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United States General Accounting Office
Washington, DC 20548

August 16, 2001

The Honorable Joseph I. Lieberman
Chairman
Committee on Governmental Affairs
United States Senate

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Subject: No Evidence That Communications Between the FERC Chairman and the Chairman of Enron Corporation Violated Criminal Statutes or Ethics Regulations

Dear Mr. Chairman:

This letter responds to your May 30, 2001, request that we review the communications between Curt Hébert, Jr., Chairman of the Federal Energy Regulatory Commission (FERC),¹ and Kenneth Lay, Chairman of Enron Corporation, who were the subjects of an article published in *The New York Times* on May 25, 2001. You were concerned that communications between the Chairman of FERC, an independent federal agency, and the Chairman of Enron, an entity regulated by that agency, may violate applicable federal criminal statutes or ethics regulations.

We conducted our work in June 2001. We interviewed witnesses who have first-hand knowledge of the conversation referred to in the *Times* article—Mr. Hébert, his Chief of Staff, FERC's General Counsel, and Mr. Lay.

In summary, based on our review of the information we gathered and consultation with our General Counsel, we found no evidence that either Mr. Hébert or Mr. Lay violated criminal statutes or ethics regulations.

Communications Between Mr. Hébert and Mr. Lay

Messrs. Hébert and Lay confirmed that they had a telephone conversation in February 2001, that Mr. Hébert asked Mr. Lay to endorse him continuing as FERC's Chairman,² and that Mr. Lay asked Mr. Hébert about his views on what FERC's policy

¹ President George Bush named Mr. Hébert as FERC Chairman on January 22, 2001. The President, with the advice and consent of the Senate, appoints all FERC commissioners to 5-year terms. The President designates one of the commissioners to serve as Chairman; the designated Chairman need not be approved by the Senate. Thus, Mr. Hébert serves as Chairman at the President's sufferance and could be replaced, without Senate approval, if the President desired. On August 7, 2001, it was reported that Mr. Hébert announced his resignation, to be effective at the end of August 2001.

² According to Mr. Lay, Enron had written to the White House supporting Mr. Hébert when he was first appointed FERC Chairman.

should be on access to the electricity grid. Further, they both agree that they did not discuss any matters Enron Corporation had before FERC. However, they disagree on how the conversation about FERC's policy on access should be interpreted.

Mr. Hébert believes that Mr. Lay was attempting to tie his support for Mr. Hébert continuing as Chairman to a change in Mr. Hébert's position on this policy issue.

Mr. Lay said that because Mr. Hébert was pressing him for an endorsement,³ he took the opportunity to ask him about his position on access, an issue that he and Mr. Hébert did not agree on. However, Mr. Lay said he never told Mr. Hébert that Mr. Hébert's position on this issue was tied to his endorsement, nor did he imply any such connection. Mr. Lay told us that during the conversation, Mr. Hébert said that FERC was addressing some issues and that Mr. Lay would probably be happy with the direction in which FERC was moving. This statement conflicts with Mr. Hébert's recollection. Mr. Hébert told us that he refused to waiver on his policy.

Mr. Hébert's Chief of Staff and General Counsel were present during all or part⁴ of the telephone conversation between Messrs. Hébert and Lay but heard only Mr. Hébert's conversation. They based their characterization of the substance of the conversation on what they heard and their subsequent conversation with Mr. Hébert. They both agree that Mr. Hébert asked Mr. Lay to endorse him continuing as Chairman. They further agree that they heard Mr. Hébert justify his position concerning the access issue to Mr. Lay. In addition, they both said that after the telephone conversation, Mr. Hébert said that he would not get Mr. Lay's support unless he changed his position and that he could not compromise his position.

GAO Legal Analysis

Three criminal statutes have some relevance to these circumstances. The first, 18 U.S.C. section 201, a bribery statute, makes it a crime to give, offer, or promise anything of value to a public official with the intent to influence any official act; the statute also makes it a crime for any public official to demand, seek, receive, accept, or agree to receive or accept anything of value in return for being influenced in performing any official act. The second, 18 U.S.C. section 210, makes it a crime to offer or promise money or a thing of value to any person in consideration of the use or promise to use any influence to procure any appointive office in the U.S. government. The third, 18 U.S.C. section 211, makes it a crime to solicit or receive any money or thing of value in consideration of the promise of support or use of influence in obtaining public office.

Additionally, there are ethics regulations to which all executive branch employees must adhere. Executive Order 12674 specifically states that an employee shall not solicit or accept any gift or item of monetary value from a person or entity seeking official action from, or conducting activities regulated by, the employee's agency. The executive order further specifies that employees shall not use public office for

³ According to Mr. Lay, Mr. Hébert expressed concern about the possibility that Pat Wood would be appointed to replace him as Chairman. Mr. Lay told us that in February, rumors were circulating that President Bush might appoint Mr. Wood to serve as a FERC commissioner and that the President might designate Mr. Wood to replace Mr. Hébert as Chairman. Mr. Wood was nominated as a commissioner by the President on April 30 and confirmed by the Senate on May 25.

