FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

June 4, 2014

Honorable Mary Landrieu
United States Senate
Committee on Energy and Natural
Resources
Washington, DC 20510

Dear Chair Landrieu,

Thank you for the opportunity to testify at my nomination hearing on May 20, 2014 before the Committee on Energy and Natural Resources. Attached are my responses to the Questions for the Record posed by members of the Committee.

Sincerely,

Norman C. Bay
Director
Office of Enforcement

QUESTIONS FOR THE RECORD
FOR
Mr. Norman Bay

SENATOR MARY LANDRIEU

Louisiana is at the center of America's energy revolution and issues before FERC affect Louisianans in many different ways.

I understand that both Commissioner LaFleur and Mr. Bay cannot answer questions about disputed issues pending before the Commission due to *ex parte* rules, but I would like remind you both of a number of issues that I have previously raised with FERC. These are by no means a comprehensive list of my concerns that impact Louisiana directly.

Question 1. TOLEDO BEND

Last weekend, I held a field hearing in Louisiana at the beautiful Toledo Bend Reservoir to discuss how the hydroelectric project there can further enhance the economic benefits it brings to the region.

The Toledo Bend dam and reservoir provide significant benefits to Northwest Louisiana through the abundant supply of clean water, renewable electricity, and recreation opportunities. The ongoing FERC relicensing process, however, threatens the economic promise of the project. The Sabine River Authority has already spent $10 million over the past 7 years on relicensing, a huge sum of money that could have otherwise been invested in new infrastructure needed to secure additional economic development and create jobs.

FERC can partially offset these costs by granting the Toledo Bend Project a new 50-year term as I requested in a letter I sent on February 5. Without objection, a copy of this letter will be entered into the Committee record of this hearing.

The problems Toledo Bend has faced over the past several years are not unique. **What is FERC doing to simplify the relicensing process and how it is making sure that the costs associated with relicensing aren't diminishing the economic benefits of hydroelectric projects like Toledo Bend?**

Answer: The Supreme Court has held that the Federal Power Act requires the Commission to examine all public interest considerations to ensure that hydropower licenses are best suited to a comprehensive plan for developing affected waterways. License applicants must provide the Commission information regarding affected resources for the Commission to understand the environmental impacts of relicensing a project. Depending on the complexity of the issues involved in the licensing proceeding and the availability of existing information, the costs of gathering this information will vary. Further, there are other federal and state resource agencies involved in the licensing process, and if these agencies seek substantial new information the proceedings may be prolonged. My understanding is that within these constraints, the Commission makes every effort to ensure that hydropower relicensing proceedings are as

efficient and cost-effective as possible, requiring only those studies that are justified and shown to be reasonably cost-effective, and encouraging stakeholders to reach agreement on the scope of the process and the issues in the proceeding. However, if confirmed, I am always willing to look for possible additional ways to streamline the process.

Question 2. LIQUID NATURAL GAS

FERC remains at the center of our efforts to efficiently approve licenses for Liquefied Natural Gas (LNG) export facilities in Louisiana and across the country. Responsibly exporting LNG will create thousands of high-paying jobs and help provide energy security for our allies. We should be exploring how to expedite the approval of LNG export facilities.

On April 2, 2014, I wrote a letter calling on FERC to swiftly approve Sempra's planned LNG export facility in Cameron Parish that would create nearly 3,000 jobs. Without objection, this letter will be included in the official record of this hearing.

On April 24, 2014, I wrote the Commission a letter in strong support of Trunkline's Lake Charles LN G export facility asking that FERC move expeditiously through the regulatory process. This facility is expected to create about 250 permanent positions and several thousand jobs. Without objection, this shall be made part of the hearing record.

What can FERC doing to expedite the approval of LNG export facilities in the United States?

Answer: I believe that the Commission is currently processing LNG export facility applications efficiently. To this end, it is particularly important to ensure that the Commission receives all necessary information from the applicant. Accordingly, if confirmed, I would continue the Commission practice of encouraging applicants and other stakeholders to provide necessary information quickly and completely, so that the Commission is in a position to act in a timely manner.

