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MEMBER
COMMITTEE ON ENERGY AND
COMMERCE

Congress of the United States
House of Representatives
Washington, DC 20515-0529

HENRY A. WAXMAN
29TH DISTRICT, CALIFORNIA

October 8, 2002

The Honorable W.J. "Billy" Tauzin
Chairman
House Energy and Commerce Committee
2125 Rayburn HOB
Washington, DC 20515

The Honorable Joe Barton
Chairman
Energy and Air Quality Subcommittee
2125 Rayburn HOB
Washington, DC 20515

Dear Chairmen Tauzin and Barton:

I am writing in regard to your decision to exempt the vast majority of Texas from the House's controversial proposal to amend the nation's electricity laws.

As you know, the September 19 House offer would fundamentally change the nation's electric utility industry. This proposal is profoundly deregulatory in nature, stripping shareholder and consumer protections that have been law for 70 years. Repealing FERC's merger review and the Public Utility Holding Company Act, for example, would only increase the potential severity of future corporate debacles like Enron.

In other respects, the proposal greatly expands federal authority at the expense of the states and the cities. The proposal expands FERC's jurisdiction over public power and rural electric cooperatives, and it preempts the states' siting and environmental laws regarding the construction of transmission lines. Each of these provisions is immensely controversial.

During the debate of your proposal, Representative Dingell and I pointed out the irony that the Electric Reliability Council of Texas (ERCOT) is exempt from its most controversial provisions. As you know, ERCOT encompasses about three-quarters of Texas and serves about 85% of the customer load in the state.

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The following is a list of some of the provisions that ERCOT is exempted from:

- Section 102, which is designed to raise transmission rates and explicitly requires FERC to increase profits earned by transmission facilities.¹
- Section 108, which would allow energy companies to bypass state reviews, state denials, or state environmental requirements with regard to siting transmission facilities by granting FERC the authority to supersede state decisions.²
- Section 110, which would raise consumer rates as an incentive for encouraging transmitting utilities to join a Regional Transmission Organization.³
- Section 111, which grants FERC new jurisdiction over public power, rural electric cooperatives, and federal power marketing agencies.⁴

This surprising double-standard has been embraced by several other prominent Texans in addition to Mr. Barton. President Bush, for instance, has supported legislation (H.R. 3406) that radically reshapes federal electricity regulation in each of the contiguous states but Texas. At FERC, the three non-Texan Commissioners — Bill Massey, Linda Breathitt, and Nora Meade Brownell — have all testified that Texas should be under FERC jurisdiction.⁵ Only FERC Chairman Pat Wood, a Texan, maintains that FERC jurisdiction should apply everywhere but Texas.⁶

When I offered an amendment to ensure that each of the electricity provisions in the House offer apply to Texas in the same manner and to the same extent as they apply in the other 48 contiguous states, each of you vigorously opposed my amendment. This was unexpected

¹Sec. 102, Proposed House Offer dated September 18, 2002 (2:25pm) at 1.

²Sec. 108, Proposed House Offer dated September 18, 2002 (2:25pm) at 21-24.

³Sec. 110, Proposed House Offer dated September 18, 2002 (2:25pm) at 33.

⁴Sec. 111, Proposed House Offer dated September 18, 2002 (2:25pm) at 34. This provision is drafted so that it will also not apply in certain other states, including Louisiana.

⁵Testimony of the FERC Commissioners before the House Subcommittee on Energy and Air Quality (December 12, 2001).

⁶*Id.*

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because my amendment would have treated Texas no differently than you seek to treat the rest of the nation.

As I recall, you raised several objections to applying your electricity provisions to Texas. Rep. Barton's primary argument was that ERCOT is not interconnected with grids outside of Texas, making its activities solely a state concern. This is factually inaccurate. Contrary to Mr. Barton's statement, ERCOT is connected to electricity systems outside of Texas, and electricity is transmitted in and out of ERCOT and Texas, just like other states.

According to FERC Commissioner Pat Wood, ERCOT is interconnected with the rest of the nation by two transmission lines which have a capability of approximately 840 megawatts.⁷ These lines are located at Oklaunion, Texas, in the northern part of the state and in Monticello, Texas, in the eastern part of the state. Also, I understand there is a third connection from Midland, Texas, to New Mexico. Apparently, these connections are regularly used to import and export electricity.

Additionally, at least two generating stations have been sited since 1998 so that electricity can be sold in ERCOT or exported from Texas. One of these Texas generating plants is the Gateway generating station in Rusk County, Texas, which is operated by the Tenaska Company and is capable of generating at least 830 megawatts. This plant can send power into two grids at the same time — into ERCOT and into the Southwest Power Pool which serves Oklahoma, Kansas, and portions of other states. Another generating plant within the ERCOT system is the Frontier generating station in Grimes County, Texas, which is also operated by the Tenaska Company and has a generating capacity of 830 megawatts. In addition to ERCOT, this plant can transmit power into the Southeastern Electric Reliability Council, which serves Louisiana, Arkansas, and much of the Southeastern United States.⁸ Both of these plants meet ERCOT's transmission requirements while also serving demand in other states.

