FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

June 12, 2014

The Honorable Mary L. Landrieu
Chair
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510-6150

Dear Chair Landrieu:

Attached are my responses to the Supplemental Questions for the Record posed by members of the Committee.

Sincerely,

Norman C. Bay
Director
Office of Enforcement

Enclosures

FROM SENATOR MURKOWSKI

(PLEASE ANSWER ANY QUESTION BELOW THAT CALLS FOR A "YES" OR "NO" ANSWER "YES OR "NO" BEFORE ELABORATING. IF YOU DETERMINE THAT YOU CANNOT ANSWER IN THIS MANNER, PLEASE INDICATE WHY YOU CANNOT.)

Norman Bay

Question 1. Do you support Order No. 745 vacated by the United States Court of Appeals in Electric Power Supply Association v. Federal Energy Regulatory Commission (No. 11-1486, decided May 23, 2014)? Do you agree or disagree with the Court's Opinion and its reasoning? Please answer yes or no and explain the basis for your answer, especially with respect to the jurisdictional and compensation issues. If you disagree with the Court's analysis, please outline the basis for your disagreement and your own alternative analysis, giving particular attention to the jurisdictional and compensation issues.

Answer: As I stated in my June 4, 2014 answer to your prior Question 19, my understanding is that the Commission is in the process of reviewing the *Electric Power Supply Association* (*EPSA*) decision. On June 11, 2014, Acting Chairman LaFleur announced that FERC will ask the full U.S. Court of Appeals for the District of Columbia Circuit to rehear *en banc* the *EPSA* decision. If confirmed, and in light of any further actions that the court may take, I would discuss this case with my colleagues on the Commission before making any determinations. In addition, because the court vacated and remanded Order No. 745, pending issuance of the court's corresponding mandate, it would not be appropriate for me to prejudge what further steps I would support, if confirmed.

Question 2. In reference to the above question, if the decision stands, how should the Commission proceed to remedy the resulting impacts to the organized markets?

Answer: See answer to Question 1.

Question 3. As a follow up to my prior question 12 (previously submitted), please identify any policy initiative or rulemaking started or completed by the Commission during the tenure of former Chairman Wellinghoff with which you disagree or from which you would depart as Chairman.

Answer: Any policy initiatives or rulemakings are a product of decisions of the entire Commission. Since I have been the Director of the Office of Enforcement, over 4000 orders, including at least 75 Final Rules and 75 Notices of Proposed Rulemaking, have been issued. If confirmed, my first priority would be to be fair, balanced and pragmatic in addressing issues; to

decide cases on the merits, based on the facts and the law; and to be consensus-oriented. However, it would not be appropriate for me to prejudge how I would decide any matters referenced in your question that are currently pending before the Commission or that may come before the Commission, if confirmed.

Question 4. As a follow up to the discussion that took place during your nomination hearing, since you became head of the Office of Enforcement (OE), how many investigations of any kind has OE itself initiated? Please disaggregate the data when providing your response (e.g., formal and informal investigations; public and non-public investigations; "significant" actions and less than "significant" actions as you were using the term in response to Senator Landrieu at the hearing).

Answer: Since I became the Director of the Office of Enforcement, the office has opened 79 investigations. Two of those investigations were opened as formal non-public investigations and 11 were converted to formal by the Commission during the course of investigation. Two of the investigations were publicly announced by the Commission at the time of initiation. In addition, the Commission publicly referred four matters to the Office of Enforcement to consider whether to open an investigation; in each of those four instances, an investigation was opened following an assessment by OE. With respect to the question concerning "significant" actions, I was referring to those actions that require Commission attention during the investigative process, such as authorizing a formal investigation, granting settlement authority, or later approving a settlement. The Commissioners are informed when an investigation is opened and are briefed by OE staff upon request. In addition, the Commission receives a monthly written non-public report on all pending investigations.

Question 5. By contrast, how many investigations of any kind has the Commission itself initiated during your tenure as OE Director?

Answer: The Commission has directed the Office of Enforcement to open two investigations during my tenure as OE Director. In addition, the Commission has referred four matters to OE to consider whether an investigation should be opened; in each of those four instances, an investigation was opened following an assessment by OE.

Question 6. With respect to the set of 43 proceedings that was the subject of discussion at the hearing, please describe the status of the proceedings and the criteria that you applied to define the set. Please contrast the set of 43 proceedings with other pending investigations of any kind. Please provide data as to how many of the investigations in that set of 43 commenced as a

consequence of a Commission order and how many started with or "bubbled up" from OE. If you must protect the specific identity of the proceeding, please redact accordingly.

Answer: As I stated previously, there were 43 pending investigations in the Office of Enforcement at the time of our discussion at the hearing. The Office of Enforcement has an internal non-public system for tracking the number of pending investigations, and that system was used to identify the 43 investigations. Three of these 43 investigations were commenced pursuant to a Commission order or a Commission referral. The "status" of the investigations varies widely; some were recently opened and in the early fact-finding stages, some have been underway for months or even years, and some are near conclusion. The set of 43 pending investigations does not include matters that are being preliminarily assessed by OE staff but have not yet been opened as investigations. Matters in this category would include, but are not limited to, allegations brought to the attention of OE staff through Hotline calls, self-reports of potential violations from companies, market surveillance, discussions with ISO/RTO personnel and market monitors, and questionable activity uncovered in the course of investigating other matters. Many such matters are reviewed by staff and closed without investigation and without ever being raised to the level of the OE Director. For example, as described in OE's most recent Annual Report, OE staff received 75 new self-reports of potential violations in FY 2013 and closed 94 self-reports, including some that had been pending from FY 2011 and FY 2012.

As a result of its review of facts and defenses, Enforcement staff terminates many matters without opening an investigation. Between 2005 and 2013, for instance, staff received nearly 600 self-reports of potential violations, but converted only 60 of them (10%) to investigations; and of the 160 Hotline calls that staff received in FY 2013 alone, only two resulted in staff opening investigations. And staff's review of relevant facts and circumstances does not end there. Even after investigations are opened, many are ultimately closed with no action (as reported each year in the annual Enforcement Report).

Question 7. As a follow up to my question 12 (previously submitted), under the DOE Organization Act, is the Chairman of FERC vested with the full administrative authority to administer each FERC office? Does the FERC chairman have the authority and the duty to oversee the Office of Enforcement? How has this authority been exercised by the Chairman during your tenure as OE Director? If confirmed and designated Chairman, how would you exercise this authority?

Answer: Under section 401(c) of the Department of Energy Organization Act, the Chairman of FERC is responsible for the executive and administrative operation of the agency. This role includes the selection, appointment, and supervision of personnel employed by or assigned to the Commission, including the Office of Enforcement. To the best of my knowledge, during my tenure as Director of OE, the Chairmen for whom I have served have exercised that authority in a

manner consistent with the statute. If I am confirmed and designated by the President to serve as Chairman of FERC, I will take seriously my executive and administrative responsibilities with respect to all of FERC's component program offices. I also will work closely with my colleagues to maintain the bipartisan consensus on enforcement matters that has characterized nearly all Commission votes on OE investigations during my tenure.

Question 8. As a follow up to my question 12 (previously submitted), what authority, if any, do the Commissioners other than the Chairman have for overseeing and managing the FERC enforcement process? Do the Commissioners other than the Chairman have any authority in overseeing the day-to-day work of OE?