Question 3. MIDLA PIPELINE

The Commission has heard from me a number of times about Boston-based hedge fund ArcLight's plans to abandon the Midla Pipeline and the people of nine parishes in Northeast and Central Louisiana. ArcLight's plan would effectively end affordable natural gas service to nine parishes in Louisiana - Franklin, Catahoula, Ouachita, Richard, Tensas, Concordia, West Feliciana, East Feliciania and East Baton Rouge.

ArcLight should have known the pipeline was in serious need of repair to maintain safe operations when it purchased Midla in April 2013. I agree with Louisiana customers that ArcLight should be held responsible for the poor condition of the pipeline, which it recently purchased and now owns, and is also responsible to finance the necessary maintenance, repair and possible replacement without saddling customers with an unaffordable bill.

ArcLight must take responsibility for the safety and operation of the Midla pipeline and offer constructive solutions to solve the safety and operational problems of the pipeline in a way that allows 9,000 Louisiana customers to continue to get natural gas at an affordable price.

Without getting into specifics of the ArcLight abandonment proceedings, do you agree that it is a violation of the Natural Gas Act public interest standard to abandon a pipeline and effectively strand the affected customers with no service, or unreasonable terms of service?

Answer: Section 7(b) of the Natural Gas Act states that "[n]o natural gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." If confirmed, I would carefully examine all relevant aspects of the public interest, with continuity of service to existing customers being an important consideration when applying this section of the Natural Gas Act.

SENATOR TIM JOHNSON

Question 1. Expanding transmission has been a big hurdle to wind energy development in the Dakotas. What policy steps should we be taking to encourage transmission? And what are your views on the allocation of costs from building new transmission?

Answer: In Order No. 1000, the Commission took a number of important policy steps to improve existing transmission planning and cost allocation processes and encourage more efficient or cost effective transmission infrastructure. There, the Commission found that ongoing challenges in the electricity industry, including changes in the generation mix and projects for ever-increasing investment in transmission, had rendered the existing transmission planning and cost allocation requirements adopted in Order No. 890 insufficient to ensure that transmission rates remained just and reasonable and to prevent potential undue discrimination. To remedy these deficiencies, Order No. 1000 adopted a package of reforms that are intended to create more robust transmission planning processes at the regional level to consider and evaluate, on a non-discriminatory basis, possible transmission alternatives and produce transmission plans that can meet transmission needs more efficiently and cost-effectively. Additionally, Order No. 1000's reforms sought to remove barriers to participation by new entrants to the transmission development business, to allow additional entities the opportunity to invest in transmission infrastructure. Finally, Order No. 1000 sought to ensure that the costs of transmission solutions chosen to meet regional transmission needs are allocated fairly to those who receive benefits from them. Order No. 1000 adopted six cost allocation principles and required each region to develop a cost allocation method that is consistent with those principles. These principles require that the costs of a transmission facility be allocated roughly commensurate with the benefits likely to be received from that facility, and explicitly prohibit any assignment of costs to those who do not receive benefits. Regions are given significant flexibility to develop their own

cost allocation methods that fit their needs and circumstances. Taken together, these reforms adopted in Order No. 1000 are intended to improve the likelihood that needed transmission facilities can proceed past the planning stage and to construction.

In EPAct 2005, Congress also directed that the Commission provide incentive-based rate treatments to encourage transmission development. The Commission has taken steps to implement transmission incentives consistent with that directive, and most recently in 2012 adopted a policy statement that refocuses those incentives to encourage utilities to use ratemaking tools that mitigate risk, and that provides guidance as to the kinds of new transmission projects that the Commission believes would merit a higher return on equity.

The Commission in the last few years has taken steps to reduce the time and cost to process small generator interconnection requests and allow for more efficient interconnection of these resources to benefit customers.

Question 2. South Dakota has a large number of rural electric cooperatives and public power entities that focus first and foremost on low costs for their customers. How can the need to preserve low rates be reconciled with the Administration's environmental and clean electricity goals?