In short, the claim that ERCOT is not part of an interstate electricity grid is pure fiction.

Mr. Barton's argument that it would be unconstitutional to regulate Texas is also without merit. The Constitution does not contain a clause exempting Texas from federal regulation.

⁷Letter from Chairman Pat Wood, Federal Energy Regulatory Commission, to Rep. Henry A. Waxman (Dec. 21, 2001).

⁸See *Tenaska Plans 830-MW Merchant Plant on ERCOT/Eastern Interconnect Border*, Southeast Power Report (August 20, 1999); *Tenaska's Dynamic Duo Scores in Two NERC Grids at Once*, Power Engineering (July 1, 2001). See also, Tenasko's website at <http://www.tenaska.com/Projects/projects.htm>.

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Even if the ERCOT system were not connected to electricity systems in other states — which, of course, is not the case — the Commerce Clause gives Congress ample authority to regulate electricity generation and distribution in Texas. If the Committee were to accept Mr. Barton's argument that a physical structure (i.e., a electric transmission line) must cross state boundaries before our Committee has jurisdiction under the Commerce Clause, we would cede jurisdiction over many of the Committee's major laws. The Clean Air Act (which regulates air pollution regardless of whether it crosses state lines), the Superfund law (which applies to contaminated sites regardless of whether the contamination crosses state lines), and the Safe Drinking Water Act (which sets standards for drinking water systems regardless of whether they cross state lines), are just a few examples of cases where the Committee currently exercises jurisdiction over activities that may be isolated within a state.

Chairman Tauzin seemed to argue that because intrastate natural gas pipelines in California are subject to the "Hinshaw" exemption in the Natural Gas Act, Texas should be exempt from controversial electricity provisions that apply elsewhere in the continental United States.

This is an unusual argument, and one that is difficult to take seriously. The Hinshaw exemption dates back to 1954, when Congress amended the Natural Gas Act to give states sole jurisdiction over pipelines entirely within their borders.⁹ As its legislative history indicates, the Hinshaw exemption was designed to prevent "unnecessary duplication of State and Federal jurisdiction" and it is "thoroughly consistent with the original intent of the Congress in enacting the Natural Gas Act; namely, that the act was to supplement, and not supplant State regulation."¹⁰ Currently, the Hinshaw exemption applies to pipelines in some 40 states, including Texas, Louisiana, and California.¹¹

Perhaps Chairman Tauzin made this argument because some have alleged that the operation of California's *intrastate* pipelines was the cause of excessive gas prices during the California energy crisis. I am sure you will be interested to learn that we now know that these

⁹Natural Gas Act, Section 1(c).

¹⁰House Committee on Interstate and Foreign Commerce, *H.R. 5976 Amending the Natural Gas Act*, 83rd Cong., 1-2 (1953) (H. Rpt. 83-899).

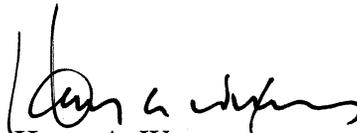
¹¹In 1999, the most recent year for which we have information, the following states contained pipelines subject to the Hinshaw exemption: AL, AR, AZ, CA, CO, CT, DE, GA, KS, KY, IA, IL, IN, LA, MA, MD, ME, MI, MO, MS, MT, NH, NJ, NM, NV, NY, OH, OK, OR, PA, SC, SD, TN, TX, UT, VA, WA, WV, WY, and WI. FERC staff paper, *Hinshaw Exemptions as of September 30, 1999* (undated).

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excessive prices were related to the operation of an *interstate* pipeline. As FERC Chief Administrative Law Judge Curtis Wagner recently found, the Texas company El Paso Natural Gas manipulated the natural gas market in California by withholding supply, contributing to the skyrocketing electricity prices California experienced last year.¹² Since the El Paso pipeline is an interstate pipeline, it is not subject to the Hinshaw exemption. However, as the El Paso example illustrates, activities by Texas companies can have profound impacts on other states. Indeed, exempting Texas from electricity regulations that apply to the rest of the country perpetuates the idea that Texas companies like El Paso, Enron, and Dynegy should be above the law.

I hope this clarifies the concerns you raised. If you insist on proceeding with your electricity proposal, which I oppose, I hope that you will reconsider your opposition to including Texas in its novel regulatory scheme.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry A. Waxman". The signature is fluid and cursive, with a large initial "H" and "W".

Henry A. Waxman
Member of Congress

¹²*CPUC V. El Paso Natural Gas Company, et al.*, FERC Docket No. RP00-241-006 (Sept. 23, 2002).