Answer: As explained in my answer to Question 7, under section 401(c) of the DOE Organization Act, the Chairman is responsible for the executive and administrative operation of the agency, including the selection, appointment, and supervision of personnel in the Office of Enforcement. The Commissioners also provide direction and guidance to the Office of Enforcement through the Commission's orders, rulemakings, and policy statements. In addition, Commissioners provide their individual views on enforcement through various means, including public statements, and in individual meetings with the Office of Enforcement staff, and in closed meetings as needed. The Commissioners are informed when an investigation is opened and are briefed by staff upon request. In addition, the Commission receives a monthly written non-public report on all pending investigations. See answer to Question 4.

Question 9. As a follow up to the discussion that took place during your nomination hearing, during your tenure as OE Director, how have settlement negotiations been initiated? How frequently, if at all, has OE staff informed subjects of investigation that, although it lacks or has not yet sought formal settlement authority, it would recommend settlement with distinct attributes or elements? Is this a relatively common practice?

Answer: The Commission's policy is to encourage settlements. *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 at P 33 (2008). As a result, in every matter that has resulted in settlement or that has proceeded to hearing, there have been settlement discussions. The initiation of settlement negotiations varies with the circumstances of the investigations. In most of the investigations, after Enforcement staff has issued its preliminary findings to the subject and received the subject's response, reviewed it and, if staff still determines sanctions are appropriate, staff prepares a memorandum to the Commission seeking settlement authority. After it has obtained Commission authority to discuss settlement (the Commission authorizes a range and certain terms), staff communicates that fact to the subject to see if they wish to discuss settlement. If the subject does not wish to negotiate a settlement, staff will proceed to prepare the 1b.19 (Wells) notice.

Subjects of investigations have frequently approached Enforcement staff to discuss a settlement – either before or after Enforcement staff has presented its preliminary findings. Doing so can help streamline the enforcement process and lead to prompter resolution of a matter, which many subjects seek. In those cases, staff engaged in such discussions but informed the subject that staff does not yet have Commission settlement authority. In that context, if staff and the subject discussed terms that staff believed were reasonable and fair, consistent with what it learned in its investigation, staff would inform the subject that staff would be willing to recommend certain settlement parameters to the Commission but could not know whether the Commission would accept the staff's recommendation. In those cases, staff prepared a settlement memorandum to the Commission seeking settlement authority, including the subject's proposal in the memorandum.

Question 10. As a follow up to my question 11 (previously submitted), would you support the reforms suggested in The FERC Enforcement Process: Time for Structural Due Process and Substantive Reforms, 35 Energy Law Journal No. 1 (2014) ("ELJ Article") and, if not, what alternative changes, if any, would you suggest? Would you support -- and if not, what alternative, if any, would you offer specifically -- as to each of the following:[1]

a. granting additional discovery rights to the subjects of investigations;

b. adopting limitations on the scope of enforcement staff discovery;

c. permitting the appointment of an Administrative Law Judge as a discovery master in non-public investigations;

d. granting subjects of investigation more prompt access to the transcripts of their depositions upon request as FERC regulations currently provide;

e. amending discovery practices and applying the Commission's settlement rule to enforcement settlements;

f. clarifying and confirming the position of the Commission with respect to de novo review of civil penalties;

g. clarifying the application of penalty guidelines and the calculation of penalties;

h. clarifying the terms under which matters and persons or entities under investigation are disclosed publically;

[1] If you would not support any reform with respect to any one of the enumerated ideas, please say so

i. clarifying and applying more regularly the "safe harbor" provisions in Order No. 670; j. defining market manipulation more clearly so that parties have clear notice of permissible and impermissible behavior.

Answer: During my tenure as OE Director, matters have been raised that relate to process questions. I have carefully considered them with staff and addressed them in a fair manner consistent with the law and the Commission's policies and procedures. For example, the issue of timing of access to transcripts has been litigated, non-publicly, before the Commission and a majority of the Commission has explicitly affirmed the Office of Enforcement's ability to temporarily withhold a transcript, or access to a transcript, in appropriate circumstances. As I previously stated in my June 4, 2014 answer to your prior Question 11, I am, and always have been, committed to ensuring that the rules and processes employed by the Office of Enforcement in its investigations are fair, workable, and efficient. Throughout my tenure as Director, I have continuously explored ways to improve the enforcement program, and have routinely sought the views of interested persons, both inside and outside FERC. However, as I explained in greater detail in my June 4, 2014 answer, I believe that the Energy Law Journal article referenced in your question is fundamentally flawed and contains many legal and factual errors. I do not believe it would be appropriate to commit to supporting reforms that are based on such erroneous legal and factual assertions. I also believe that FERC provides ample process to subjects – more process than is required by the Due Process Clause or the Administrative Procedure Act. Having said that, if confirmed, I remain open to a dialogue on any reforms based on legitimate concerns and suggestions that are consistent with administrative enforcement principles as directed by the Commission and would discuss this matter with my colleagues on the Commission before making any determinations.

Question 11. In light of your answers to my question 11 (previously submitted),: Has a single due process concern about the practice or conduct of OE staff (e.g., such as asserted in the ELJ Article noted above) come to your attention during your tenure as Enforcement Director? If so, did you find the concern or concerns to be valid? In that case, did you take steps to address the concern? If you lacked authority to address such a concern or believed it would otherwise have to be addressed by the Commission would you have brought the concern to the attention of the Chairman and/or Commission so that it might be addressed? Please provide examples of due process concerns such as those outlined in the ELJ Article that you addressed directly or brought to the Commission for resolution.

Answer: As explained in greater detail in my June 4, 2014 answer to your prior Question 11, I believe the Energy Law Journal article referenced in your question is fundamentally flawed and contains many legal and factual errors. I also believe that FERC provides ample process to subjects – more process than is required by the Due Process Clause or the Administrative Procedure Act. As I stated in my June 4, 2014 answer, and restate here, throughout my career,

including my tenure as Director of the Office of Enforcement, I have always tried to see how the rules and policies in government can be made more efficient, workable, and fair. I have been, and will continue to be, committed to the fundamental principle of protecting due process rights. If confirmed, I would listen to and fairly consider constructive suggestions on how the Commission can improve the manner in which it conducts its enforcement program. If confirmed, I would discuss this matter with my colleagues on the Commission before making any determinations.

Question 12. As a follow up to my question 11 (previously submitted), does the OE Director have authority to direct the OE staff with respect to providing exculpatory evidence or deposition transcripts to the subjects of investigations? If not, what additional authority would the OE Director need to address conduct related to exculpatory evidence or deposition transcripts such as that asserted in the ELJ Article noted above if the OE Director found the concern to be justified?

Answer: I believe that the Commission's Director of the Office of Enforcement has sufficient authority to direct the staff of the Office of Enforcement with respect to the conduct of investigations consistent with the Commission's *Policy Statement on Disclosure of Exculpatory Materials* and the Commission's rules governing witness's access to transcripts.

Question 13. In response to QFR 11(e) you stated that "in the vast majority of cases deposition transcripts are released to the person who has been deposed, though in a small number of cases Enforcement will temporarily deny a request for a transcript when there is a serious concern over protecting the integrity of the investigation." Please provide data to support your answer, including when during the investigation the transcripts have been provided or made available.

Answer: As noted in my answer to Question 4, OE has opened 79 investigations during my tenure as OE Director. According to records from the Division of Investigations, OE has temporarily denied access to a transcript upon request in nine investigations during my tenure. See my answer to Question 15 for a summary of those investigations in which access was temporarily delayed.