Answer: Rural electric cooperatives and public power entities have a long record of providing reliable, low cost energy. According to the National Rural Electric Cooperative Association, cooperatives employ an all-of-the-above strategy to meeting customer needs. Many utilities regulated by the Commission may do the same, and the Commission's job is to ensure that the resulting rates, terms and conditions of service are just and reasonable. In general, the Commission's ratemaking authority does not apply to the cooperatives.

Question 3. What are your thoughts on FERC's authorities to combat financial manipulation in energy markets? Does FERC have the right tools and information to combat fraud?

Answer. My view is that with EPAct 2005's anti-fraud and market manipulation provisions and civil penalty authority, and the Commission's implementing regulations, FERC does have the authorities needed to combat financial manipulation in energy markets.

I would note one legislative fix that would enhance the Commission's ability to carry out Congress's goal of combating market manipulation. In *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013), the U.S. Court of Appeals for the District of Columbia Circuit ruled that the CFTC's exclusive jurisdiction over futures contracts deprives FERC of authority to bring an action based on manipulation in the futures market, even if the activity affected prices in the physical markets for which FERC has exclusive jurisdiction. Although the Commission reads the *Hunter* decision as narrow in scope, some market participants interpret the decision more broadly to cover not only manipulation in the futures market, but also many additional transactions and products, including those squarely within FERC's jurisdictional markets. Accordingly, a legislative fix to

eliminate uncertainty on this matter could ensure that FERC has the full authority needed to police manipulation of wholesale physical natural gas and electric markets.

In general, FERC has the right tools and information to combat fraud. In the last few years, FERC has gained access to a variety of new data and information sources, including:

- *Large Trader Report Data* – FERC receives a daily feed of data related to the financial positions of large traders of financial natural gas and electric products from the CFTC. This information assists FERC in determining whether physical energy market participants have financial positions that would benefit from manipulation of the FERC-jurisdictional markets.

- *RTO Data* – In Order No. 760, FERC directed the RTO and ISOs to deliver electronically to FERC data related to, among other things, virtual offers and bids, marginal costs, and financial transmission rights. This information permits FERC to conduct comprehensive surveillance of the RTO and ISO markets to determine if any market participants are violating its statutes, rules, or orders.

- *ICE Data* – FERC receives a daily feed of transactional data for physical natural gas and electric products from the IntercontinentalExchange (ICE). This data feed permits FERC to conduct comprehensive surveillance of trading activities related to physical natural gas and electric products that are traded on ICE.

- *E-Tags* – Order No. 771 established a process by which FERC has access to a database of complete E-Tags, which are used for scheduling transmission of electric power and provide information about power flows scheduled at interties. E-Tags provide FERC staff with information related to power flows between control areas that could be used as part of a manipulative scheme.

Using this disparate market data, FERC staff performs statistical analyses through automated, algorithmic screens to detect anomalies and suspicious trading patterns, making it possible for FERC to detect quickly a variety of potentially fraudulent and/or manipulative schemes, investigate the conduct involved, and pursue an enforcement action against the subject, if appropriate.

SENATOR DEBBIE STABENOW

Question 1. In July, 2013 the FERC imposed $410 million in penalties on JP Morgan for manipulating electricity markets in Michigan and California in 2010 and 2011. The company had to pay back $1 million it had defrauded from electricity customers in Michigan and $124 million for customers in California.

This demonstrates the need for FERC's oversight to ensure that energy markets provide customers with a fair price for the energy they depend on in their homes, farms, and

businesses. What ideas will you bring to enhance FERC's efforts to detect instances of illegal market manipulation?

Answer: In 2012, FERC established a new Division of Analytics and Surveillance (DAS) within the Office of Enforcement. This division developed and operates a comprehensive and robust surveillance program to detect instances of market manipulation in the natural gas and electric markets. DAS performs statistical analyses through automated, algorithmic screens to detect anomalies and suspicious trading patterns, making it possible for FERC to detect quickly a variety of potentially fraudulent and/or manipulative schemes using data and information to which FERC has recently gained access. These data sources include: (1) Large Trader Report Data from the CFTC that contains the financial positions of large traders of financial natural gas and electric products; (2) RTO market data pursuant to Order No. 760; (3) transactional data from the IntercontinentalExchange (ICE) for physical energy products traded on the exchange; and (4) E-Tags, which provide information about power flows scheduled at interties pursuant to Order No. 771. DAS also works closely with the market monitors from each ISO and RTO on potential issues identified in the organized markets to help ensure that manipulative schemes in the organized markets are detected and stopped promptly.

