

February 11, 2003

Senate Committee on Energy and Natural Resources
364 Dirksen Building
Washington, DC 20510
(202) 224-6163 [fax]

Dear Chairman Domenici,

Today your Committee will discuss the President's appointment of Joseph Kelliher to one of two open seats at the Federal Energy Regulatory Commission (FERC). While the Energy Committee traditionally gives wide latitude to the President's FERC nominees, Public Citizen believes that Mr. Kelliher's controversial role as liaison to Vice President Cheney's National Energy Policy Development Group make the nominee uniquely unfit for a FERC commissioner. We therefore ask the Committee to oppose or delay Mr. Kelliher's appointment to FERC until the questions raised in this letter are answered in a satisfactory manner.

Public Citizen challenges the selection of Mr. Kelliher because he abused his responsibilities to the public while at the Department of Energy. As one of the primary coordinators of the Administration's National Energy Policy Development Group, Kelliher actively solicited the advice of large energy industry corporations and associations while ignoring similar requests from organizations representing the public interest. Although these meetings and conversations were carried out in private, the Administration has so far successfully fought to limit the release to only a small percentage of these communications. From this sliver of information, it is clear that whole email passages and other correspondence were simply lifted from language supplied by lobbyists and placed not only into the *National Energy Policy*, but also carry the force of law through Executive Order and regulatory rulemakings.

Although the U.S. Government Accounting Office has recently declined to pursue its landmark legal action against the Executive Branch to force the Administration to turn key documents over to the public, they only did so because continued pursuit of the case would consume resources the agency does not have.¹ So the legal merits of the case remain, as evidenced by the lawsuit brought by the conservative watchdog organization Judicial Watch remains active and continues to proceed through the courts.²

¹Dana Milbank, "GAO ends fight with Cheney over files," *Washington Post*, February 8, 2003.

²D.C. District Court, *Judicial Watch, Inc. v. National Energy Policy Development Group*.

Kelliher's inappropriate relationship and communications with corporate lobbyists not only tainted the Administration's *National Energy Policy*, but raise questions about the ability of Mr. Kelliher to be an impartial voice at FERC. FERC is weathering a storm of criticism for its deficient handling of the west coast energy crisis, the Commission's failure to maintain any effective enforcement of dozens of corrupt energy corporations, the deteriorating relations between FERC and nearly half of the state utility regulators who continue to be mistrustful of the Commission's jurisdictional intentions, and the Commission's poor track record protecting consumers.³ With FERC at its most crucial juncture in its history, now is not the time to nominate an individual with a tarnished record like Mr. Kelliher. For these reasons, Public Citizen asks the Committee to oppose or delay Mr. Kelliher's appointment to FERC until the questions raised below are answered in a satisfactory manner.

Following are summaries of a few of the private email correspondences between Kelliher and various lobbyists representing energy corporations that saw much of their demands incorporated not only into the President's *National Energy Policy*, but also adopted into law through executive fiat.

Kelliher Delivers Enron's "Dream List"

Stephen Craig Sayle, former Counsel to the House Commerce Committee, worked for Texas Rep. Joe Barton. Sayle and Kelliher shared the same boss, although Sayle left the Committee in 1993, whereas Kelliher joined in 1995. Sayle now serves as a Vice President of the Dutko Group, accepting money from mostly energy and telecom corporations to lobby the federal government.

During the time Kelliher was compiling information for Vice President Cheney's National Energy Policy Development Group, Sayle was lobbying on behalf of Calpine, El Paso Corp, Enron, NiSource and Trigen Energy (a subsidiary of France-based Suez). Together these corporations paid Sayle's firm \$550,000 in the first six months of 2001 alone.⁴ These five companies formed the Clean Power Group, and collectively gave 80 percent of their \$5.6 million in campaign contributions since 1999 to Republican candidates.⁵

Two of the five companies now face serious legal problems. Since Enron declared bankruptcy in December 2001, it has been revealed that top executives and the company's board of directors were aware of widespread accounting fraud and of the role the corporation played in causing the west coast energy crisis of 2000-01. El Paso Corp. is under numerous federal and state criminal

³Government Accounting Office, *Concerted Actions Needed by FERC to Confront Challenges That Impede Effective Oversight*, GAO-02-656, June 2002, <<http://www.gao.gov/audit.htm>>.

