NATIONAL ENERGY MARKETERS ASSOCIATION

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The Honorable Jeff Bingaman
Chairman
Committee on Energy and Natural Resources
364 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Bingaman:

On behalf of the members of the National Energy Marketing Association (NEM), I am writing to express my grave concerns about recent allegations that the collapse of Enron is in some way related to the failure of the Securities and Exchange Commission to treat energy marketers as "public utilities" under the Public Utility Holding Company Act (PUHCA) of 1935. Injecting this sort of misleading argument into the public debate can only serve to distract Congress from the many genuine issues raised by the Enron bankruptcy and could have far-reaching negative impacts on the liquidity and vitality of energy markets.

NEM is a national, non-profit trade association representing a regionally diverse cross-section of both wholesale and retail marketers of energy and energy-related products, services, information and technology throughout the United States. NEM's membership includes: small regional marketers, large traditional international wholesale and retail energy suppliers (as well as wind and solar power), billing and metering firms, Internet energy providers, energy-related software developers, risk managers, energy brokerage firms, information technology providers as well as suppliers of advanced metering and distributed generation technology. Membership includes both affiliated and unaffiliated companies.

This regionally diverse, broad-based coalition of energy and technology firms has come together under the NEM auspices to forge consensus and to help eliminate as many issues as possible that would delay competition. NEM is committed to working with representatives of state and federal governments, large and small consumer groups and utilities to devise fair and effective ways to implement the competitive restructuring of natural gas and electricity markets. NEM and its members appear before state Public Utility Commissions, the Federal Energy Regulatory Commission and legislative bodies throughout the nation.

NEM has not actively lobbied for or against PUHCA repeal, although the association has supported efforts to enact broader legislation that would facilitate the development of deeper, more liquid wholesale energy markets. As any economist would testify, and any state regulator that has sought to implement a retail open access program would confirm, the key to any competitive market is ensuring that consumers have an adequate number of sellers from which to choose. Thus, I hope you will view my comments in this context, rather than the debate on PUHCA repeal legislation itself.

1. Power Marketers Are Not "Utility Companies" Under PUHCA

The basic claim of those advocating the linkage between Enron's collapse and PUHCA repeal is that the Securities and Exchange Commission erred in issuing a "no action" letter to Enron's wholesale power marketing subsidiary, thus not requiring Enron to "register" under PUHCA. Obviously, many aspects of Enron's business activities are currently under scrutiny, but it is important to note that the company was treated no differently than any other market participant in this regard. In fact, even a cursory review of the PUHCA law should demonstrate that the SEC had no other reasonable way to read the law.

The SEC's 1994 no-action letter stated in essence that power marketers are not electric utility companies under PUHCA. As a result, Enron, like any other company holding similar interests, would not be treated as a public utility holding company under PUHCA as a result of owning interests in power marketers. While Consumers for Fair Competition (CFC) correctly notes that "PUHCA is intended to regulate the structure, financing and operations of *utility* holding companies" (emphasis added), it fails even to broach the fundamental question of whether it is proper to treat power marketers as electric utility companies under PUHCA, or to consider the enormous potential disruption to the energy industry that would result if they were treated as such. Rather, it simply assumes that power marketers must be treated as public utility companies under PUHCA because if the SEC had done so Enron would have been treated as a public utility holding company under PUHCA, which would have subjected it to additional regulation, etc.

"Utility assets" are defined by Section 2(18) of PUHCA as "facilities, in place, of any electric utility company or gas utility company for the production, transmission, transportation, or distribution of electric energy or natural or manufactured gas." Section 2(a)(3) of PUHCA defines an electric utility company as a company that owns "utility assets" or operates "*facilities* used for the generation, transmission, or distribution of electric energy for sale" (emphasis supplied), in other words physical assets used in electric power operations. Power marketing, the trading and marketing of energy, does not involve ownership and operation of utility assets. Rather, aside from office equipment, their principal asset consists of paper contracts for generation and transmission capacity. Because power marketers (typically) own none of the "utility assets" that define electric utility companies under PUHCA, it would be unwise and improper under

commonly accepted rules of statutory interpretation to treat power marketers as "electric utility companies" under PUHCA.