Moving forward, if confirmed, I would continue to support DAS in its efforts to detect potential manipulation. I would work with DAS to ensure that it continues to have the resources, including staff, data, and technology, that it needs for its current surveillance efforts and to develop new and even more sophisticated surveillance tools. I would also continue to encourage DAS and the Office of Enforcement's Division of Energy Market Oversight to stay on top of developments in the energy markets and the related financial markets, through coordination with experts throughout the Commission, industry outreach, and training, to ensure that the surveillance program adapts quickly to market changes.

Question 2. Under FERC's Order 1000, one of the standards of review for a regional cost allocation formula for electric transmission is that the costs imposed are "roughly commensurate" to the benefits received. What do you interpret "roughly commensurate" to mean and what types of information would you look for to determine whether the standard has been met in a particular instance?

Answer: The U.S. Court of Appeals for the Seventh Circuit established the "roughly commensurate" standard in a case interpreting the longstanding "cost causation" principle. The Commission incorporated the "roughly commensurate" standard into the cost allocation principles adopted in Order No. 1000. The Commission has begun to evaluate individual region's filings submitted in compliance with Order No. 1000, and the Commission's orders to date on those filings demonstrate that a variety of approaches to cost allocation can satisfy the "roughly commensurate" standard, thereby reinforcing that regions can develop proposals that address their individual needs while also meeting the minimum requirements established by the Commission. If confirmed, I look forward to addressing this issue in subsequent Commission orders, including those that will address remaining Order No. 1000 compliance filings.

Question 3. Although I am not opposed to all exports of natural gas, I am concerned that large-scale exports of natural gas could result in higher prices for residential consumers and squander what is clearly a competitive advantage right now for American manufacturers and for the American economy. The new abundance in American natural gas has led to more than $100 billion in announced investments in more than 120 new manufacturing projects. A study by the Boston Consulting Group concluded that affordable natural gas prices could lead to 5 million more manufacturing jobs by the end of the decade. A recent study by Charles River Associates found that using natural gas to increase American manufacturing output creates twice the direct value to our economy and creates eight times as many jobs as exporting the gas.

Thirteen projects to export natural gas have been proposed to FERC. Combined with the export terminal at Sabine pass that has already been approved, the projects represent a total export capacity of 20.9 billion cubic feet per day, equivalent to 31 percent of U.S. production in 2013. With such a significant volume of exports under consideration, FERC's responsibility for ensuring that project are constructed and operated safely and with minimal environmental impacts takes on significant importance. What lessons have you learned so far about FERC's natural gas export terminal evaluation process that would help FERC carry out its responsibilities in a thorough way?

Answer: The Department of Energy, not FERC, acts on requests to export natural gas, considering matters such as the impact of exports on domestic gas markets. The Commission reviews the physical facilities used in exports, to ensure such facilities are designed and constructed safely and with minimal environmental impacts. As a general matter, given careful project development by the applicant, and thorough, comprehensive review by the Commission and other state and federal agencies, LNG facilities can be designed to be safe and to have only limited environmental impacts.

Question 4. The recent work that the FERC has completed with the Commodity Futures Trading Commission (CFTC) on finalizing Memoranda of Understanding has been encouraging. It is important for regulators to share relevant information that is within each agency's expertise, which ultimately results in better market oversight, including the prevention of fraud and market manipulation. However, we also need to be sure regulators handle sensitive market data appropriately and that agencies work well together on questions of jurisdiction and to ensure protection of confidential market data.

a. What systems does the FERC have in place to protect the confidentiality of sensitive market data shared by the CFTC?

Answer. FERC has in place an Interconnection Service Agreement (ISA) with the CFTC that ensures the confidentiality, integrity, and availability of the data. This ISA documents the interconnection arrangements for both parties, defines security safeguards, and provides the technical and operational security requirements. The transfer of the data is protected through the use of Federal Information Process Standard 140-2 approved encryption mechanisms. The interconnection at FERC is located within a controlled access facility, guarded 24 hours a day.

Individual users do not have access to the data except through their systems' security software inherent to the operating system.

Access to the data within the FERC system is restricted to authorized users based on their job responsibilities and need to access the data to perform those responsibilities. All users of the system must pass at minimum a public trust security clearance (e.g., background checks) and must pass annual Computer Security Awareness training. FERC users commit to protect confidential data on FERC servers in accordance with the Privacy Act and Trade Secrets Act (18 U.S.C. § 1905) and the Unauthorized Access Act (18 U.S.C. §§ 2701, 2710). All data is clearly identified as provided by the CFTC, and all users are instructed about its sensitivity.

b. How does the FERC use information collected from the CFTC to ensure "just and reasonable" rates? What manipulative schemes or devices is the agency looking for?

Answer: The CFTC provides FERC with a daily feed of information from its Large Trader Report, including market participants' open financial positions for natural gas and electric products that are traded on exchanges. This information is useful in ensuring "just and reasonable" rates because it assists FERC staff in quickly identifying potentially manipulative conduct in the physical energy markets. This information is particularly useful in identifying manipulative schemes that employ a "tool" to manipulate a price-setting mechanism to improve the value of a "benefiting position." In this type of scheme, FERC typically sees the potential manipulator taking a loss or sub-optimizing trades in physical markets as the tool to target physical prices, resulting in increased value for products in the potential manipulator's financial portfolio, its benefiting position. Because a large part of establishing a violation of FERC's Anti-Manipulation Rule involves proving intent, a clear understanding of the benefiting position is important to identify and prove the scheme. Using the data provided by the CFTC, FERC staff is often able to quickly determine whether a market participant whose physical energy trading indicates potential manipulation holds a financial position that would benefit from the market participant's conduct in FERC's jurisdictional markets.

c. Has the FERC conducted surveillance of the futures market or is the agency working exclusively with the CFTC to collect data applicable to FERC's mission?

Answer: FERC is working with CFTC to collect data applicable to FERC's mission and conducts surveillance only with respect to FERC jurisdictional markets. But, as noted above, the financial benefits market participants receive can be very relevant to potential market manipulation in the physical markets. FERC does not use the CFTC data to conduct surveillance of the futures market. However, if FERC were to learn of any potential problematic conduct in the futures market that might be of interest to the CFTC, FERC would inform the CFTC. FERC and the CFTC also created a working group to promote collaboration and information sharing.

d. How has the recent court ruling confirming the CFTC's exclusive jurisdiction over futures markets impacted the FERC's approach to market oversight?

Answer. The recent court ruling (*Hunter*) precludes FERC from bringing a case where manipulation is conducted in the futures markets only. However, FERC continues to monitor the physical natural gas and electric markets where potential manipulation may occur to benefit a futures position held by the market participant. Although the Commission reads the *Hunter* decision as narrow in scope, some market participants interpret the decision more broadly to cover not only manipulation in the futures market, but also many additional transactions and products, including those squarely within FERC's jurisdictional markets. Accordingly, a legislative fix to eliminate uncertainty on this matter could ensure that FERC has the full authority needed to police manipulation of wholesale physical natural gas and electric markets.

SENATOR JOE MANCHIN III

Question 1: Would you describe to the Committee your views on the Commission's duties, responsibility and authority provided to it under Section 215 of the Federal Power Act?

Answer: The Commission's fundamental authority and responsibility under Section 215 is to review reliability standards proposed by the Electric Reliability Organization (the North American Electric Reliability Corporation, or NERC), approve or remand the proposed standards based on whether they meet the statutory criteria, and oversee enforcement of the approved standards. The Commission also has authority to direct NERC to file a new or modified standard addressing a specific matter if the Commission considers such a standard appropriate to carry out Section 215. In performing these functions, the Commission seeks to identify any significant risks to the reliability and security of the bulk-power system, and ensure that these risks are addressed appropriately.

Question 2: What steps are you preparing to take to carefully and objectively review the impacts of the pending 111(d) GHG rules on grid reliability?

Answer: As I stated at the hearing, grid reliability is "job one." The Environmental Protection Agency (EPA) issued its proposed rules for greenhouse gas emissions from existing sources under Clean Air Act (CAA) section 111(d) on June 2, 2014, and the Commission should carefully review the proposal 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. If confirmed, I believe that FERC must continue to work closely with the EPA throughout this process.

Question 3: Can you assure the Committee the commission will work closely with EPA, utilities and NERC to ensure that reliability is not compromised by the pending rule?

Answer: Yes, doing so is a key part of the Commission's responsibility for maintaining the reliability of the bulk-power system.

Question 4: What steps are you prepared to take to address the possibility that the 111(d) rule would require resources to be dispatched on the basis on environmental "attributes" rather than cost?

Answer: The Commission's statutory responsibilities include just and reasonable rates, electric reliability, and efficient markets. Currently, resources are generally dispatched by the markets based on cost (or bids), but also in compliance with other applicable laws. For example, applicable laws may limit generators to running only a fixed number of hours in some areas, and may limit the dispatch of hydropower resources based on various environmental factors. Similarly, the dispatch of resources in the future would have to comply with any applicable requirements resulting from state (or federal) implementation plans under CAA section 111(d). The EPA issued its proposal on greenhouse gas emissions on Monday 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.

Question 5: Mr. Bay, you have no direct experience in regulation of energy infrastructure or markets. The previous five chairmen all had more than 20 years of experience in the energy industry and as regulators before becoming chairman. Was Congress wrong when it previously required experience as a prerequisite for this position?

Answer: I respectfully disagree with the assertion that I have "no direct experience in regulation of energy infrastructure or markets." On the contrary, for the past five years, as the Director of the Office of Enforcement (OE), I have been involved in the regulation of energy infrastructure and markets. FERC has five Commissioners, and eleven Office Directors, who are the highest ranking staff at the Commission. As one of the eleven Office Directors, I participate in weekly meetings with the Chairman and other Office Directors on a wide array of important issues being reviewed by the Chairman's Office. I also meet with industry executives, RTO/ISO executives, staff, and market monitors, and representatives from various energy stakeholder groups as part of my duties as Director of OE. OE has almost 200 staff, which represents about one-seventh of the staff at the Commission.

OE has a broad portfolio that requires a deep understanding of the markets, including market rules and market fundamentals. OE is tasked with investigations of potential violations, the auditing and accounting of jurisdictional entities, market oversight, and market analytics and surveillance. OE also investigates serious reliability violations and was the lead office for the inquiries into the Southwest cold snap of February 2011, the Arizona-Southern California outages of September 2011, and the Northeastern snowstorm event of October 2011. As noted in OE's 2013 Annual Report, the priorities of the office include market manipulation, serious reliability violations, anti-competitive conduct, and market transparency issues. OE has also

been the lead office with respect to the issuance of a number of FERC policy statements and rulemakings. Moreover, OE has been involved in the review of Commission orders relating to the markets, reliability, data reporting and market transparency, accounting issues, and gas-electric coordination, and is responsible for doing the ex post analysis of potential market power for the market-based rate authority program. OE is responsible for identifying important trends and developments in the markets, and reporting them to the Commission and to the public. As part of its oversight function, OE issues an annual state of the markets report, as well as a summer and winter assessment of market conditions. All of this work goes to the regulation of energy infrastructure or markets.

Question 6: If not, are we wrong to ask how it is appropriate to now require ZERO previous experience for a job of this importance?

Answer: For the reasons stated above, I respectfully disagree with the assertion that I have no experience in market or infrastructure regulation.

Question 7: Should FERC adopt policies that support one fuel type over another?

Answer: No. FERC policies should be fuel neutral while allowing non-discriminatory access to FERC-jurisdictional markets.

Question 8: Are there currently any FERC policies, in your view, that promote one fuel type or energy source over another?

Answer: No.

Question 9: EPA projected that its Mercury and Air Toxics Standards would not endanger grid reliability because the regulation would result in less than 5 GW of power plant retirements. Yet, EIA now projects that the regulation will close for 50 GW of power plants. More EPA regulations are to come – particularly for GHG emissions from existing plants. How will you address the inaccuracy to date on EPA projections on regulatory impacts on reliability?

Answer: In evaluating EPA's proposed rules under section 111(d), the Commission should engage a range of entities, including state officials, NERC, RTOs/ISOs, and industry, and consider all information they may offer on the issues. Adequate planning can help anticipate and address any potential implications for resource adequacy and reliability. If confirmed, I believe that FERC must continue to work closely with the EPA throughout this process. This approach will help ensure that the Commission's evaluation is based on the best available information. If confirmed, I am also open to carefully considering other suggestions and discussing the issue with my colleagues on the Commission.

Question 10: We hear that base load energy is essential to the grid but struggles in organized markets. Can you describe benefits to the grid that base load power is uniquely positioned to provide?

Answer: Base load generators have traditionally been a source of dependability, fuel security, and resource diversity.

Question 11: Do you believe that base load energy resources are essential to the reliable operation of the grid?

Answer: Yes, I believe that base load energy resources are essential to the reliable operation of the grid. As described in response to Question 10, base load energy resources are a dependable source of generation that can also provide fuel security.

Question 12: What direction were you given by former Chairman Wellinghoff in your enforcement efforts?

Answer: As the Director of the Office of Enforcement (OE), I was responsible for implementing the enforcement program consistent with the Commission's Strategic Plan. Under the Strategic Plan, FERC's mission was to provide "reliable, efficient, and sustainable energy for consumers." There were two overall goals: (1) "just and reasonable rates, terms and conditions;" and (2) "infrastructure." OE effectuated both goals. Under the first goal, OE helped foster a "culture of compliance" among jurisdictional entities and used "risk-based audits." Under the second goal, OE helped "monitor, audit and enforce Reliability Standards." One priority for the Commission has been to ensure that consumers are protected from fraud and market manipulation and that there is a level playing field for all market participants.

Question 13: Have you had any contacts with former Chairman Wellinghoff since you were nominated to serve as Chairman?

Answer: No, I have not had any contacts with former Chairman Wellinghoff since I was nominated.

Question 14: If so, could you describe those contacts for the committee?

Answer: See response to Question 13.

Question 15: Why shouldn't FERC treat any net metering sale as a wholesale sale?

Question 16: If a utility's grid operating costs are being shifted from net metering customers to other customers, is that just and reasonable?

Question 17: Under what circumstances do you believe FERC should take action to prevent cost shifting from net metering customers to other customers?

Answer (Questions 15-17): Net metering policies generally are established by state legislative and regulatory bodies, typically with input from utilities, technology providers, consumer advocates, and other stakeholders. The Commission has found that no wholesale sale occurs when an individual homeowner, or similar entity, installs generation and accounts for its dealing with the utility through the practice of net metering. Where there is no net sale over the billing period, the Commission has not viewed its jurisdiction as being implicated. I recognize that net metering issues have been receiving increased attention in recent months. If confirmed, I look forward to participating in any consideration of these issues that may come before the Commission, including jurisdictional matters or concerns about cost shifting.

Question 18: FERC has determined that demand response should be given the locational marginal price. Do you believe this is the right policy or should it be overturned?

Answer: On Friday, May 23, 2014, the U.S. Court of Appeals for the D.C. Circuit issued a decision vacating Order No. 745 and addressing the Commission's jurisdiction over demand response. My understanding is that the Commission is in the process of reviewing that decision.

Question 19: Should FERC treat a megawatt of energy produced the same as a "negawatt" of energy saved? What are the issues that differentiate a megawatt from a negawatt?

Answer: On Friday, May 23, 2014, the U.S. Court of Appeals for the D.C. Circuit issued a decision vacating Order No. 745 and addressing the Commission's jurisdiction over demand response. My understanding is that the Commission is in the process of reviewing that decision.

Question 20: Will the physical security standard recently passed by NERC adequately protect the public from electric grid outage caused by terrorist attack?