Question 14. In your response to QFR 11(e) you cite Commission regulation 18 CFR § 1b.12 for the authority for the "office responsible for the investigation may for good cause deny such request" for a deposition transcript. At the hearing, you testified that "transcript access can be denied if there is a concern over the integrity of the investigation." What is the process for determining if "concern over the integrity of the investigation" rises to the level of "good cause"

as required by the applicable regulation? How often has OE invoked "good cause" to deny access to deposition transcripts during your tenure as OE Director?

Answer: In the vast majority of cases, when a witness (or more commonly, the witness's attorney) requests a copy of his or her deposition transcript, it is provided immediately, or as soon as the transcript is available from the court reporting service. In a small number of cases, the Office of Enforcement has temporarily denied such a request, as provided for in 18 CFR § 1b.12, where it has had serious concerns about protecting the integrity of its investigation. Such a decision is made on a case-by-case, witness-by-witness basis and is carefully reviewed. As noted in my answer to Question 13, OE has temporarily denied access to a transcript upon request in nine investigations. Examples of "good cause" include situations where there is reason to believe that a witness may use the transcript to help develop false testimony; where the witness may use the transcript to coach another witness (in contravention of the Commission's witness sequestration rule); and where a witness may be intimidated or unwilling to testify fully and truthfully due to pressure from his or her employer, who may demand copies of the deposition transcripts from the employee. The timing issue of access to transcripts has been litigated, non-publicly, before the Commission and a majority of the Commission has explicitly affirmed the Office of Enforcement's ability to temporarily withhold a transcript, or access to a transcript, in appropriate circumstances.

It is also important to note, as I stated at the hearing, that every witness who appears for a deposition at FERC is entitled to counsel and virtually every witness appears with counsel. Such counsel, along with any co-counsel or paralegals who attend the deposition, are entitled to take notes throughout the course of the deposition.

Question 15. You also testified that "where access to the transcript may be delayed, eventually it is released. It is a question of when." Please provide data concerning the number of deposition requests, the number of depositions provided within the time requested, and the number delayed. Please also provide, along with case-specific explanations for each such delay, the number of cases where access to transcripts was delayed and provide data about the time that elapsed between the time of the deposition and the time that transcripts were made available to the person deposed. Also, please state whether it is fair to assume that deposition transcripts were promptly provided in any case not addressed in your answer to this question. If the question calls for confidential information, please redact the confidential information (e.g., case names).

Answer: As noted in my answer to Question 13, OE has opened 79 investigations during my tenure as OE Director. In the vast majority of those investigations, OE has taken depositions of key witnesses and has routinely provided transcripts upon request. Based on records from the Division of Investigations, OE staff has taken over 330 depositions since I have been OE Director. Staff has temporarily delayed access to a transcript upon request in just nine

investigations during my tenure. In several of these nine investigations, staff provided transcripts (or transcript access) immediately upon request for some witnesses but temporarily denied access for other witnesses – because any decision to delay access is made on a witness-by-witness basis. In each instance where access was temporarily delayed, staff had concerns over the integrity of the investigation, as described in my answer to Question 14. The time that elapsed between a transcript request and granting of access varied among the nine investigations. For example, in one investigation, access was delayed for five witnesses for periods of 31 days, 43 days, 69 days, 79 days, and 15 months.

Some delays occur because of actions taken by the witness or counsel. In one of the nine cases, for example, a witness agreed three times to appear on a specific date for his deposition, but reneged on all three occasions. He then filed non-public litigation before the Commission to prevent the deposition; when the Commission unanimously ordered him to appear for his deposition, he still refused. OE staff was then forced to go to federal district court to try to compel his appearance.

As discussed in my June 4, 2014 answer to previously submitted Question 11.e, FERC practice is not an outlier among enforcement agencies in this area.

Question 16. As a follow up to the discussion that took place during your nomination hearing, what authority does the Commission have to reform the process and procedures followed by its Enforcement staff? Please explain.

Answer: The Commission established the processes and procedures followed by the Office of Enforcement, pursuant to its statutory authority, through its orders, rulemakings, and policy statements and it may modify those processes and procedures through those means.

Question 17. As a follow up to the discussion that took place during your nomination hearing, if you are confirmed and designated Chairman, would you adopt reforms in the administration of the enforcement program? If so, what changes would you make other than any that you have already outlined in response to these questions?

Answer: As I stated in the answer to Question 11 above and in the June 4, 2014 answer to previously submitted Question 11, if confirmed, I would be open to considering how the Commission does its work and always willing to listen to and consider constructive suggestions. If confirmed, I would discuss this matter with my colleagues on the Commission before making any determinations.

Question 18. As a follow up to the discussion that took place during your nomination hearing, would you reform Commission rules to grant, earlier in the process, persons subject to investigation with equal access to the Commissioners, establishing a firewall between the Commission and Enforcement staff earlier in the investigation process? And, if not, why not? Please explain.

Answer: See my June 4, 2014 answer to your prior Question 11.f. The Commission's determinations regarding access to the Commissioners by subjects of an investigation and separation of functions in investigative matters are the subjects of various existing rules and policy statements. If confirmed, I would discuss this matter with my colleagues on the Commission before making any determinations.

Question 19. As a follow up to my question 24 (previously submitted), what are the clear defenses and safe harbors with respect to "market manipulation"? Please explain and list all defenses and safe harbors. In response to QFR 11(c) you noted the Commission's previous statement in Order No. 670 that "If a market participant undertakes an action or transaction that is explicitly contemplated in Commission-approved rules and regulation, we will presume that the market participant is not in violation of the Final Rule." In explaining this Commission statement, you further note that "while a finding of market manipulation is not warranted when a subject acts in a manner that is explicitly contemplated in Commission- approved rules and regulation, it is also true that finding of market manipulation does not require any violation of a specific market rule or tariff." What, if any, is the difference between actions "explicitly contemplated" by the Commission and actions that are allowed under the Rules? If a market participant acts within the FERC rules but the action in question was not "explicitly contemplated" by the Commission, could such action rise to the level of market manipulation? Please explain.

Answer: In 2006, the Commission rescinded prior Market Behavior Rules 2 and 6 that existed before the Commission adopted the Anti-Manipulation Rule. *Order Revising Market-Based Rate Tariffs and Authorizations*, 114 FERC ¶ 61,165 (February 16, 2006). In that proceeding, several commenters argued that actions taken at the direction of a Commission-approved ISO or RTO should have explicit safe harbor status because market participants should be able to rely on the directives of an ISO or RTO without fear of prosecution for market manipulation for following such provisions. *Id*. at P 26. The Commission disagreed, reasoning as follows:

> As the Commission stated in Order No. 670, if a market participant undertakes an action or transaction that is explicitly contemplated in Commission-approved rules and regulations, we will presume that the market participant is not in violation of section 1c.2. If a market participant undertakes an action or transaction at the direction of an ISO or RTO that is not approved by the Commission, the market participant can assert this as a

> defense for the action taken. Of course, if a market participant acting with the requisite scienter has provided inaccurate or incomplete information to the ISO or RTO, and the ISO and RTO acts in reliance on the false or incomplete information, following such ISO or RTO directions is no defense to such manipulative conduct for that market participant. Just as we reject calls for inclusion of a list of prohibited conduct in section 1c.2, we similarly reject a list-type approach to defenses. Instead, we will evaluate all of the facts and circumstances of an allegation of market manipulation before deciding how to proceed. *Id.* at P 27 (emphasis added, footnote omitted).