⁴Mid-year lobbying disclosure report filed by the Dutko Group on behalf of their client, the Clean Power Group, on August 14, 2001 with the U.S. Senate Office of Public Records, <<http://sopr.senate.gov>> The five corporations listed were members of the Clean Power Group at the time of Sayle's communications with Kelliher.

⁵Center for Responsive Politics, <<http://www.opensecrets.org/industries>>.

investigations for intentionally withholding delivery of natural gas in the major pipeline serving all of southern California during the energy crisis in order to jack up prices and for feeding false data to natural gas publications.

On behalf of these clients, Sayle corresponded with Kelliher through a series of emails beginning on March 23, 2001. Sayle began with a long, somewhat rambling email describing his clients' goals regarding New Source Review (NSR) and a "multipollutant strategy," ending the email with the comment, "Obviously, this is a dream list. Not all will be done. But perhaps some of these ideas could be floated and adopted."⁶

With the political capital of companies like Enron behind Sayle's proposals, most of the "dream list" was in fact incorporated into the Bush-Cheney energy plan. Hours after penning the long email, Kelliher asked Sayle to summarize the email's main points. Sayle responded the same day by writing, "A multipollutant regulatory strategy should be estimated for the power generation sector including: Gradually phased in [mercury, nitrogen oxides and sulfur dioxide emissions] reductions; Reform/replacement of NSR; Use of market-based/emission trading programs; Inclusion of both existing and new plants and equal treatment for both. The last bullet is the critical one to ensure that: a) we encourage the new generation that is required b) we ensure that the new technologies developed through DOE programs can come into the market."

This email, along with a follow-up Powerpoint presentation Sayle sent to Kelliher (*A Comprehensive Multipollutant Emission Control Strategy for Power Generation*), outlined the Clean Power Group's support of the "cap and trade" approach to address emissions of mercury, nitrogen oxides and sulfur dioxide from power plants, but proposed a voluntary cap on carbon dioxide. The proposal also sought reforms to New Source Review (discussion of this issue to follow in the next section). The Clean Power Group would benefit from such a proposal because they could release more emissions under such a "flexible" plan than under the more stringent rule-making process the Clinton Administration had initiated.

After receiving Sayle's email, Kelliher incorporated much of the lobbyist's text into Vice-President Cheney's National Energy Policy Development Group: "The NEPD Group recommends that the President direct the Administrator of the Environmental Protection Agency (EPA) to propose multi-pollutant legislation...that would establish a flexible, market-based program to significantly reduce and cap emissions...provide regulatory certainty to allow utilities to make modifications to their plants without fear of new litigation; provide market-based incentives, such as emissions-trading credits to help achieve the required reductions."⁷ And indeed, President Bush's "Clear Skies" initiative, which is directly built upon the recommendations in the *National Energy Policy*, embraces the strategy laid out months earlier in Sayle's email.

⁶All email communications referenced in this letter involving Mr. Kelliher can be accessed here: <www.nrdc.org/air/energy/taskforce/tfinx.asp>.

⁷Page 3-3, <<http://www.whitehouse.gov/energy/Chapter3.pdf>>.

Kelliher Sets Stage for Federal Favor to French Company

The Powerpoint presentation Sayle sent to Kelliher also advocates an “output-based allocation system to reward efficiency (include CHP).” Combined Heat & Power (CHP) is a technology which can improve the efficiency of fossil fuel power plants.

