentation.

Your statements in the June 4 letter also appear to contradict FERC's own recent statements that it has the authority to correct tariff violations and to order refunds retrospectively. To cite but a couple of examples, in June 2003, your order stated that FERC "must ensure that market-based rates remain within the zone of reasonableness required by the FPA." (103 FERC ¶ 61,349 at P 21 (2003)). Yet in failing to set the date of revocation earlier than June 25, 2003, the FERC fails to ensure that market-based rates remain within the zone of reasonableness, and indeed, the FERC is by no means powerless in this matter. The Commission is not prohibited from "ordering a company to honor its tariff," as provided in *East Tennessee Natural Gas Company*, 631 F.2d 794, 800 (D.C. Cir. 1980).

As we mentioned in our previous letter, Northwest customers who were victimized by Enron's clearly fraudulent actions should not be prohibited from compensation for such fraudulent actions simply because they occurred prior to the filing of a complaint. The grievances of the victims should be redressed from the time when they became victimized, and this Commission has already found that fraudulent actions did in fact take place prior to June 25, 2003.

We again remind you that we and several other Members of Congress implored this Commission to impose price caps on the energy companies who were very obviously gouging our constituents. As your June 2003 order states, Sections 205 and 206 of the FPA,.16 USC § 824d, 824e (2000)

impose an "*obligation* . . . to protect electricity customers from unjust and unreasonable rates," and to "ensure that market-based rates remain within the zone of reasonableness required by the FPA." (103 FERC ¶ 61,349 at P 21 (2003)). By this Commission's own admission, in *American Electric Power Scooter Corporation*, 106 FERC ¶ 61,020 at 61,049 "the FPA and the Commission's authority under Sections 205 and 206 (and 309) of the FPA would be virtually meaningless if we had no authority to enforce the tariffs that the statue requires must be filed with and reviewed with us."

The present date of revocation of the market-based rate authority of Enron's power trading arm must be corrected. This Commission has in numerous orders (see e.g., *Jack J. Grynberg, Individually and as Partner for the Greater Green River Basin Drilling Program: 72-73 v. Rocky Mountain Natural Gas Company,* 90 FERC ¶ 671,247 at 61,826, *reh'g denied,* 93 FERC ¶ 82,180 at 61,587 (2000); *Delmarva Power and Light Company*, 24 FERC ¶ 61,199 at 61,461, *order on reh'g,* 24 FERC ¶ 61,380 at 61,795-96, *reh'g denied* 25 FERC ¶ 61,083 (1983); *petition for review denied*, 763 F.2d 533 (3rd Cir. 1985)) consistently required regulated entities to disgorge refunds of amounts "illegally collected." The Supreme Court has found (*United Gas Improvement Co. v. Callery Properties, Inc.,* 382 U.S. 233, 230 (1966)) that the Commission has a "duty. . . where refunds are found due, to direct their payment to the earliest possible moment consistent with due process."

We would also like to note that while we are pleased that the FERC recently announced it will be reviewing the material uncovered by the Snohomish County PUD, it is a sad reality that the Snohomish County PUD has had to step up and fill the federal law enforcement void left by this Commission's persistent inaction. We all know that the FERC failed miserably in its duty to enforce the law by delaying for months the imposition of West coast price caps on electricity. We all know that President Bush, Vice President Cheney, and members of this administration's obstinate resistance to price caps while Enron was gouging electricity customers has cost those customers and the United States economy dearly. We all know that when the FERC finally upheld the law and imposed the effective price caps, the energy crisis clearly abated. We all know that Snohomish County residents now deserve effective action by the FERC. We urge you to take such action immediately.

Sincerely,

Jay Inslee
Member of Congress

Rick Larsen
Member of Congress