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March 27, 2006

Joseph T. Kelliher
Chairman
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Dear Mr. Kelliher:

I am writing to request information about your role and that of your chief of staff in the case involving the Southern Company that is currently pending before the Federal Energy Regulatory Commission. According to internal Commission documents and an agency employee with knowledge of the case, your chief of staff intervened to undermine the career staff handling the case and offer an unusually favorable settlement to the Southern Company.

On May 5, 2005, the Commission, then chaired by Pat Wood, opened a case against Southern Company Services, Inc., and its affiliates, including Southern Power.[1] The Southern Company is one of the largest generators of electricity in the United States and operates in Florida, Georgia, Mississippi, and Alabama. Southern Power is an affiliate of the Southern Company that generates and sells power. Its customers are (1) Southern Company affiliates, such as Alabama Power, Georgia Power, and Savannah Electric and (2) other utilities and power companies, such as the Florida Municipal Power Agency, Florida Power & Light, and the Orlando Utilities Commission.

The Commission had two primary concerns. First, it was concerned that Southern Power had access to insider information from the other Southern affiliates that could give Southern Power an unfair advantage when it competed for contracts awarded by these affiliates or by other companies. Second, the Commission was concerned that under a "pooling agreement" with the other Southern affiliates, Southern Power could purchase backup power at below market rates, giving Southern Power an unfair competitive advantage over other companies when it competed for energy contracts.[2]

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[1] Federal Energy Regulatory Commission, *Order Establishing Hearing Procedures*, Docket No. EL05-102-000 (May 5, 2005).

[2] *Id.*

Typically, when the Commission opens a case, the agency's career trial staff investigates the allegations and begins accumulating evidence for the record. The trial staff may also elect to enter into settlement negotiations with the company being investigated. If a settlement is not reached and the trial staff believes that the case should proceed, a hearing is held before an Administrative Law Judge.

It appears that the Southern Company case has been handled differently. In July 2005, you replaced Pat Wood as Chairman of the Commission, and Daniel Larcamp became your chief of staff. After obtaining boxes of records, the trial staff began deposing Southern Company witnesses in November 2005. Midway through the depositions, however, Mr. Larcamp intervened. According to Rich Heidorn, an agency employee on the trial staff, the investigation was suspended and the depositions were halted because Mr. Larcamp personally entered into settlement negotiations with the Southern Company.

Commission documents confirm key elements of the Mr. Heidorn's account. They show that Mr. Larcamp was designated "non-decisional staff" in September 2005 so that he could have direct communications with the Southern Company.[3] They also show that Mr. Larcamp did, in fact, enter into "extensive settlement discussions" with the Southern Company.[4]

The most significant document is an internal Commission email that summarizes a December 2, 2005, meeting between Mr. Larcamp and Commission trial staff about the Southern case. According to this email, Mr. Larcamp stated that "support for this proceeding at the chairman level has vanished with Joe taking over from Pat."[5] Mr. Larcamp told the staff that "the case would be a tough one politically and that he strongly prefers settlement."[6] He also said that "Southern would likely apply political pressure."[7] According to the email, Mr. Larcamp explained, "even if the case goes forward, the Chairman would not be eager to expedite it and it would likely languish through 2007."[8] Southern Company is a major political donor. Over the last decade, 73% of Southern's $6.5 million in political contributions went to Republicans.[9]

According to Mr. Heidorn, the career trial staff was upset that the case had been halted in such an unusual way. He said that the career staff was kept "out of the loop" and that Mr. Larcamp did not provide them with the draft settlement he negotiated. In fact, internal emails

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[3] Federal Energy Regulatory Commission, *Notice of Designation of Commission Staff as Non-Decisional* (Sept. 21, 2005).

[4] Federal Energy Regulatory Commission email (Jan. 25, 2006).

[5] Federal Energy Regulatory Commission email (Dec. 5, 2005).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] www.opensecrets.org (Mar. 9, 2006).

reveal the trial staff did not obtain the draft settlement until January 25, 2006, when attorneys for the Southern Company sent the document in response to a staff request.[10]

The draft settlement appears to be a sweetheart deal for the Southern Company. It does not address either of the key concerns that led the Commission to launch its investigation. Mr. Heidorn characterizes the settlement as "complete capitulation" because the Commission "got nothing in return." He told my staff that the settlement reflects "very selective enforcement" and that "consumers are the ultimate losers."