Sayle’s request resulted in the *National Energy Policy* recommending “that the President direct the EPA Administrator to promote CHP through flexibility in environmental permitting.”⁸ President Bush has proposed spending \$52 million in fiscal year 2004 for corporate partnerships on distributed generation technologies and CHP.⁹

Five months after the National Energy Policy Development Group released its report, Bush’s EPA selected Trigen Energy as a “founding partner” for the Administration’s Combined Heat & Power Partnership, which was “established as a direct result of President Bush’s *National Energy Policy* report.”¹⁰

Southern Co., Clean Power Group’s Successful Push to Redefine New Source Review

The Clean Air Act imposes sensible public health standards to protect people from coal power plant and oil refinery emissions. To be fair to industry, the Act exempts, or grandfathers, plants that were already built at the time the law was passed in the 1970s. New Source Review (NSR) was authorized in the 1977 amendments to the Act to apply the tougher environmental standards should grandfathered plants choose to make significant modifications or upgrades to their facilities, thereby increasing emissions. NSR, therefore, levels the playing field by not granting older plants a competitive advantage.

But lobbyists contacting Kelliher loudly complained that their clients needed to do away with NSR because the law inhibited the ability of these dirty facilities to continue operating after undergoing an upgrade. Sayle, in his communications with Kelliher on behalf of the Clean Power Group, argued for “Reform/replacement of NSR.” But the most extensive email traffic on the issue was between a lobbyist for Southern Co. and Kelliher.

Southern Co. is the second largest operator of coal-fired power plants in America, and the largest campaign contributor from the entire energy industry since 1999. The company showered 71 percent of its \$3.2 million in campaign contributions over that time period on Republicans.¹¹

On March 23, 2001, Michael J. Riith, a lobbyist for Southern Co, wrote this email to Kelliher: “Good Morning. This is the document I told you was in ‘the works’ on NSR in relation to the

⁸Page 4-9, <<http://www.whitehouse.gov/energy/Chapter4.pdf>>.

⁹Page 378, <<http://www.whitehouse.gov/omb/budget/fy2004/pdf/appendix/DOE.pdf>>.

¹⁰Trigen press release, October 15, 2001, <<http://www.trigen.com/news/releases/EPA-Partnership.shtml>>.

¹¹Center for Responsive Politics, <<http://www.opensecrets.org/industries/contrib.asp?ind=E>>.

national energy strategy. As promised, it is attached. I hope this is helpful. After talking with you yesterday, the last thing you need is another issue to deal with. Thanks for your consideration. Again, I look forward to lunch on Tuesday. Best regards, Mike.”

The document referenced in this email to Kelliher is titled *A National Energy Strategy Should Include Reform of EPA’s New Source Review Program*. The document recommends that “a National Energy Strategy that is focused on increasing supply should find ways to resolve the inconsistency between the Strategy’s goals and EPA’s current NSR interpretation... which would exclude from NSR review projects that are routine repair and replacement and allow utilities and other industries to move forward with needed projects.” Southern Co. had a lot to gain from redefining NSR, since the Justice Department and the EPA named Southern as one of several utilities in a November 1999 lawsuit for violation of NSR.

After Kelliher accepted this language from the Southern lobbyist, the Bush *National Energy Policy* adopted passages quite similar: The National Energy Policy Development Group “recommends that the President direct the Administrator of the Environmental Protection Agency, in consultation with the Secretary of Energy and other relevant agencies, to review New Source Review regulations, including administrative interpretation and implementation... [and] recommends that the President direct the Attorney General to review existing enforcement actions regarding New Source Review to ensure that the enforcement actions are consistent with the Clean Air Act and its regulations.”¹²

President Bush took this recommendation and ran with it: the Administration announced in November 2002 that factories, oil refineries and coal power plants would win exemptions from NSR, fulfilling the requests asked of Kelliher.¹³ Granted, opposition to NSR within the energy industry was widespread: but the FOIA records released thus far reveal zero communication between Kelliher and public interest organizations who could argue the merits of retaining the status quo interpretation of NSR.

