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ENERGY AND COMMERCE COMMITTEE
RANKING MEMBER
SUBCOMMITTEE ON
TELECOMMUNICATIONS AND
THE INTERNET
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Congress of the United States
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September 30, 2002

The Honorable Billy Tauzin
Chairman
Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jeff Bingaman
Chairman
Energy and Natural Resources Committee
364 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Tauzin and Chairman Bingaman:

As you know, at the September 19, 2002 meeting of the House and Senate conferees on H.R. 4, I offered an amendment to strike Section 136 from the House offer. Unfortunately, that amendment was rejected by the House conferees on a party-line vote, and is now part of the House electricity offer that is currently pending before the Senate conferees. I am writing you today to call your attention to some recent developments that I hope will lead you and the other House and Senate conferees to reconsider your support for Section 136.

You will recall that Section 136 provides that any company that was, as of December 31, 2001, an affiliate of a holding company (as defined in PUHCA), and held investment securities (as defined under the Investment Company Act of 1940) of one or more companies engaged directly or indirectly in the electric or gas utility business, or other permitted business activities, shall be exempt from regulation as an Investment Company.

Under this provision, any such company could operate as a mutual fund or other type of investment company and be totally exempt from SEC oversight and regulation under the Investment Company Act.

The supporters of this special-interest provision have indicated that it is aimed at benefiting a single company, a Kansas-based company called Westar Energy, a utility holding formerly known as Western Resources. Apparently, Westar decided several years ago to diversify into the burglar alarm business and is now seeking to spin off its failed investment in that company. Westar reportedly claims that it needs an exemption from the Investment Company Act because of its holdings in this burglar alarm company

might bring them within the definition of an investment company should PUHCA be repealed.

I believe there are significant risks involved in granting such a special-interest exception. In 1996, Enron came to Congress when it was considering the National Securities Markets Improvement Act, and it sought an exemption from the Investment Company Act. Mr. Dingell and I resisted this provision, and it was not added to the final bill – though the Majority insisted on report language encouraging the SEC to favorably consider on Enron's request. The following year, in 1997, Enron sought and obtained an exemption from the SEC from the Investment Company Act of 1940, which it exploited to engage in activities that would have been prohibited if it had been regulated as an Investment Company.

The SEC has informed me that the type of Investment Company Act exemption proposed in Section 136 of the House offer is significantly broader than the exemption granted Enron back in 1997 and it appears that literally hundreds of unregulated investment companies could be created if this provision became law. But if the prospect of creating hundreds of unregulated investment companies isn't enough to disturb you, just consider the implications of this proposed loophole with respect to Westar, and its ratepayers. In this regard, I believe that there is new information that should lead you to reject adoption of this provision.

First, the Kansas Corporation Commission (KCC) -- which regulates public utilities in that state -- has now come out in opposition to the proposed exemption and has issued an order to block the transaction which the exemption is designed to facilitate. In the attached letter, KCC Chairman Bill Graves states "The Commission has issued orders prohibiting Westar from splitting off its unregulated businesses from its regulated electric companies." Chairman Graves notes that "the Commission has found that Westar inappropriately allocated over one billion dollars of debt related to its unregulated businesses to its electric utility operations" and that "until that inequity is corrected, the Commission has banned Westar from any restructuring activity that would allow the unregulated businesses to become separated from the debt that was incurred on their behalf."

KCC Chairman Graves goes on to explain in his letter that "The proposed exemption to the Investment Company Act would have the effect of removing an important obstacle to Westar splitting its companies and leaving non-utility debt with the utility companies. As a result, I am concerned that the proposed exemption has serious implications for the Commission's effective regulation of Westar and protection for the ratepayers of Kansas."

Chairman Graves notes "The proposed exemption is particularly inappropriate at this time because of the impaired financial health of Westar, as noted by the credit rating

services." He therefore recommends that "continued oversight of Westar by both the Federal Energy Regulatory Commission and federal securities regulators, as well as the KCC," in order "to protect the ratepayers of retail electric service in Kansas and the shareholders of Westar." Finally, he concludes that "At a time of financial stress on Westar, it is unnecessarily risky to retreat from historical federal oversight that protects consumers and shareholders of Westar."

I am attaching a series of articles which recently appeared in the Kansas press detailing the KCC's recent actions to block Westar's proposal to split off its unregulated businesses from its regulated businesses, as well as a recent article reporting that Westar's chief executive, David Wittig, stands to receive a $10-15 million golden parachute if the proposed transaction is completed. According to the article, Doug Lake, the company's Vice President for Strategy, would receive between $7.6 and $12 million if this transaction is completed. Westar's electricity ratepayers, however, would be left holding the bag on millions of dollars of debt.