The nature of 1c's prohibition "is very fact-specific, the very permutations of which are limited only by the imagination of the perpetrator." *Id*. at P 24. Or, as has been said in securities cases involving 10b-5, on which the Commission's Anti-Manipulation Rule is modeled, and which is broad by design to capture all forms of market manipulation: "The methods and techniques of manipulation are limited only by the ingenuity of man." *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971). *See also United States v. Arcadipane*, 41 F.3d 1, 5 (1st Cir. 1994) ("Fair warning, however, does not mean that the first bite is free, nor does the doctrine demand an explicit or personalized warning.").

Question 20. As a follow up to my question 46 (previously submitted), please explain whether, and if so how, the position that OE attorneys are taking in recent federal district court litigation concerning de novo review of enforcement findings/penalties is consistent with any Commission precedent on the subject of de novo review. Is it correct to assume that you support these positions? What role, if any, have you had in developing these positions?

Answer: FERC has set forth an interpretation of section 31(d)(3) of the Federal Power Act in several recent federal court proceedings. The text of the statute provides that, when a subject elects the federal court penalty assessment review option:

> If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (A), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in Part, such assessment. (emphasis added).

Thus, the plain language of the statute provides for *de novo* "review," not *de novo* "trial."

This statutory provision clearly provides that a federal court has the authority to review the law and the facts underlying the penalty assessment *de novo*. It does not state that the district court should simply affirm the penalty assessment without review or follow the same approach it would in a case under the Administrative Procedure Act – and FERC has not argued otherwise.

FERC has argued that, in conducting the *de novo* review, the federal court can, and should, limit its review to the Commission's assessment order and the record and briefing underlying that order. But FERC has also argued that the court has authority to require additional hearings, including a trial, if the court determines that would be useful in carrying out its section 31(d)(3) review. Ultimately, the federal courts will decide what this statutory provision means, and FERC will of course abide by those decisions.

Yes, it is correct to assume that I support the positions taken in the matters currently pending in federal district court. I reviewed the pleadings before they were filed and I discussed these issues with OE staff and others within FERC.

There is no controlling Commission precedent on point. Although the Commission did refer to section 504 of the Natural Gas Policy Act of 1978 (NGPA) as providing for a "trial de novo" in *Energy Transfer Partners* (ETP), the Commission was not interpreting the statutory language of the NGPA when it made that comment. *Energy Transfer Partners*, 121 FERC ¶ 61,282 (2007). Rather, in that case, ETP was asking the Commission for a rehearing on the Order to Show Cause to allow it to seek a *de novo* review in the federal district court immediately—prior to the Commission even deciding whether a civil penalty should be assessed. The Commission disagreed and found that the section 504 of the NGPA did not preclude the Commission from holding an ALJ hearing prior to assessing a penalty. Thus, the Commission was not interpreting the language of 504 as it related to what "review de novo" means. The language it used in the order, "trial de novo," was more of a short-hand phrase used to explain that the subject will be permitted a district court review following the penalty assessment.

Question 21. You testified that "the PJM market monitor referred the 'up-to-congestion matter' to the Commission." Did the PJM market monitor take the position that the "utc" trades violated a commission rule? Did the market monitor recommend enforcement action? And, if so, on what basis? Is the Commission order you referenced in the public domain. If so, please provide it. If not, please explain why not.

Answer: In PJM's public filing seeking a tariff amendment to help prevent further similar conduct, PJM alleged "trades that were undertaken with the intent of manipulating PJM market rules so as to gain an allocation of marginal loss surplus revenue without any corresponding usage of the transmission system." PJM Interconnection, L.L.C., Tariff Filing, Docket No. ER10-2280, at 6 (filed August 18, 2010).

The Commission order I referred to that authorized the Office of Enforcement to conduct the up-to-congestion investigation is the Order of Non-Public, Formal Investigation, which can be found at 132 FERC ¶ 61,169 (August 25, 2010). That order is available at http://www.ferc.gov/EventCalendar/Files/20100825171848-IN10-5-000.pdf.

I cannot discuss the content of the PJM market monitor's referral because it remains a non-public document.

Question 22. As a follow up to my question 8 (previously submitted), in the event of a conflict between an EPA rule and a FERC reliability standard, rule, concern or obligation, what actions, if any, would you take beyond engaging in the consultations you outlined during the hearing? This week, EPA issued a proposed rule on new source performance standards for existing coal fired electric generating units that imposes obligations that would lead to or force retirements of generation units or stations or lead to service curtailments of electric generating units likely to impair reliability. Do you believe this proposed rule will result in reliability impacts? Please explain your answer fully. If so, what actions would you take to preserve reliability? Would you use the full extent of FERC's authority, as a practical matter to -- as Senator Manchin asked during the hearing -- "overrule" or "not to adhere" to, as he put it, "where the EPA might want to go versus . . . reliability"? If not, why not? Does FERC require additional authority in order to stand "shoulder-to-shoulder" with EPA?

Answer: As you point out, the Environmental Protection Agency (EPA) issued its proposed rules for greenhouse gas emissions from existing sources on June 2, 2014 and I have not yet had an opportunity to fully review that proposal. That said, my understanding is that EPA's proposal offers broad flexibilities that will empower states to design state implementation plans that ensure resource adequacy and reliability. The proposal does not impose any plant-specific requirements, so any generating units needed to ensure reserve margins can remain in service to meet peak loads even if they are dispatched less intensively in order to reach state-wide emissions targets. In addition, the proposal does not require any compliance until 2020, and it gives states flexibility over a ten-year period through 2029 to reach their overall emission rate targets. However, if confirmed, I would monitor this issue and engage with a range of entities, including state officials, NERC, RTOs/ISOs, and industry. Adequate planning can help anticipate and address any potential implications for resource adequacy and reliability.

The Commission does not have the authority over what rules the EPA ultimately promulgates. However, if confirmed, I believe that FERC must continue to work closely with the EPA throughout this process. I recognize that EPA has responsibilities under the Clean Air Act and other legislation. The Commission has a similar, and no less important, responsibility to help maintain the reliability of the bulk-power system. During this process, if confirmed, I believe it will be important for FERC to raise any potential reliability matters. I do not believe that FERC needs new authority to do this.

Question 23. As a follow up to my question 8 (previously submitted), many statutes require one agency to interact with another to balance important federal policy goals. For example, Section 404 of the Clean Water Act grants EPA, in effect, the power to "veto" certain permits issued by the Army Corps of Engineers. Should Congress grant FERC additional authority along such

lines or any other to protect electric reliability in the face of federal policies that would impair it? What steps would you take to assert and ensure, with respect to regulations proposed by the EPA or other federal agencies, FERC's statutory responsibility for the reliability of the electric grid?

Answer: See answer to Question 22. If confirmed, I believe that FERC must continue to work closely with the EPA throughout this process. I recognize that EPA has responsibilities under the Clean Air Act and other legislation. The Commission has a similar, and no less important, responsibility to help maintain the reliability of the bulk-power system. During this process, if confirmed, I believe it will be important for FERC to raise any potential reliability matters with the EPA. I do not believe that FERC needs new authority to do this.

