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November 5, 2009

Senator Barbara Boxer, Chairman
U.S. Senate Committee on
Environment and Public Works

Dear Chairman Boxer:

Thank you for taking testimony on October 27, 2009, from Federal Energy Regulatory Commission (FERC) Chair Jon Wellinghoff regarding Section 151 of S. 1733, which would establish an Office of Consumer Advocacy (OCA) regarding rates and services of companies regulated by FERC.

We are always glad to hear agency chairs proclaim their support of consumer protections as Chairman Wellinghoff did. However, we want to make you aware that recent court decisions – backed by arguments made by FERC – may gut the ability of the Office of Consumer Advocacy to protect consumers before it is even enacted. That’s because courts have ruled that FERC cannot find that Enron-esque electric rates are excessive in order to protect consumers from price-gouging; rather, FERC must adhere to a next-to-impossible, undefined “unequivocal public necessity” standard. In short, courts have transformed the Federal Power Act from a utility consumer protection statute into a statute that protects utilities and energy traders from complaints by consumers that the rates are excessive.

On November 3, 2009, the U. S. Supreme Court heard oral argument on a follow-up case to its anti-utility-consumer decision last year where it held that FERC had to presume that rates in a wholesale rate contract were “just and reasonable” simply because a utility seller and wholesale buyer had agreed to them, and that FERC could not modify the rates unless some undefined “unequivocal public necessity” were demonstrated. In this year’s case, the utilities argue that not only parties to a rate contract, but also third parties, such as consumer advocates, State utility commissions, and consumers themselves (as well as wholesale buyers who had *not* agreed to a rate case settlement), also have to satisfy the unequivocal public necessity standard before electric or natural gas rates can be modified.

At oral argument, the Court appeared set to find that the public necessity standard does apply to all third parties as well as to parties to a contract. Such a finding would overturn seventy-four years of the practice under the Federal Power Act (and Natural Gas Act) by not only reversing the burden of proving the rates to be just and reasonable, which the statute imposes on the utility seller, but also establishing such a high standard of proof that then-Judge Scalia has called it virtually insurmountable.” Extraordinarily, FERC has filed a brief in *support* of the utilities. Moreover, FERC claims for itself the “discretion” to impose this impossibly high standard in advance on anyone challenging *future* FERC rates whenever the agency finds it appropriate to do so. This is contrary to both the letter and the spirit of the Federal Power Act, a consumer-protection statute that requires rates to be not only “reasonable” but also “just.”

Justices Stephens and Souter writing in dissent last year in *Morgan Stanley* correctly contended that the majority had “mangled” both the text of the Federal Power Act and the precedent under it in reaching a result where unreviewed wholesale electric rates must be “presumed” to be lawful simply because the seller and buyer have agreed to them.

Now the utilities contend that if such parties are allowed to object to rates because they are excessive (as they have been able to do for seventy-four years), the American utility system will collapse. In fact, contrary to most of the rest of the world, which nationalized their public utilities after the Great Depression, investor-owned utilities in the U.S. thrived under extensive rate and corporate regulation. The utility plaintiff states in its Reply Brief p.8):

[T]he broad range of parties and *amici* before the Court today – from elected officials, to industry associations, to AARP, to the aptly named Public Citizen – makes clear that the “hordes of motivated non-parties” have arrived already.

It is astonishing to Public Citizen that plaintiffs can argue with a straight face that the Federal Power Act was designed to protect regulated utility sellers from the “hordes” of public citizens/ratepayers rather than *vice versa*. What is more astonishing, and much sadder, is that FERC is supporting the utilities’ appeal.

Because FERC Chair Wellinghoff failed to mention this case in his testimony on the Office of Consumer Advocacy, FERC’s position in it, and its implications for consumers, those “hordes” of ratepayers that the Office of Consumer Advocates in S.1733 is supposed to protect, we urge the Committee to take supplemental testimony from him on this issue. The Committee may also wish to remind Chair Wellinghoff that ours is a government of the hordes, by the hordes and for the hordes, and that his own job description is to protect these hordes from excessive wholesale electric and natural gas rates.

Sincerely,

Tyson Slocum, Director
Public Citizen’s Energy
Program

Cc: Chair Bingaman, Other Committee
FERC Commissioners: