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HOUSE-SENATE JOINT CONFERENCE ON H.R. 4,  
SECURING AMERICA'S FUTURE ENERGY ACT  
OF 2001, SUBTITLE A-FEDERAL POWER ACT  
AMENDMENTS, ELECTRICITY PROVISIONS  
THURSDAY, SEPTEMBER 19, 2002

House of Representatives

Committee on Energy and Commerce

Washington, D.C.

and

United States Senate

Committee on Energy and Natural Resources

Washington, D.C.

**Committee Hearings**

of the

**U.S. HOUSE OF REPRESENTATIVES**



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5 HOUSE/SENATE CONFERENCE ON H.R. 4,

6 SECURING AMERICA'S FUTURE ENERGY ACT OF 2001

7 THURSDAY, SEPTEMBER 12, 2002

8 House of Representatives,

9 Committee on Energy and Commerce,

10 Washington, D.C.

11 and

12 United States Senate,

13 Committee on Energy and Commerce

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15

16 The joint conference met, pursuant to call, at 9:40 a.m.,

17 in Room 2123, Rayburn House Office Building, Hon. W.J. (Billy)

18 Tauzin [chairman of the committee] presiding.

19 Present: Representatives Tauzin, Bilirakis, Barton,

20 Upton, Stearns, Gillmor, Burr, Dingell, Waxman, Markey,

21 Boucher, Gordon, Gutknecht, Norwood, Hansen, Cubin, Rahall,

22 Boehlert, Bartlett, Costello, Young of Alaska, Oberstar, and

23 DeFazio.

24 Senators Bingaman, Breaux, Reid, Jeffords, Murkowski,

25 Domenici, Craig, Campbell, and Thomas.

2574 Mr. BOUCHER. Aye.

2575 The CLERK. Mr. Boucher votes aye. Mr. Gordon.

2576 Mr. DINGELL. Aye, by proxy.

2577 The CLERK. Mr. Gordon votes aye. Mr. Rush.

2578 Mr. BARTON. Aye, by proxy.

2579 The CLERK. Mr. Rush votes aye. Mr. DeLay.

2580 Mr. BARTON. No, by proxy.

2581 The CLERK. Mr. DeLay votes aye--no.

2582 Mr. BARTON. No, no, by proxy. The clerk will report the

2583 tally.

2584 The CLERK. Mr. Chairman, on that, there were six ayes and

2585 eight nays.

2586 Mr. BARTON. The amendment of Mr. Dingell fails. Are there

2587 other amendments to the proposal? Mr. Markey seeks

2588 recognition.

2589 Mr. MARKEY. Thank you, Mr. Chairman. I have 143.

2590 Mr. BARTON. That is an amendment? Mr. Markey is

2591 recognized for five minutes in support of Markey Amendment

2592 143. The clerk will pass out the amendment.

2593 Mr. MARKEY. Excuse me, Investment Company Act, yes.

2594 The CLERK. "Amendment to the proposed House offer on

2595 H.R. 4 offered by Mr. Markey."

2596 Mr. BARTON. The gentleman is recognized in support of his

2597 amendment.

2598 [The Amendment offered by Edward Markey follows:]

2599

\*\*\*\*\* INSERT \*\*\*\*\*

2600 Mr. MARKEY. Thank you, Mr. Chairman, very much. Mr.  
2601 Chairman, Section 136 provides that any company that was as  
2602 of December 31, 2001 an affiliate of a holding company, as  
2603 defined in PUHCA, and held investment securities, as defined  
2604 under the Investment Company Act of 1940, of one or more  
2605 companies engaged directly or indirectly in the electric or  
2606 gas utility business or other permitted business activities  
2607 shall be exempt from regulation as an investment company.  
2608 Now, under this provision, any such company could operate as  
2609 a mutual fund. Can you believe we are talking about that in  
2610 the energy market? These companies want to transform  
2611 themselves into mutual funds. Can you believe that, Peter? Or  
2612 other type of investment company--what? Yes, I agree, let us  
2613 invest in that company. Invest in Wall Street with the rest  
2614 of the energy industry. And be totally exempted from SEC  
2615 oversight and regulation.