Question 24. As a follow up to my question 8 (previously submitted), please state what you know about the negotiations/discussions between FERC and EPA about the appropriate role of FERC and NERC in the EPA's consideration of the potential reliability impacts of EPA's proposed Clean Air Act regulations affecting existing coal power plants. Please also provide a copy of the "staff document" that you referred to in your answers for the record of the hearing with respect to the interactions between EPA and FERC.

a. What is or was your position on the appropriate role for FERC and NERC in the EPA's consideration of the potential reliability impacts of its proposed Clean Air Act regulations affecting existing coal plants?

Answer: I believe that FERC must continue to work closely with the EPA, NERC, and others throughout this process, to fulfill its responsibility to help maintain the reliability of the bulk-power system. My understanding is that Acting Chairman LaFleur has provided you a copy of the joint staff document.

b. Do you or did you support the proposals of other Commissioners whether in internal FERC discussions or otherwise that FERC and NERC should have a robust and effective role? If so why and if not, why not?

Answer: I believe that FERC and NERC must continue to work closely with the EPA and others throughout this process.

c. If you had been Chairman at that time, what would have been your position on the appropriate roles of FERC and NERC in the EPA rulemaking process concerning EPA's "MATS" rule.

Answer: I believe that FERC and NERC must continue to work closely with the EPA and others throughout this process. The EPA's rules on power plant emissions of mercury and air toxics (MATS) explicitly recognized the need to maintain a reliable bulk-power system and, to do so, encouraged applicable authorities to grant "fourth-year" extensions of compliance obligations in

most circumstances, and many of these authorities have done so. EPA also prescribed a process for granting "fifth-year" extensions when needed for reliability, including considering input from the Commission and others, such as NERC, on reliability issues. In response, the Commission issued a policy statement providing for how it will provide advice to the EPA for it to rule on requests for such "fifth-year" extensions. I support the Commission's Policy Statement on this matter.

> d. If you are confirmed, what will be your position about the FERC and NERC roles with regard to the reliability impacts of EPA's impending regulation of GHG emissions from existing coal power plants? If you believe your position has been entirely and accurately stated in your prior answers to questions in connection with this hearing, please identify the answers.

Answer: Please see my answers above and to previously submitted Question 8.

Question 25. Have you reviewed my White Paper entitled Powering the Future: Ensuring the Federal Policy Fully Supports Electric Reliability? If not, please see http://www.energy.senate.gov/public/index.cfm/powering-the-future . Please provide your position on the recommendations in that White Paper. Would you take the same position if confirmed and designated Chairman? If not, why not?

Answer: Yes, I have reviewed your White Paper. I strongly agree with your core recommendations (on page 16) that the "reliability of electric service, along with its affordability and environmental performance, must be continuously maintained and improved," and that "[i]ndustry, regulators, and other leaders should share their candid views," on the effects of EPA rulemakings. I would take the same position if confirmed. I am still considering your more specific recommendations, but definitely support the concept of ongoing engagement by FERC with EPA, to ensure that EPA continues to closely consider reliability in its regulatory actions.

Question 26. As a follow up to my question 8 (previously submitted), what is your position with regard to the respective jurisdictions of FERC and State PUC's with regard to electric reliability impacts of EPA regulations of existing coal plants? Would you support the adoption of a formal documented process for consultation between FERC and EPA or FERC and the States? If so, what process would you support?

Answer: As I stated in the June 4, 2014 answer to previously submitted Question 8, the FERC, EPA, and DOE have communicated often regarding the potential reliability impacts of the EPA's power sector regulations and have a joint staff document that describes how the agencies will monitor the power sector's progress in responding to certain EPA regulations affecting the

electric power sector. With respect to consultation between FERC and the states, in 2012, FERC and NARUC formed a Forum on Reliability and the Environment to discuss these issues, which are now included in a regular NARUC committee. It is important for FERC and state regulators to have a cooperative relationship while respecting each other's jurisdiction. If confirmed, I look forward to working with my state colleagues, including through coordination with the NARUC.

Question 27. More generally, what is your regulatory philosophy for the comity between FERC and State PUC's individually and their NARUC association? Have you ever attended a NARUC meeting of any kind? Have you ever met with any State PUC in your FERC official capacity?

Answer: Because both FERC and state regulators are charged with protecting the public interest, they share a common interest and responsibility. It is important for FERC and state regulators to have a cooperative relationship while respecting each other's jurisdiction. If confirmed, I look forward to working with my state colleagues, including through coordination with the National Association of Regulatory Utility Commissioners (NARUC). While I have not attended a NARUC meeting, I have met with a number of state commissioners and staff in my official FERC capacity. I have also participated in FERC technical conferences that included commissioners from a number of state commissions.

Question 28. Are you familiar with the FERC-NARUC Collaborative on the electric and gas interface? Please state your views on the value of the collaborative and on the issue of gas and electric coordination.

Answer: I am familiar with the Emerging Issues Collaborative, which recently held a panel titled Gas and Electric Interdependencies – Coordination Issues. I believe it is important for FERC and state regulators to have a cooperative relationship while respecting each other's jurisdiction. If confirmed, I look forward to working with my state colleagues on gas-electric coordination issues, including through coordination with the NARUC.

Question 29. In your experience as United States Attorney in New Mexico, as counsel to Sandia National Laboratory or at any other time in your career, have you had any experience with the creation, classification, handling or mishandling of information classified for national security purposes? If so, what is the standard that applies -- and what, in your view, is the standard that should apply -- to determine whether a person suspected of mishandling or wrongfully disclosing classified information should be prosecuted to the full extent of the law?

Answer: During my service as United States Attorney in New Mexico and at other times during my career, I have had experience with the creation, classification, handling or mishandling of

information classified for national security purposes. Depending on the specific facts of a case, there are several federal statutes that potentially could be applied in the prosecution of person accused of mishandling or wrongfully disclosing classified information. FERC does not have criminal jurisdiction, and, as an institutional matter, the Department of Justice is uniquely situated to address the standards that should be applied in such situations.

Question 30. Have you read or reviewed Management Alert: DOE/IG-0906 (see http://energy.gov/ig/downloads/management-alert-doeig-0906)? What is your judgment about the Management Alert referenced above, its conclusions, and the Commission's course of conduct on the matters covered by the Alert up to and including the present?

Answer: While I have read the DOE IG Management Alert, I have not been involved in either the matters covered by the Alert or the Commission's response to that issuance. Therefore, I am not in a position to state an opinion on the DOE IG Management Alert or the Commission's response. That being said, I recognize the importance of protecting sensitive information and support efforts to ensure that it is properly safeguarded.

Question 31. At any time, were you consulted or were you views sought or did you offer your views, informally, indirectly, formally or directly by any other person or former official or employee of the FERC or any other Federal Agency concerning the Management Alert referenced above and studies and documents that are in any manner related to the Management Alert? If so, who consulted you or sought your views or to whom did you offer your views? At what time did the exchange(s) take place?

Question 32. Did you ever offer your views concerning whether documents referenced by the Management Alert or related in any matter to it should have been classified?

Answer (31-32): The DOE Inspector General Management Alert stated that "the Department's subject matter experts have confirmed that at least one electric grid-related presentation created by the Commission staff should have been classified and protected from release at the time it was created." I have never seen the presentation referred to in the Management Alert. As a result, if confirmed, I will carefully review the DOE Inspector General's final report on this matter. I will also carefully consider the views of all relevant classification authorities.