Big Oil Presents Kelliher an Offer Bush Doesn’t Refuse: Ready-Made Executive Orders

A series of emails in March 2001 between Kelliher and Jim Ford, a registered lobbyist with the American Petroleum Institute, documents Kelliher’s reliance on the industry’s proposals to preempt state regulation, and includes *two* proposed Executive Orders, both of which Bush eventually adopted and signed into law.

The American Petroleum Institute represents over 200 oil and gas companies. Oil and gas corporations lavished 79 percent of their \$57 million in campaign contributions to Republicans since 1999.¹⁴

¹²Page 7-14, <<http://www.whitehouse.gov/energy/Chapter7.pdf>>.

¹³Nick Anderson, “Bush Prevails in Clean Air Duel,” *Los Angeles Times*, January 23, 2003.

¹⁴Center for Responsive Politics, <<http://www.opensecrets.org/industries/indus.asp?Ind=E01>>.

On March 20, 2001, the oil industry lobbyist emailed Kelliher a document titled, *Overview: U.S. Oil and Natural Gas Supply Situation*. The third page of this document suggests that Bush “require Executive Branch agencies to avoid significant adverse energy consequences in proposing regulatory other administrative actions.” On May 18, 2001, Bush signed an Executive Order mirroring the lobbyist’s request to Kelliher: “I [President Bush] am requiring that agencies shall prepare a Statement of Energy Effects when undertaking certain agency actions...such Statements of Energy Effects shall describe the effect of certain regulatory actions on energy supply, distribution, or use.”¹⁵

The oil lobbyist’s email also asked Kelliher to recommend “Executive Branch agencies to review existing rules and policies and revise them as necessary to eliminate significant adverse energy consequences... [and] provide a ‘strike force’ to complement existing staff of public land management agencies to immediately reduce the tremendous backlog of pending applications for permits to develop federal oil and gas leases.” A similar memo addressed to Kelliher was penned by Darrell Henry, director of public affairs for the American Gas Association, which sought a strike force “to streamline regulation of exploration and production on federal lands.” The American Gas Association had originally been turned down by the Clinton Administration for such an Executive Order when the Association first requested it in January 2000.¹⁶

President Bush again complied, signing a second Executive Order on May 18 which read: “it is the policy of this Administration that executive departments and agencies shall take appropriate actions...to expedite projects that will increase the production, transmission, or conservation of energy...For energy-related projects, agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects...There is established an interagency task force to monitor and assist the agencies in their efforts to expedite their review of permits or similar actions, as necessary, to accelerate the completion of energy-related projects, increase energy production and conservation, and improve transmission of energy. The Task Force also shall monitor and assist agencies in setting up appropriate mechanisms to coordinate Federal, State, tribal, and local permitting in geographic areas where increased permitting activity is expected.”¹⁷

Kelliher and Oil Fight the States, and the Fed Wins

The American Petroleum Institute lobbyist emailed Kelliher a second document titled *Recommendations for a National Energy Policy* on March 20, 2001. The first regulation about which the oil lobbyist complained in this document was the **Coastal Zone Management Act of 1972**. The law guarantees coastal states input in the development of offshore oil exploration, especially off the coast of California and in the Gulf of Mexico. The oil industry grumbles that

¹⁵<http://www.whitehouse.gov/news/releases/2001/05/20010518-6.html>

¹⁶Don Van Natta, Jr, “Executive Order Followed Energy Industry Recommendation,” *The New York Times*, April 4, 2002.

¹⁷<http://www.whitehouse.gov/news/releases/2001/05/20010518-5.html>

some states, like California, have used the law to prioritize environmental protection and coastal preservation over increased oil drilling. As a result, the oil lobbyist urged Kelliher to “amend the Coastal Zone Management Act to ensure that valid offshore natural gas and oil lease rights are protected in the CZMA process.” Such an amendment would limit the ability of states to have adequate input over oil development projects off their shores.