⁴ FERC's General Counsel said that sometime after February 9, 2001, he was summoned to Mr. Hébert's office where Mr. Hébert was already engaged in a telephone conversation with Mr. Lay.

private gain, and that employees shall act impartially and not give preferential treatment to any private organization or individual. The Office of Government Ethics has promulgated Standards of Ethical Conduct to which all executive branch employees are required to adhere.⁵ These standards repeat that employees shall not use public office for private gain, shall act impartially, and shall not give preferential treatment to any private organization or individual.⁶ Moreover, FERC has issued regulations that supplement the Office of Government Ethics' standards. In general, FERC employees with decisionmaking responsibilities are prohibited from having off-the-record (i.e., *ex parte*) communications relevant to the merits (i.e., capable of affecting the outcome of or influencing a decision) of a contested on-the-record proceeding. However, FERC's regulations specifically exclude from their definition of prohibited off-the-record communications, any relevant communications with respect to general background or broad policy discussions involving an industry FERC regulates, where the discussion occurs outside the context of any particular proceeding and does not affect the specific merits of the proceeding. Significantly, the regulations state that it is FERC's policy to encourage the public, including those subject to regulation by FERC, to submit suggestions, comments, or proposals concerning substantial prospective regulatory policy issues. This policy is intended to serve as a means of advising FERC of potential significant issues and problems that may come before it during its activities.

Regardless of who initiated the discussion concerning open access, it does not appear that any of the criminal statutes summarized above were violated. All three statutes require that money or a "thing of value" be offered or solicited in return for something else. The only thing that may have been sought or offered here was Mr. Lay's political support for Mr. Hébert continuing as Chairman. Although the courts interpret the term thing of value broadly to include both tangibles and intangibles, our review of case law found no support for the proposition that mere political support may be considered a thing of value for purposes of the relevant criminal statutes.

Moreover, under the plain language of each of the above-referenced criminal statutes, the offer of a thing of value must be tied to an expectation of a corresponding action by the other party. That is, there must be an expected *quid pro quo*, a specific intent to give or receive something of value in exchange for an official act. Here, there is no evidence that such an exchange was contemplated, and Mr. Lay specifically said that he did not tie his support to Mr. Hébert changing his position on access. When Mr. Hébert asked for Mr. Lay's endorsement, it was not unreasonable for Mr. Lay to ascertain whether the Chairman would take a position that would be to Enron's advantage. Mr. Lay wanted the Chairman to take a position in favor of making open access mandatory. According to Mr. Hébert, when he said that he would not support mandatory open access, Mr. Lay said that he would not support Mr. Hébert continuing as Chairman. In fact, after Messrs. Lay and Hébert discussed open access, neither party was willing to budge from his own position, and neither party offered to use his influence for the benefit of the other. Thus, there was no exchange or offer to exchange something of value for some action or influence by the recipient.

⁵ 5 C.F.R. § 2635.101 *et seq.*

⁶ 5 C.F.R. §§ 2635.101(b)(7), (8), and 2635.702.

The essence of the above-referenced regulations is that government employees may not use their public offices for private gain, and government employees must act impartially and not give preferential treatment to any private organization or individual. Even though Mr. Hébert asked Mr. Lay for his support, there is simply no evidence that he used his public office to obtain that support or that he offered to give preferential treatment to Enron. To the contrary, Mr. Hébert refused to change his position on access even though that refusal might have cost him Mr. Lay's support.

In addition, as stated previously, FERC's regulations explicitly encourage parties regulated by FERC to submit suggestions, comments, or proposals concerning substantial prospective regulatory policy issues as a means of advising FERC of potential significant issues and problems. Thus, discussion of important policy issues such as access to the electrical transmission grid by representatives of companies like Enron is specifically encouraged as a matter of policy under FERC's regulations. The only restraint imposed by FERC's regulations is that FERC decisionmakers may not have ex parte discussions relevant to the merits of contested on-the-record proceedings pending before FERC with parties to those proceedings. Here, both Mr. Lay and Mr. Hébert specifically said that while Enron had some matters before the FERC, they did not talk about those matters. This was confirmed by our interviews with the other individuals who were present when the conversation took place. Thus, the FERC rules on ex parte communications were not violated.

Conclusion

On the basis of information obtained in the interviews and a review of the statutes and regulations previously discussed, we found no evidence that applicable federal criminal statutes or ethics regulations were violated. There is no evidence that the Chairman attempted to use his public office for private gain, acted other than impartially, or offered preferential treatment to Mr. Lay and Enron. Likewise, there is no evidence that Mr. Lay offered a thing of value to Mr. Hébert, the FERC Chairman, as that term has been interpreted by the courts on similar issues.

As arranged with your office, unless you announce its contents earlier, we plan no further distribution of this letter until 30 days after the date of the letter. At that time, we will send copies of the letter to interested congressional committees and the Chairman of FERC. We will also make copies available to others on request.

The letter will also be available at www.gao.gov. If you have any questions, please call me at (202) 512-7455 or Director Ronald Malfi at (202) 512-6722. Senior Analyst Shelia James, Senior Attorney Peter Iannicelli, and Assistant General Counsel Robert Cramer made key contributions to this letter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Robert H. Hast". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert H. Hast
Managing Director
Office of Special Investigations

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