This understanding of how power marketers should be treated under PUHCA becomes even more obvious when one considers them within the broader context of the statute. The general legislative purpose of PUHCA was to eliminate the perceived evils associated with public utility holding companies that maintained highly diversified and highly dispersed holdings. Congress found that such systems existed for financial reasons that conflicted with the underlying public utility service requirements of public utility companies. It thus limited the business of utility holding companies to a single "integrated public-utility system" that, among other things, is "capable of physical interconnection." Interconnection can take place only if there is something to interconnect. Because power marketers do not own "utility assets" or other "facilities" used in utility operations, they own nothing that could be interconnected with an electric utility company as defined in PUHCA. At this point it should be obvious on its face that the SEC staff reached a proper conclusion. It is, however, worth considering the damages to the public interest and energy markets that an opposite result would lead.

The conclusion that CFC now suggests was appropriate would effectively eliminate the power marketing industry and subvert the liquidity and reliability needed from the electric power industry. Every company owning a power marketer would become a "utility holding company" subject to registration under PUHCA, unless an exemption from registration could be found.

Upon registration, the utility holding company would be required to prove that its power marketing activities constitute an integrated and physically interconnected system, a showing that would be impossible to make where a marketer has no utility assets or other facilities to interconnect. Therefore, under PUHCA the utility holding company would be forced to divest its interest in the marketer, since PUHCA's strict integration requirements could not be met. The only way marketers could continue to exist would be on a stand-alone basis, unassociated with any other company and therefore limited in its ability to attract capital to maintain the liquidity that wholesale power markets require.

This result is incompatible with the Federal Energy Regulatory Commission's ("FERC") long-stated goal of developing a vibrant wholesale market in which traditional, asset-owning utilities compete with marketers to supply electricity. Power marketers play a vital role in the wholesale electricity market, increasing liquidity by enabling energy suppliers to contract with any one of a large number of suppliers to meet their supply needs. Indeed, the existence of a large number of buyers and sellers and a large and diverse supply of products are key components of a well-functioning competitive marketplace. Instead of supporting this developing market, subjecting power marketers to regulation as "electric utility companies" under PUHCA would impair the ability of power marketers to participate effectively in these markets. This shrinking of the marketplace in turn

would lead to greater price volatility and decreased reliability, is not in the public interest and not the intent of Congress in enacting PUHCA.

2. The Purpose and Jurisdictional Scope of PUHCA Is Distinct From That Of The Federal Power Act

CFC notes that power marketers are regulated as utilities under the Federal Power Act ("FPA"), but this fact has no implications for the SEC's conclusion that marketers are not "electric utility companies" under PUHCA. Although Congress enacted the FPA and PUHCA in the same piece of legislation, these two statutes were aimed at remedying two distinct problems: the former sought to eliminate unjust, unreasonable and unduly discriminatory rates in the wholesale electricity and transmission markets; the latter sought to eliminate abuses resulting from complicated corporate structures and financing resulting from highly diversified and dispersed utility holding companies systems.

In light of this difference in purposes, it is not surprising that these two statutes differ markedly in jurisdictional scope. Public utilities for purpose of the FPA include all companies that own or operate facilities subject to the FERC's jurisdiction, which, in turn, includes the terms and conditions for the transmission and wholesale sale of electric energy in interstate commerce. While the language of PUHCA limits electric utility companies to companies that own "utility assets" or operate "facilities used for" the generation and transmission of electricity, the FERC has interpreted the FPA definition of public utilities to cover all "contracts, accounts, memoranda, papers and other records, in so far as they are utilized in connection with" the transmission or wholesale sale of electricity, i.e., activities subject to the FERC's jurisdiction. *Citizens Energy Corp.*, 35 FERC ¶ 61,1988 at 61,452 (1986).

This approach is based within the broader statutory framework created by the Federal Power Act, given its underlying purpose of regulating the rates, terms and conditions of electricity sales and transmission service. In contrast, PUHCA does not regulate rates and has no analogous purpose that justifies treating marketers as utilities under that statute. As explained above, PUHCA was meant to regulate the integrated utility holding companies, not utility rates.

3. Conclusion

Power marketers such as Enron's marketing business, while subject to regulation by the FERC under the FPA, are properly excluded from the definition of "electric utility company" under PUHCA. The reasoning and policy underlying the SEC Staff's no-action letter remain valid today and, in fact, any change in interpretation of PUHCA's application to marketers would have severe consequences throughout the entire energy industry. Marketers are vital to the continued development of a robust wholesale market for electricity and their operations should be encouraged, not discouraged, by regulators.

Respectfully submitted,

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