While the Bush Administration declined to copy the exact text used by the oil lobbyist, Kelliher and the Administration parroted the lobbyist’s complaints and recommendations. For example, the oil lobbyist email complained that the Coastal Zone Management Act became “a tool for unnecessary delay and duplicative regulation of offshore exploration and production.” Bush’s *National Energy Policy* echoes the lobbyist’s request: “These delays and uncertainties can hinder proper energy exploration and production projects.”¹⁸ The oil lobbyist’s email asks Kelliher to “direct the Department of Commerce to administer state consistency programs to ensure priority consideration is given to responsible oil and natural gas development [with regards to the Coastal Zone Management Act].” The Bush Administration produced this recommendation on CZMA: “The NEPD Group recommends that the President direct the Secretaries of Commerce and Interior to re-examine the current federal legal and policy regime (statutes, regulations, and Executive Orders) to determine if changes are needed regarding energy-related activities and the siting of energy facilities in the coastal zone and on the Outer Continental Shelf (OCS).”¹⁹

That Bush Administration recommendation came after Kelliher returned this email on March 21, 2001 to the oil lobbyist: “Do you have more detail on the CZMA issue? Your description suggests that legislation is not needed, and that changing the regulations would suffice. Is that true? Also, please explain in more detail how the current regulations relating to consistency impede offshore development, it is not clear what the problem is. Thanks.” The oil lobbyist responded on March 22: “We do have more. I’ll get back to you with supplementary material as soon as possible. Curious as to whether any of the other suggestions we’ve made—particularly the short-term administrative measures recommended in the first e-mail I sent you—have any traction. By the way, I heard some word yesterday that the NEP development group may have produced a draft. Can you shed any light on this?” Bush Administration lawyers unsuccessfully argued that the state of California, through the Coastal Zone Management Act, had no right to review the Clinton Administration’s decision to allow increased drilling off the state’s coast by renewing existing leases.²⁰ The Bush Administration’s willingness to take California to court contrasts with the President’s approach to his brother, governor of Florida. President Bush announced plans to protect Governor Bush’s coast by spending \$120 million to buy oil and gas rights in the Everglades and another \$115 million to pay oil companies to stop drilling plans in the Gulf of Mexico. President Bush rejected a similar offer proffered by Governor Davis of California.

¹⁸Page 5-7, <<http://www.whitehouse.gov/energy/Chapter5.pdf>>.

¹⁹Page 5-8, <<http://www.whitehouse.gov/energy/Chapter5.pdf>>.

²⁰Unanimous decision by a three-judge panel of the 9th U.S. Circuit Court of Appeals, *State of California v. Norton*, December 2002.

Kelliher Treats Oil Companies Royally

The oil lobbyist's memo also recommends promoting and expanding the federal government's *royalty in kind* pilot program. The program allows corporations drilling for oil on public land to forgo paying cash royalties to taxpayers. Instead, companies provide an amount of the oil as an in-kind contribution to the federal government. Since federal land supplies one-third of the oil and gas produced in the United States, expansion of this program could have a significant impact on the federal treasury.

The Bush Administration accepted the lobbyist's recommendation, as the National Energy Policy requests that the Secretary of the Interior "explore opportunities for royalty reductions."²¹ A recent Government Accounting Office report, however, criticizes the current royalty in kind program, concluding that the government is unable to determine whether taxpayers receive a fair shake from the program. For example, the GAO concluded that since the pilot program currently "relies upon royalty payers to self-report the amount of oil and gas they produce, the value of this oil and gas, and the cost of transportation and processing that they deduct from royalty payments, there are concerns about the accuracy and reliability of these data."²² Indeed, the industry's cheerleading for the royalty in-kind program stems from recent court decisions that found U.S. oil companies, equipped with an "honor system" self-reporting system, routinely underreported the volume of oil and natural gas removed from taxpayer land, therefore allowing the companies to cheat the public. By seeking to end cash payments for the privilege of drilling on public land altogether, it appears as though the oil companies are attempting to hedge their losses from the embarrassing court decisions.