Secondly, you and other House and Senate conferees should be aware that Westar is currently the subject of a federal grand jury investigation. While the full details of the nature and scope of this investigation have not yet been publicly revealed, in a September 27th 8-K filing with the SEC, Westar has disclosed that:

> "On September 17, 2002, the Company was served with a federal grand jury subpoena by the United States Attorney's Office in Topeka, Kansas. The subpoena seeks documents and testimony concerning the use of aircraft leased by subsidiaries of the company and annual shareholder meetings. Since that date, employees of the Company and of the Company's subsidiary responsible for the operation of the aircraft have received additional subpoenas seeking documents and testimony concerning use of the aircraft, the chief executive officer of the Company, and the Company generally. The Company intends to cooperate with the United States Attorney's Office in this matter.
>
> "The Board of Directors of the Company has appointed a Special Committee consisting of Frank J. Becker, Charles Q. Chandler, IV, and John C. Nettels, Jr., to investigate certain matters relating to the grand jury investigation. The Special Committee has retained as its counsel the law firm of Debevoise & Plimpton, including Mary Jo White, the former United States Attorney for the Southern District of New York and chair of the firm's litigation department."

It is not too late for my Republican colleagues to reverse its earlier decision to grant Westar a new, ill-advised legal loophole. This company is is under federal investigation and the state commission with regulatory authority over this company has come out strongly in opposition to the provision, as well as the underlying business transaction it is

aimed at advancing. Accordingly, I strongly urge the House Republican conferees to reconsider their support for this ill-considered loophole and I urge the Senate conferees to resist adoption of this Enron-like loophole.

Sincerely,

Edward J. Markey
Member of Congress

Enclosures

Cc: Representative Bilirakis
Representative Barton
Representative Upton
Representative Stearns
Representative Gillmor
Representative Burr
Representative Dingell
Representative Waxman
Representative Boucher
Representative Gordon
Representative Rush
Senator Hollings
Senator Baucus
Senator Kerry
Senator Rockefeller
Senator Breaux
Senator Reid
Senator Jeffords
Senator Lieberman
Senator Murkowski
Senator Domenici
Senator Grassley
Senator Nickles
Senator Lott
Senator Craig
Senator Campbell
Senator Thomas

Kansas Corporation Commission

Bill Graves, Governor *John Wine, Chair* *Cynthia L. Claus, Commissioner* *Brian J. Moline, Commissioner*

September 27, 2002

Honorable Edward J. Markey, Congressman
United States House of Representatives
2108 Rayburn HOB
Washington, DC 20515-2107

Dear Congressman Markey:

In response to your request, I am providing you with my position on Westar Energy, Inc.'s ("Westar") proposal to seek an exemption from the Investment Company Act of 1940 within the context of the energy bill currently being negotiated by a House-Senate conference committee as H.R. 4. I am concerned about the proposed exemption, particularly in light of a pending Kansas Corporation Commission ("Commission" or "KCC") investigation into Westar and its relationships with its affiliate companies.

The Commission has issued orders prohibiting Westar from splitting off its unregulated businesses from its regulated electric companies. Among other things, the Commission has found that Westar inappropriately allocated over one billion dollars of debt related to its unregulated businesses to its electric utility operations. Until that inequity is corrected, the Commission has banned Westar from any restructuring activity that would allow the unregulated businesses to become separated from the debt that was incurred on their behalf.

The proposed exemption to the Investment Company Act would have the effect of removing an important obstacle to Westar splitting its companies and leaving non-utility debt with the utility companies. As a result, I am concerned that the proposed exemption has serious implications for the Commission's effective regulation of Westar and protection for the ratepayers of Kansas.

The proposed exemption is particularly inappropriate at this time because of the impaired financial health of Westar, as noted by the credit rating services. I believe that continued oversight of Westar by both the Federal Energy Regulatory Commission and federal securities regulators, as well as the KCC, is needed to protect the ratepayers of retail electric service in Kansas and the shareholders of Westar. At a time of financial stress on Westar, it is unnecessarily risky to retreat from historical federal oversight that protects consumers and shareholders of Westar.

For these reasons, the Commission encourages you to vote against the conference committee report on H.R. 4 or any other effort to approve the proposed exemption. Please feel free to contact me if you have any questions or need additional information.

Sincerely,

John Wine

Cc: Honorable Sam Brownback, Senator
Honorable Pat Roberts, Senator
Honorable Jerry Moran, Congressman
Honorable Jim Ryan, Congressman
Honorable Todd Tiahrt, Congressman
Honorable Dennis Moore, Congressman