A key issue in the case is whether to treat Southern Power as a "marketing affiliate" of the other Southern companies. Under federal regulations, one company is a "marketing affiliate" of another company if (1) it sells electricity in interstate commerce and (2) it controls, is controlled by, or is under common control with the other company.[11] If Southern Power were designated a marketing affiliate, its ability to receive insider information from other Southern companies would be restricted under Commission rules. But under the settlement, Southern Power is not considered a marketing affiliate even though (1) it sells electricity to other companies for resale and (2) Southern Company owns it and the other Southern affiliates. As a result, the settlement places no limitations on Southern Power's ability to gain a competitive advantage by using insider information to obtain contracts from Southern affiliates or other companies.

In addition, the draft settlement does not address Southern Power's access to the "Southern pool." Under its pooling agreement with the Southern companies, Southern Power can rely on the other companies' electricity generation as a backup source of electricity, and it can purchase this power at cost from the pool. This gives Southern Power a significant competitive advantage because other companies that compete with Southern Power may have to buy power at a much higher price on the open market.

When the trial staff finally saw the draft settlement, they suggested several changes to better protect the consumer. For example, they recommended that the pooling agreement be amended to limit Southern Power's use of the Southern pool. According to Mr. Heidorn, however, these suggested modifications were rejected by Mr. Larcamp. The unaltered settlement apparently will go into effect once all of the remaining parties have reached agreement with the Commission.

This is not the first time that questions have been raised about favoritism that you have provided to energy companies. In 2001, as Senior Policy Advisor to the Secretary of Energy, you were involved with Vice President Cheney's Energy Task Force. In one email exchange, you solicited advice from a natural gas industry lobbyist by asking: "If you were King, or Il Duce, what would you include in a national energy policy, especially with respect to natural gas

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[10] Federal Energy Regulatory Commission emails (Jan. 24-25, 2006).

[11] 18 C.F.R. § 358.3(b), (e), and (k).

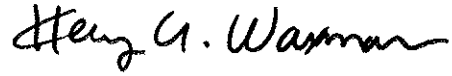
issues?"[12] The Energy Task Force then recommended that the Bush administration support development of a Caspian natural gas pipeline, the issue being pushed by the lobbyist.[13] In March 2001, you also obtained national energy policy recommendations from the American Petroleum Institute, including a recommendation for the President to issue an executive order regarding energy considerations in agency rulemakings.[14] The President issued such an executive order on May 18, 2001.[15]

Under the Bush Administration, the Federal Energy Regulatory Commission has accelerated efforts to deregulate the nation's electricity infrastructure. These actions have not been without controversy. As part of its aggressive push toward open markets, the Commission has assured the public that it would develop clear rules and enforce them consistently. If the information I have received is true, it undercuts the basic premise that the Commission will treat all market participants evenhandedly.

Serious questions have been raised about your actions and those of your chief of staff in the Southern Company case. In order to better understand these issues, I request a briefing on the status of the Southern Company case and your and Mr. Larcamp's role in negotiating the settlement. I would also like to receive copies of all communications (whether written or electronic) between representatives of any of the Southern companies and you or Mr. Larcamp. Please provide summaries of any oral communications between representatives of any of the Southern companies and you or Mr. Larcamp.

I ask that you provide the briefing and the information I have requested by April 3, 2006. As you know, any retaliation against Mr. Heidorn for protected disclosures of information to Congress is prohibited under the Whistleblower Protection Act.

Sincerely,



Henry A. Waxman
Ranking Minority Member

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[12] *See* Natural Resources Defense Council, *Energy Department Releases Index of Missing Cheney Energy Task Force Documents* (Apr. 26, 2002) (online at http://www.nrdc.org/media/pressreleases/020426.asp).

[13] *Id.*; National Energy Policy Development Group, National Energy Policy at 8-12, 8-13 (May 2001) (online at http://www.whitehouse.gov/energy/Chapter8.pdf).

[14] Email from American Petroleum Institute to Joseph Kelliher (Mar. 20, 2001).

[15] Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (May 18, 2001) (online at http://www.whitehouse.gov/news/releases/2001/05/20010518-6.html and http://ceq.eh.doe.gov/nepa/regs/eos/eo13211.html).