2616 Back in January, Mr. Dingell and I wrote the Securities  
2617 and Exchange Commission to ask about the impact of a similar  
2618 proposal, and they reported that there may be hundreds of  
2619 unregulated investment companies that would result from  
2620 enactment of this language and that it would be impossible to  
2621 determine the exact number of unregulated investment  
2622 companies it could potentially create. The SEC provided me  
2623 with five boxes of documents containing information about the  
2624 potentially hundreds of companies that could exploit this

2625 | loophole.

2626 |       Now, we are told that this is only a special interest  
2627 | provision that is aimed at benefitting a single company, a  
2628 | Kansas-based company known as WestStar Energy, a utility  
2629 | holding company, formally known as Western Resources, that  
2630 | decided several years ago to diversify into the burglar alarm  
2631 | business. Now this company reportedly claims that they need  
2632 | an exemption from the Investment Company Act because of their  
2633 | holdings, but I see no reason why we should give it to them.  
2634 | If this company has a legitimate case to make as to why they  
2635 | are only incidentally or temporarily an investment company or  
2636 | why they should be exempted from the act, why aren't they  
2637 | successfully making that case today at the Securities and  
2638 | Exchange Commission? The SEC actually has the authority to  
2639 | address any legitimate issue this company may have, either by  
2640 | finding that WestStar Energy does not meet the definition of  
2641 | an investment company under Section 3 of the 1940 act or by  
2642 | using its exemptive authority under Section 6 of the 1940 act  
2643 | to exempt them from the act's application. If the company has  
2644 | a legitimate case to be made, they should make it to Harvey  
2645 | Pitt and the Securities and Exchange Commission staff. They  
2646 | should not be wasting our time with a legislative fix.

2647 |       The fact that they are doing so raises some alarm bells  
2648 | for me as to what their real motivations might be. It is not  
2649 | exactly this incredible watchdog over at the Securities and

2650 Exchange Commission that we are talking about. I mean I think  
2651 they are willing to be very open minded. That is what Harvey  
2652 Pitt said when he took over. So if they can't get past the  
2653 Harvey Pitt standard as per a waiver, what are we doing on  
2654 this committee, which has been trying our best to put some  
2655 lead in the pencil of that agency over the last year to make  
2656 sure that it in fact does stand up to those who want to  
2657 engage in acts of nefarious misbehavior as malefactors of  
2658 financial fraud upon ordinary, unsuspecting investors across  
2659 our country?

2660 I would like to remind my colleagues that we went down  
2661 this path before of considering legislative exemptions from  
2662 the 1940 act and pressuring the Securities and Exchange  
2663 Commission to grant administrative exemptions in 1996. Enron  
2664 came to Congress when we were working on the National  
2665 Securities Markets Improvement Act, and they sought an  
2666 exemption from the Investment Company Act, the same act.  
2667 Now, Mr. Dingell and I resisted this provision, and it was  
2668 not added to the final bill, although the majority insisted  
2669 on report language encouraging the Securities and Exchange  
2670 Commission to favorably consider Enron's request. The  
2671 following year, in 1997, Enron sought and obtained an  
2672 exemption from the Securities and Exchange Commission from  
2673 the Investment Company Act of 1940 which it exploited to  
2674 engage in activities that would have been prohibited if it

2675 had been regulated as an investment company. The proposed  
2676 1940 act exemption and Section 136 of this bill is  
2677 significantly broader than that exemption granted Enron back  
2678 in 1997, and literally hundreds of unregulated investment  
2679 companies could be created across our country if that  
2680 provision, which is in this bill, becomes law.

2681 Why should we permit it to happen? Have my colleagues and  
2682 I learned nothing from our hearings this year? I don't  
2683 believe we are going to allow that to happen again. Let us  
2684 not let the mistakes of the past be repeated again in this  
2685 committee. Please support the Markey amendment to block this  
2686 attempt at circumventing the legitimate oversight  
2687 responsibilities of the Securities and Exchange Commission.

2688 Mr. BARTON. Is there discussion of the pending Markey  
2689 amendment? I would be happy to speak. The Chair would  
2690 recognize himself in mild opposition to the Markey amendment.  
2691 We have been round and round on this. I think the gentleman  
2692 is--the gentleman from Massachusetts certainly has good  
2693 reasons to offer his amendment. There really is a policy  
2694 decision here that the committee--the Conference Committee  
2695 needs to make. This particular provision benefits one  
2696 company. That company is Case Western Resources based on  
2697 Topeka, Kansas. The provision has been in the draft that was  
2698 circulated at the subcommittee that I Chair, it has been in  
2699 the discussion drafts, it is in the pending proposal at my



2700 request.

2701 The reason that I put it in is because this company is in  
2702 a unique situation that it has got a subsidiary that has a  
2703 natural gas affiliate that its primary business is in  
2704 electronic security, and because of the problems that have  
2705 occurred in the stock market, the affiliate that it is trying  
2706 to sell puts it in this unique position that it finds itself.

2707 I am sure when we go to the Senate, if this stays in the  
2708 bill, that the Senate will discuss it. I would love for the  
2709 SEC to act on this thing. They have no substantive reason not  
2710 to. They will say that off the record, but for some reason  
2711 they refuse to exercise their regulatory authority on the  
2712 record. Perhaps this debate might encourage them to. So,  
2713 again, at the appropriate time, I think that this would be a  
2714 subject that we could work together on with our colleagues in  
2715 the Senate. Today I am going to oppose the amendment but only  
2716 in a very mild way. Does the gentleman from Michigan wish--

2717 Mr. DINGELL. Mr. Chairman.

2718 Mr. BARTON. The gentleman is recognized for five minutes.

2719 Mr. DINGELL. I rise in support of the amendment offered  
2720 by the gentleman from Massachusetts. I was intrigued by the  
2721 exemption from the Investment Company Act of 1940. This is a  
2722 statute which has been protecting investors, including the  
2723 savings and investments of a lot of us here today, for well  
2724 over half a century. Without government subsidies or taxpayer

2725 credit, investment companies, including the ever popular  
2726 mutual funds, have operated with remarkable safety and  
2727 soundness and have provided capital to meet the needs of a  
2728 growing economy. Why? Because the Investment Company Act  
2729 provides investors with specific protections against  
2730 self-dealing, against conflict of interest, against  
2731 misappropriation of funds, against overreaching with respect  
2732 to fees, expenses and undisclosed risks of many types. The  
2733 SEC has the important job of policing these and other  
2734 requirements, and it has done so both responsibly and  
2735 successfully.

2736 I found that there was an exemption in the offer which is  
2737 now before us, which--and I started hunting around to see who  
2738 it was that was going to benefit from this. There is only  
2739 one company, Western Resources, but it is interesting to note  
2740 that any company which could structure itself to be roughly  
2741 the same as Western Resources could come in under that  
2742 loophole and then could function not just as a manager of  
2743 natural resources but in fact as a mutual fund and could do  
2744 everything that any mutual fund can do, open or closed end  
2745 and would be able then to do so totally without any scrutiny,  
2746 totally without any protection for the investors or anything  
2747 being done by the SEC to prevent the kind of abuses that the  
2748 Investment Company Act was put in place to prevent.

2749 The director of SEC's Division of Investment Management

2750 | informed us in a February 13 memo that there may be hundreds  
2751 | of unregulated investment companies that would result from  
2752 | this exemption. In other words, it isn't just Western  
2753 | Resources that is going to be able to do any kind of  
2754 | rascality they want, totally exempt from the Holding Company  
2755 | Act, but a lot of people are going to be able to come in and  
2756 | do the same kind of mischief, disregarding the needs and the  
2757 | concerns of investors. Now, I would remind everyone here  
2758 | present that the situation in the economy is not good, and  
2759 | one of the reasons is nobody has any confidence in the  
2760 | marketplace. Because of Enron, because of Global Crossing,  
2761 | because of WorldCom and a lot of other people, including the  
2762 | good folks at Tyco who so diligently took advantage of the  
2763 | opportunities to enrich themselves and disregard the  
2764 | well-being of investors, have now shaken the trust of  
2765 | investment public.

2766 |       I have warned the industry time after time, everybody  
2767 | thinks it runs on money. It doesn't. It runs on public  
2768 | confidence. And if there is public confidence, then there  
2769 | will be lots of money made by everybody. The Investment  
2770 | Company Institute very wisely sent us a communication on this  
2771 | in which the head of that institution, Mr. Matt Fink,  
2772 | observed this: The provision would permit this company and  
2773 | perhaps others to operate as a mutual fund, but to be  
2774 | completely free from SEC regulation under the Investment

2775 Company Act. Thus, we are warned. We are not setting up an  
2776 exemption only for Western Resources who may be as virtuous  
2777 as the papacy.

2778 [Laughter.]

2779 Mr. BARTON. Let us hope more virtuous than that.

2780 Mr. DINGELL. But--or a nunnery.

2781 Mr. MARKEY. The Pope is Polish, remember that.

2782 Mr. DINGELL. But even if that is so, we have no  
2783 assurances that this splendid loophole is not going to be  
2784 available to any number of smart rascals, MBAs and others on  
2785 Wall Street and elsewhere so that they can skin the American  
2786 investors in the most scandalous and outrageous ways. The  
2787 amendment gives us firm assurance that we are preventing a  
2788 rich plethora of scandal which will come back to haunt us if  
2789 we don't adopt the amendment. I yield back the balance of my  
2790 time.

2791 Mr. BARTON. Thank the gentleman. I will make one more  
2792 observation, and then we will call the vote. The letter that  
2793 the gentleman referenced from the SEC was based on an earlier  
2794 version of language. The SEC today would tell you in a  
2795 similar letter that this language in the pending proposal  
2796 does in fact deal with just one company. That may be onerous  
2797 but it does just deal with one company. It does not deal  
2798 with potentially hundreds of companies, as that letter  
2799 indicated.

2800 | Is there any other discussion of the pending Markey  
2801 | amendment? The gentleman from Massachusetts.

2802 | Mr. MARKEY. Thank you, Mr. Chairman. First of all, let  
2803 | me insert in the record a letter from the Investment Company  
2804 | Institute--

2805 | Mr. BARTON. Without objection, so ordered.

2806 | Mr. MARKEY. --from the 18th opposing this exemption.

2807 | [The Investment Company Institute letter follows:]

2808 | \*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

2809 Mr. MARKEY. And obviously every other mutual fund company  
2810 in the United States would oppose it, because this one  
2811 company, and everyone else that would slip in under this  
2812 exception because it wouldn't just be one company, would be  
2813 exempt from all of the other requirements that legitimate  
2814 mutual fund companies have to abide by.

2815 Now, you are wondering where are they getting an  
2816 exemption from? So I am about to list for our audience some  
2817 of the legal niceties that they seek to escape by having this  
2818 exemption. They escape oversight by independent directors,  
2819 don't have to do that in that company; bans on affiliated  
2820 transactions; making daily marking to market of assets, won't  
2821 have to do that; no limits on leveraging and no special full  
2822 disclosure requirements, which the other mutual fund  
2823 companies will be required to do. So we start right now, a  
2824 nice set of juicy exemptions that basically--that turn the  
2825 transparency dial down to zero in terms of the world can know  
2826 about what is going on inside of this company.

2827 Moreover, listen to this, the special grandfathered  
2828 investment companies that we are turning this one into that  
2829 could be established pursuant to this would not be subject to  
2830 the restrictions applicable to other investment vehicles,  
2831 such as hedge funds, that currently rely on specific  
2832 exemptions from registration under the 1940 act. They could,  
2833 therefore, engage in some of the risky and speculative

2834 investment strategies pursued by hedge funds with no  
2835 assurance that they would be limited in size, pursuant to  
2836 statutory limits on the number of hedge fund investors or  
2837 restrictions limiting such funds to sophisticated investors.  
2838 All in all, a really, really nice exemption from the laws,  
2839 which you would think somebody would be requesting in 1928,  
2840 you know, right before the 1929 crash, not in the year 2002  
2841 after we have just had the worst crash since that period of  
2842 time in terms of its impact upon investors, especially in the  
2843 areas that this company specifically, and I am sure other  
2844 companies that would follow its lead, seem to have a special  
2845 interest in.

2846 I think it is a terrible, terrible thing for us to be  
2847 doing. We should rely upon the Securities and Exchange  
2848 Commission. If they want to give an exemption because it  
2849 doesn't fit under the historical test as a mutual fund, they  
2850 can do it. But if it does, and my view is that is why they  
2851 are coming to us, but they want to engage in those very same  
2852 activities but without any regulation which is essentially  
2853 what this provision will allow them to do, then it is wrong  
2854 for us to be acting in that special interest way. And so once  
2855 again, I urge support for the Markey amendment.

2856 Mr. BARTON. Clerk will call the roll. All those in favor  
2857 of the Markey amendment will vote aye. All those opposed will  
2858 vote no.

2859 The CLERK. Mr. Tauzin.  
2860 Mr. BARTON. No, by proxy.  
2861 The CLERK. Mr. Tauzin votes no. Mr. Bilirakis.  
2862 Mr. BARTON. No, by proxy.  
2863 The CLERK. Mr. Bilirakis votes no. Mr. Barton.  
2864 Mr. BARTON. No.  
2865 The CLERK. Mr. Barton votes no. Mr. Upton.  
2866 Mr. BARTON. No, by proxy.  
2867 The CLERK. Mr. Upton votes no. Mr. Stearns.  
2868 Mr. BARTON. No, by proxy.  
2869 The CLERK. Mr. Stearns votes no. Mr. Gillmor.  
2870 Mr. BARTON. No, by proxy.  
2871 The CLERK. Mr. Gillmor votes no. Mr. Burr.  
2872 Mr. BARTON. No, by proxy.  
2873 The CLERK. Mr. Burr votes no. Mr. Dingell.  
2874 Mr. BOUCHER. Mr. Dingell votes aye by proxy.  
2875 The CLERK. Mr. Dingell votes aye. Mr. Waxman.  
2876 Mr. BOUCHER. Aye, by proxy.  
2877 The CLERK. Mr. Waxman votes aye. Mr. Markey.  
2878 Mr. MARKEY. Aye.  
2879 The CLERK. Mr. Markey votes aye. Mr. Boucher.  
2880 Mr. BOUCHER. Aye.  
2881 The CLERK. Mr. Boucher votes aye. Mr. Gordon.  
2882 Mr. BOUCHER. Aye, by proxy.  
2883 The CLERK. Mr. Gordon votes aye. Mr. Rush.



2884 Mr. BOUCHER. Aye, by proxy.

2885 The CLERK. Mr. Rush votes aye. Mr. DeLay.

2886 Mr. BARTON. No, by proxy.

2887 The CLERK. Mr. DeLay votes aye--no.

2888 Mr. BARTON. Clerk will report the tally.

2889 The CLERK. Mr. Chairman, on that vote, there were six

2890 ayes and eight nays.

2891 Mr. BARTON. Are there other amendments to the proposal?

2892 Mr. BOUCHER. Mr. Chairman?

2893 Mr. BARTON. Gentleman from Virginia.

2894 Mr. BOUCHER. Mr. Chairman, I have an amendment at the

2895 desk.

2896 Mr. BARTON. Speak into the microphone a little bit more.

2897 Mr. BOUCHER. I have an amendment at the desk. It is

2898 related to FERC merger review authority and the repeal of

2899 that authority by your offer.

2900 Mr. BARTON. The Chair would ask unanimous consent that

2901 the amendment be considered as read, and the clerk will

2902 circulate the amendment, and the gentleman from Virginia is

2903 recognized in support of the amendment for five minutes.

2904 [The Amendment offered by Rick Boucher follows:]

2905 \*\*\*\*\* INSERT \*\*\*\*\*