Question 33. The Department of Energy proposed a procedural change to its LNG export licensing process on May 29, 2014, which eliminates the conditional license and states the Department will only issue final licenses upon completion of NEPA review.

a. Was FERC consulted by DOE about this proposal before it was announced? If so, when, and in what context?

Answer: I do not know if FERC was consulted on this proposal before it was announced.

b. Do you have an opinion about this proposal? If so, did you have an opportunity to express it to DOE?

Answer: My initial impression is that the new DOE policy will not change the manner in which the Commission reviews and acts upon applications to site LNG facilities. I have not spoken to DOE about this matter.

c. FERC has, to date, not considered life-cycle greenhouse gas emissions as part of the NEPA review. Do you believe this policy should be changed in any way?

Answer: The Commission does consider the greenhouse gas emissions of the facilities it authorizes. For natural gas pipelines, greenhouse gas emissions are normally temporary and are limited to the duration of construction, and these emissions are considered in the Commission's NEPA analysis. For projects that involve large stationary sources of emissions, such as LNG facilities and compressor stations, the Commission's analysis considers greenhouse gas emissions for the entire life of the facilities. The analysis compares the emissions to existing standards and reporting thresholds. If appropriate, the Commission will impose mitigation measures to reduce emissions. However, the Commission does not set air quality standards. Those standards are established by the states acting under delegated authority from the EPA or by the EPA itself. As a general matter, the Commission has found that the natural gas projects that it authorizes, with appropriate mitigation, will not have significant air quality impacts. However, this issue is pending before the Commission, so I cannot comment on any specific proposal.

Question 35. As a follow up to my question 6 (previously submitted), when asked if your decision to decline to recuse yourself would be appealable, you answered "Depending on the facts and circumstances of the matter, my decision not to recuse myself, if I am confirmed, may be appealable."

a. What facts and circumstances would warrant a review of your decision not to recuse yourself?

Answer: FERC adheres to the Standards of Conduct for Employees of the Executive Branch. *See* 5 CFR Part 2635. Under the Standards of Conduct, employees must recuse themselves to avoid conflicting financial interests (5 CFR § 2635.401 and 402), or loss of impartiality based on personal and business relationships (5 CFR § 2635.501 and 502). Employees must also avoid actions that would give the appearance of an ethical violation. The ethics regulation provides specific criteria for determining whether a recusal is required. As I stated in my previous answer, the ethics regulation, 5 CFR § 2635.502, provides that:

> where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph d of this section.

Whether or not a failure to recuse is appealable depends on the facts and circumstances of the case and whether or not a person believes there has been a violation of the applicable ethics laws.

b. Why shouldn't a reasonable person conclude that a person moving from Director of Enforcement directly to Chair of the Commission would recuse himself, as Chair, from any role in any matter that was underway within the Office of Enforcement during his tenure as Director of Enforcement, either because of an actual conflict or the appearance of a conflict?
c. Why would you decline (if you would) to recuse yourself from any such matter in order to provide absolute confidence to parties before the Commission that all matters before the Commission being handled fairly? If not, please elaborate what "bending over backwards to ensure fairness might mean in this context?

Answer (b –c): I am committed to avoiding any action that would present an actual conflict of interest or the appearance of a conflict. Consultation with the DAEO and any other appropriate officials is critical to making such a determination. If confirmed, I would recuse myself from matters as required by any applicable ethics rules.

d. Will you be more specific about your personal standard on recusals and the scope of matters from which you would recuse before the vote in Committee on your confirmation?

Answer: See answer to Question 35.a.

> e. What is the standard for appeal of a recusal decision by a Commissioner? How would your decision be appealed? What time limits would govern?

Answer: Any party may request recusal of a Commissioner. If the request is denied, the issue may be raised on rehearing and ultimately in a judicial appeal. The timing would be governed by the rules of the applicable forum.

> f. I previously inquired if you would be willing to work with the Department of Justice, in addition to other entities, to determine whether you should recuse yourself from any and all cases in which you have been involved prior to taking the Oath of Office if confirmed. Your answer did not list the Justice Department as an entity you would work with. Are you willing to work with the Department of Justice to determine whether you should recuse yourself from any and all cases in which you have been involved prior to taking the Oath of Office if confirmed?

Answer: As I said previously, if confirmed, I am committed to working with the FERC Office of General Counsel (OGC), including the Designated Agency Ethics Official (DAEO), as to all ethics issues. In consultation with OGC and the DAEO, I said that I would work with any other appropriate entities if specific circumstances warranted such consultation. According to the DAEO, DOJ has no role in FERC recusal decisions.

Question 36. With request to my earlier question 5 (previously submitted), please list the names of the FERC employees who worked on the merger review proceeding and the enforcement proceeding referenced in that question. Also with respect to the same question, please take whatever steps you deem appropriate to refresh your recollection.

Answer: Nobody in the Office of Enforcement was assigned to work on the merger in Docket No. EL11-83. The merger review was led by staff from the Commission's offices of General Counsel and Energy Market Regulation, while the investigation into Constellation Energy Commodities Group trading activities in Docket No. IN12-7 was conducted separately by staff from the Office of Enforcement. I do not think it would be appropriate for me to provide the names of staff publicly.

FROM SENATOR BARRASSO

Norman Bay

Question 1. In your response to Question 1.A. and 1.C., you state that you are:

> *"not aware of any instance in which Enforcement staff has failed to produce exculpatory documents when requested."*

In your response to Question 1.B. and 1.F., you state that you are:

"not aware of any instance in which Enforcement staff has failed to produce exculpatory materials."

I would like you to clarify your response.

a. Is it true (yes or no) that during your tenure as Director of Enforcement the Enforcement Staff has never failed to produce to all investigation subjects, in a timely manner, documents that are exculpatory, potentially exculpatory, or otherwise "favorable to the defense" (as required by *Brady v. Maryland*, 373 U.S. 83 (1963))?

Answer: As I stated previously, I am not aware of any instance in which Enforcement staff has failed to produce exculpatory documents as required by the Commission's policy. See my June 4, 2014 answer to your prior Question 1. Enforcement staff follows the Commission's *Policy Statement on Disclosure of Exculpatory Materials* issued December 17, 2009. Two clarifications are necessary regarding your question. First, the Commission clearly stated its view that application of the *Brady* doctrine, while constitutionally mandated in criminal cases like *Brady* itself, is not required in administrative proceedings. Second, the Commission's Policy Statement does not use the phrase "exculpatory, potentially exculpatory, or otherwise 'favorable to the defense.'" The Commission was quite specific about what is required under the policy and what is not, and Enforcement Staff follows that guidance. In most of FERC's enforcement cases, there is no exculpatory information subject to disclosure under the Commission's policy.

Question 2. In your response to Question 1, you state that prior to the adoption of the Commission's written policy statement concerning the disclosure of exculpatory evidence on December 17, 2009:

"Enforcement staff had a longstanding practice of disclosing such evidence."

a. Is it true (yes or no) that on June 4, 2009 (as confirmed in a June 9, 2009 order) a FERC administrative law judge had to order FERC Enforcement Staff, over FERC Enforcement Staff's objections, to search for "exculpatory or potentially exculpatory material"? Energy Transfer Partners, Order Confirming Rulings at Hearing, FERC Docket No. IN06-03 (June 9, 2009).

i. If your answer is "no," please provide evidence and explain in detail why it is not true.

ii. If your answer is "yes," please explain in detail how FERC had a "longstanding practice of disclosing" exculpatory evidence if an administrative law judge had to order the Enforcement Staff to search for such material.

Answer: The ALJ's order in the *Energy Transfer Partners* case is consistent with my prior answer that FERC enforcement staff had a longstanding practice of disclosing exculpatory evidence prior to the Commission adopting its Policy Statement on Disclosure of Exculpatory

Materials. In that case, Energy Transfer Partners (ETP) argued that Enforcement staff should turn over not only actual exculpatory material called for by *Brady*, but also materials that went beyond *Brady*, such as staff work product that was prepared during the investigation or for trial. Staff objected not to disclosing exculpatory material, but rather to material that went beyond what *Brady* requires. Indeed, Enforcement staff in its response to ETP's arguments, stated "Staff has looked for exculpatory or potentially exculpatory evidence since day one of this investigation and has found none." ("Opposition By Enforcement Litigation Staff to Energy Transfer Partners, L.P.'s Motion to Compel Responses to Thirteenth Set of Data Requests, filed June 3, 2009 in FERC Docket IN06-3, citing Affidavit of John Kroeger.")

Further, the ALJ's June 9, 2009 decision recognized the "questionable applicability of *Brady* to administrative proceedings hearings in general and to this proceeding specifically [and thus] determin[ed] that the Commission should have the opportunity to address [the] issue of first impression." Energy Transfer Partners, Order Confirming Rulings at Hearing, FERC Docket No. IN06-03 (June 9, 2009) at P 3. Accordingly, the ALJ did not order disclosure to ETP of the materials it requested, but rather ordered Enforcement staff to locate certain materials and provide them to the ALJ *in camera. Id.* at P 5.

Finally, in the Commission's *Policy Statement on Disclosure of Exculpatory Materials* subsequently adopted, the Commission expressly noted that:

> The longstanding practice of staff in the Commission's Office of Enforcement (Enforcement staff) has been to provide the subjects of its investigations [exculpatory] evidence in its investigations and administration enforcement actions.
>
> ***
>
> Enforcement staff's prior practice has been to provide exculpatory material to subjects; however, the Commission believes formalizing Enforcement staff's obligation and the procedures necessary to comply with that obligation, will promote maximum fairness in its Section 1b investigations and administrative enforcement actions. 129 FERC ¶ 61,248 at PP 2, 8.

Question 3. In your response to Question 1, you state that you take *Brady*:

> *"very seriously and impress upon all of my staff members the importance of adhering to the policy."*

In your response to Question 2, you state that:

> *"[d]uring my time as Director of Enforcement, Enforcement staff…has made disclosures of Brady material."*

a. Please explain in detail and provide evidence (i.e., emails, presentations, office manuals, or similar documents) showing how you "impress upon all [your] staff members the importance" of *Brady* material.

b. Is there a written policy detailing procedures used by the Enforcement Staff to search for, identify and produce potential *Brady* material? If so, please provide the written policy procedures.

c. Please explain what training the Enforcement Staff is given in how to search for, identify and produce potential *Brady* material.

Answer (a-c): For the most part, the training and details of the procedures for *Brady* are directed by, and overseen by, the Director of the Division of Investigations (DOI). However, because I was responsible for the Commission adopting the Policy Statement soon after I started at FERC, I was involved in the early phases of training. For example, in September 2009, at an all-day training seminar for DOI staff, a session was devoted to a discussion of *Brady* and DOI's obligations to produce exculpatory material. I also know that soon after the Commission adopted the *Policy Statement on Disclosure of Exculpatory Materials* (Policy Statement), in February and March of 2010, DOI held mandatory training sessions on the new Policy Statement and *Brady*. At those sessions, a packet of non-public privileged materials was distributed that included the Policy Statement, FAQs on Brady Practice, flowcharts to assist with complying with the Policy Statement, a Department of Justice Memorandum discussing *Brady*, as well as sample of letters to subjects regarding *Brady*. That non-public packet of materials is still given to every new attorney who is hired by DOI along with a desk reference and other non-public materials containing that policy. DOI has a monthly all staff meeting at which virtually every aspect of the investigative process is discussed on a recurring basis. If a *Brady* issue arises, it is discussed in this context and with management.

a. Please specifically identify each instance, during your time as Director of Enforcement, that the Enforcement Staff has "made disclosures of *Brady* material" to the subject of a FERC investigation.

i. Please limit your response to investigations that have been made public (through a Notice of Alleged Violations, a Show Cause Order, a public settlement or some other means).

ii. In each instance, please provide FERC Enforcement Staff's transmittal that identifies the documents provided as *Brady* material (e.g., the letter to Deutsche Bank referenced in Question 11.A. (see below)).

Answer: According to records from the Division of Investigations, Enforcement staff made disclosures of materials under the *Policy Statement on Disclosure of Exculpatory Materials* in three investigations that have been made public (per your description): Competitive Energy Services, LLC and Richard Silkman; Constellation Energy Commodities Group; and Enerwise Global Technologies. I have attached the materials that were provided in the Competitive Energy Services, LLC and Richard Silkman matter because those materials are now part of a public record. The communications relating to the other two cases remain part of a non-public record, even though certain information about the investigations have been made public through Commission settlement orders.

In three other investigations that have been made public – Barclays, Deutsche Bank, and J.P. Morgan – Enforcement staff provided specific materials that were requested by the subjects, even though the materials did not constitute exculpatory information under the *Policy Statement on Disclosure of Exculpatory Materials*. The Deutsche Bank communication, which you cited in Question 5, is part of a public record. The communications relating to Barclays and J.P Morgan remain non-public, even though certain information about the investigations have been made public.

Question 4. In your response to Question 2, you state that:

> *"[a]ny assertion that Enforcement staff discloses Brady materials only upon an investigation subject requesting such disclosure is incorrect."*

You also state that:

> *"During my time as Director of Enforcement, Enforcement staff without any prior request has made disclosures of Brady materials."*

Finally, you state that:

> *"Enforcement staff…does provide Brady materials to investigation subjects prior to receiving any request from the subject for such materials."*

a. Please specifically identify each instance during your tenure as Director of Enforcement that the subject of an investigation has requested *Brady* materials. Please limit your response to investigations that have been made public (through a Notice of Alleged Violations, a Show Cause Order, a public settlement or some other means) and indicate whether *Brady* materials were produced in response to that request (noting whether the production was before or after such request).

Answer: According to records from the Division of Investigations, in addition to the six investigations referenced in my response to Question 3.a, subjects requested *Brady* materials in

the following four investigations that have been made public (per your description): BP, PacifiCorp, Rumford Paper Company, and Westar Energy. No exculpatory information was provided in those four investigations because staff was not aware of any such information.

I would also refer to my full answer previously provided on June 4, 2014 to your Question 1, and note that an attorney's characterization of certain requested material as "*Brady*" does not make it so. The doctrine set forth in the Commission's *Policy Statement on Disclosure of Exculpatory Materials* has specific elements that must be satisfied before a document or piece of information can be fairly deemed "exculpatory." Moreover, if a subject's attorney makes a "general *Brady* request" and does not receive anything in response, it would be wrong to conclude that that in itself implicates some kind of policy violation. In most of FERC's enforcement cases, there is no exculpatory information as defined by the Commission's policy.