What Would Mussolini Do? Ask a Natural Gas Lobbyist

On March 18 2001, Kelliher initiated an email correspondence with Dana Contratto, chairman of the energy group at the DC law firm/lobby shop Crowell & Moring. Kelliher asked: "If you were King, or Il Duce, what would you include in a national energy policy, especially with respect to natural gas issues... I am working up the policy elements, and am less confident of my judgment on gas pipeline issues than other areas, and thought I would pick your brain."

Mr. Contratto replied, "Of course, if I were King we would already have a national energy policy that would have kept California out of the mess in which it now finds itself... so, having said that, what can be done... more resources at FERC... could expedite pipeline certificates substantially." The Cheney energy task force parroted Contratto's advice: "The NEPD Group recommends that the President direct agencies to... expedite pipeline permitting."²³

²¹Page 5-7, <<http://www.whitehouse.gov/energy/Chapter5.pdf>>.

²²Government Accounting Office, *A More Systematic Evaluation of the Royalty-in-Kind Pilots is Needed*, GAO-03-296, January 2003, Pgs 3-4, <<http://www.gao.gov/audit.htm>>.

²³Page 7-18, <<http://www.whitehouse.gov/energy/Chapter7.pdf>>.

While Corporations Get Attention, the Public Interest Gets a Cold Shoulder

Public Citizen's search of released communications involving Kelliher turned up zero contacts with public interest organizations. But correspondence by Kelliher's co-workers indicate that public interest groups were given 48 hours to provide input—compared to private meetings, breakfasts and lunches available to energy company representatives. A March 2, 2001, email sent from Kelliher's co-worker Margot Anderson asked that fellow staffer Peter Karpoff contact public interest groups “and get them to send you any energy policy options they are advocating... can you then review the proposals and recommend some we might like to support that are consistent with the Administration's energy statements to date?” The message, which was sent on Wednesday afternoon, concluded “need by Friday noon.”

It should come as no surprise that as a result of his advocacy, Kelliher enjoys broad industry support for his nomination to FERC. The Electric Power Supply Association praised Kelliher's as “an excellent choice to round out and complement a newly re-energized FERC.” The Edison Electric Institute's Pat McMurray noted Kelliher's “broad and deep” background in energy policy in giving him their support²⁴. The American Gas Association described Kelliher in an August 16, 2001 letter to President Bush as having the “breadth of experience, judgement and expertise to fulfill the responsibilities” of a FERC commissioner,²⁵ even though he admitted he was “less confident of my judgment on gas pipeline issues.”

In addition to asking questions about Kelliher's role in writing the Administration's *National Energy Policy*, the Committee should ask Mr. Kelliher his views on important market issues currently before FERC. A quick analysis of legislation of which Kelliher has had a hand drafting shows an interest in repealing the Public Utility Holding Company Act and providing an increased regulatory role for FERC at the expense of state sovereignty.

The White House first announced its intent to nominate Kelliher in October 2001 and in May 2002 sent his nomination to the Senate, which did not act on it. Kelliher, a Republican, was nominated for a term expiring June 30, 2007, to replace former Commissioner Linda Breathitt, whose term ran out late last year. When Bush first nominated Kelliher in October 2001, he was set to fill former FERC Chairman Curtis Hebert's seat, which is set to expire in June 2004 (Hebert resigned in August 2001).

Sincerely,

Joan Claybrook
President, Public Citizen

Wenonah Hauter
Director, Public Citizen's Critical Mass Energy and
Environment Program

²⁴*The Energy Report*, October 22, 2001, Volume 29, Issue 43.

²⁵Katharine Fraser and Chris Newkumet, *Inside FERC*, September 3, 2001.