Question 5. In your response to Question 1.B., you state that you are:

> *"not aware of any instance in which Enforcement staff has failed to produce exculpatory materials."*

You also state that:

> *"[i]f staff members become aware of exculpatory materials, they produce them either at the time they are discovered or, at the latest, long before any order to show cause."*

a. Is it true (yes or no) that on October 15, 2012, the Enforcement Staff produced to Deutsche Bank "potentially exculpatory information that falls within the Commission's *Brady* Policy" but did so only (i) after an order to show cause had been issued and (ii) after Deutsche Bank specifically requested production of *Brady* material? Deutsche Bank Energy Trading, LLC, Answer of DB Energy Trading LLC to Order to Show Cause, FERC Docket No. IN12-4, Exhibit B (Nov. 5, 2012).

> i. If "no," please provide evidence and explain in detail why it is not true. If "yes," please explain in detail how your answer to Question 1.B. is true.

Answer: Again, I am not aware of any instance in which Enforcement staff has failed to produce exculpatory materials and reiterate that if staff members become aware of exculpatory materials, they produce them either at the time they are discovered or, at the latest, long before any order to show cause. In the Deutsche Bank matter, there were no materials that fell within the Commission's *Policy Statement on Disclosure of Exculpatory Materials*. The quoted phrase was used in a letter from Enforcement Staff, although the letter was dated October 26, 2012, and not October 15, 2012. On October 15, 2012, Enforcement staff transmitted various materials to counsel for Deutsche Bank which staff thought might be relevant to Deutsche Bank's defense. Those materials did not fall within the Commission's Policy Statement, and staff made no

representation that they did. On October 26, 2012, staff sent another letter to Deutsche Bank summarizing the information it had provided to Deutsche Bank throughout the course of the investigation. To indicate that staff had met its obligation under the Commission's Policy Statement, staff added the following statement: "In addition, we provided Deutsche Bank with all potentially exculpatory information that falls within the Commission's *Brady* policy." This sentence in the letter did not relate to any specific information provided to Deutsche Bank because there was no exculpatory information, notwithstanding Deutsche Bank's arguments to the contrary.

I would add that the materials referenced in the October 15 and 26, 2012 letters *were provided* to Deutsche Bank, and in plenty of time for them to be used in Deutsche Bank's defense. Although an Order to Show Cause had been issued, these materials were provided before Deutsche Bank's response to the Order to Show Cause was due, as the citation in your question indicates.

Question 6. In your response to Question 1, you state that:

> *"[i]n nearly all of FERC's enforcement investigations, the vast majority of the information is obtained directly from the subjects or through testimony of the subject's employees."*

a. Please identify, by percentage, the number of FERC enforcement cases out of the total number of FERC enforcement cases, during your tenure as Director of Enforcement, where the Enforcement Staff has obtained information from third parties other than the subject. To the extent your response may be different if broken down, please identify the percentages in market-related cases and reliability cases (and, if necessary, a third "other" category).

Answer: Enforcement staff has obtained some information from third parties other than the subject in virtually all "market-related" cases and reliability cases. For example, in virtually all "market-related" cases involving the organized electric markets, staff obtains information from the relevant RTO/ISO. In virtually all reliability cases, staff obtains information from NERC or the Regional Entity. In no way does this fact affect my prior answer, in which I explained: "In nearly all of FERC's enforcement investigations, the vast majority of the information is obtained directly from the subjects or through testimony of the subject's employees." (emphasis added).

Question 7. In your response to Question 1.G., you state that you:

> *"recall one occasion in which a subject's attorney requested Enforcement staff to search the files of an ISO/RTO and its market monitoring unit (MMU) to try to locate potentially exculpatory materials."*

You also state that:

> *"[s]taff appropriately declined to do so."*

Finally, you state that the Energy Law Journal article is "mistaken" in asserting that "ISO/RTOs and their MMUs" are part of FERC's "'prosecution team.'" You cite a court order explaining that MMUs are not "directly managed by FERC in their work."

In a recent, much-publicized order, the Commission said that in at least that one instance: "staff from the Office of Enforcement…'…has expressly directed the CAISO MMU to analyze those materials to assist us in our work.'" *J.P. Morgan Ventures Energy Corp.*, 141 FERC 61,131 (November 14, 2012).

a. In the "one occasion" you recall, did the Enforcement Staff make a similar request to the ISO/RTO and its MMU to "assist us in our work" as the Enforcement Staff did in the J.P. Morgan case cited above?

> i. If the answer is "yes," please explain in detail how, given such a request, an MMU is not part of a prosecution team and being "directly managed by FERC in their work" and why it was appropriate not to search that MMU's files for potentially exculpatory information.

Answer: Yes, the one occasion I recalled occurred during the J.P. Morgan investigation. In many investigations involving market manipulation, Enforcement staff both receives and requests information from market monitors. That fact does not convert the market monitor into a member of the "prosecution team" for purposes of a *Brady* analysis. I also note that the Commission's *Policy Statement on Disclosure of Exculpatory Materials* explicitly states that "we will not require Enforcement staff to conduct any search for exculpatory materials that may be found in the offices of other agencies." The *Energy Law Journal* article asserts that "ISO/RTOs and their MMUs are unquestionably members of the Commission's 'prosecution team,'" but it is simply mistaken. *See Electric Power Supply Ass'n v. Federal Energy Regulatory Commission*, 391 F.3d 1255 (D.C. Cir. 2004) ("It is undisputed, however, that market monitors are private parties who work outside the agency. They are not hired, paid, or directly managed by FERC in their work.").

FROM SENATOR LEE

Norman Bay

Question 1. Section 31(d)(3) of the Federal Power Act. In your response to my question regarding the meaning of section 31(d)(3) of the Federal Power Act, you state, "the text of the statutory provision does not state that there is an affirmative right to a trial de novo."

This seems to contradict Commission precedent in *Energy Transfer Partners*, 121 FERC ¶ 61,282 (Dec. 20, 2007), which interpreted identical language in section 504 of the Natural Gas Policy Act of 1978 as follows: "Congress created an affirmative right for the person to receive an review of the Commission's assessment in a *trial de novo* in district court." (Emphasis added).

> a. Is it your interpretation that section 31(d)(3) of the Federal Power Act provides an affirmative right to a trial de novo? If you conclude that it does not provide a trial de novo, please distinguish the relevant language of section 504 of the NGPA from the language in section 31(d)(3) of the FPA.
>
> b. Please explain why you did not include a discussion of the relevant language in the Energy Transfer Partners proceeding in your original answer.

Answer (a – b): In my previous answer to your question about my interpretation of section 31(d)(3), I noted that the statutory text does not provide for a trial *de novo*, but instead provides for a de novo "review," which may or may not include a trial on some or all issues, as the court determines is appropriate in the circumstances. That is the position FERC has taken in the pending district court proceedings, but as I previously also noted, ultimately, the federal courts will decide what the statutory provision means, which FERC will abide by. With respect to the *Energy Transfer Partners* decision, the Commission was not interpreting the statutory language of the Natural Gas Policy Act of 1978 (NGPA), when it made the comment that you quote in your question. Rather, in that case, ETP was asking the Commission for a rehearing on the Order to Show Cause to allow it to seek a de novo review in the federal district court immediately—prior to the Commission even deciding whether a civil penalty should be assessed. The Commission disagreed and found that the section 504 of the NGPA did not preclude the Commission from holding an ALJ hearing prior to assessing a penalty. It is in that context that it made the statement you quote—thus, the Commission was not interpreting the language of 504 as it related to what "review de novo" means. The language it used, "trial de novo," was more of a short-hand phrase used to explain that the subject will be permitted a district court review following the penalty assessment.