Answer: It is premature for me to form a final opinion on this question. If confirmed, I would consider that standard, which was filed with the Commission on May 23, 2014. Under section 215(d) of the Federal Power Act (FPA), the Commission may approve or remand a proposed reliability standard. The Commission may also order modification of a reliability standard to address a specific matter. Once the Commission approves a reliability standard it is enforceable in the United States under section 215 of the FPA. Before forming my final opinion on the physical security standard, I would consider the information contained in NERC's filing material and the public comments submitted to the Commission on the filing

Question 21: Could an attack on an electric generation plant cause a cascading outage or long-term power shortage?

Answer: My understanding is that the extent and duration of any outage from such an attack could depend upon a number of factors, such as the size and location of the plant, system loads, the configuration of the grid, the availability of replacement equipment and fuel, and the resiliency of the systems under attack.

Question 22: Why were generation plants exempted from NERC's physical security standard?

Answer: It is premature for me to form a final opinion on this question. However, the physical security standard drafting team explained its thinking in the "Guidelines and Technical Basis" document attached to the standard that was adopted by NERC's Board of Trustees. According to that document, the drafting team determined that it was not necessary to include Generator Operators and Generator Owners in the Reliability Standard for two reasons: (1) substations interconnecting generation facilities to the electric grid are considered when determining to which entities the standard would apply, and (2) the analyses conducted under the standard to identify which substations must be protected should take into account the impact of the loss of generation connected to each substation. NERC's petition to approve the physical security standard was filed with the Commission on May 23, 2014. In the petition, NERC states that a generation facility does not have the same critical functionality as certain transmission substations. In addition, the planning process for the electric grid already plans for the possible loss of a generator. NERC goes on to state that, by limiting the scope of the standard to certain transmission substations and their associated primary control centers, industry will be able to focus resources where most essential for maintaining reliable operations. If confirmed, before forming my final opinion on the physical security standard, I would consider the information contained in NERC's filing material and the public comments submitted to the Commission on the filing.

Question 23: Why did NERC exempt operators of critical control centers--including the two major control centers for the western half of the United States – from physical security requirements?

Answer: It is premature for me to form a final opinion on this question. However, the physical security standard drafting team explained its thinking in the "Guidelines and Technical Basis" document attached to the standard that was adopted by NERC's Board of Trustees. According to that document:

> In other words, primary control center for purposes of this Standard is the control center that the Transmission Owner or Transmission Operator, respectively, uses as its primary, permanently-manned site to physically operate a Transmission station or Transmission substation that is identified in Requirement R1 [for protection] and verified in Requirement R2. Control centers that provide back-up capability are not applicable, as they are a form of resiliency and intentionally redundant.

In addition, NERC's petition to approve the physical security standard was filed with the Commission on May 23, 2014. In the petition, NERC states that the drafting team determined that the standard should only provide additional physical security protections to those primary

control centers that can physically operate critical substations. They also determined that a physical attack on a control center that only has monitoring or oversight capabilities of a critical substation would not have a direct impact on reliability in real-time. If confirmed, before forming my final opinion on the physical security standard, I would consider the information contained in NERC's filing material and the public comments submitted to the Commission on the filing.

Question 24: Is it true that an electromagnetic pulse device in a suitcase or van could take out a critical grid control center or substation?

Answer: My understanding is that an electromagnetic pulse (EMP) attack could be generated from an intentional electromagnetic interference (IEMI) device that could fit in either a suitcase or van. My understanding is that whether such a device could remove a critical grid control center or substation would depend on many factors, including where the device is placed, what type of device is used, and the type of equipment that is being targeted.

Question 25: How much would it cost to build an electromagnetic pulse device capable of taking out a grid control center or substation?

Answer: My understanding is that these devices generally cost tens-of-thousands of dollars, but could cost less for someone with the knowledge to build them.

Question 26: Why doesn't the new physical security standard approved by NERC contain required protection against local electromagnetic pulse devices?

Answer: I do not know. The physical security standard drafting team explained its thinking in the "Guidelines and Technical Basis" document attached to the standard that was adopted by NERC's Board of Trustees. In addition, NERC's petition to approve the physical security standard was filed with the Commission on May 23, 2014. Neither document discusses electromagnetic pulses. If confirmed, before forming my final opinion on the physical security standard, I would consider the information contained in NERC's filing material and the public comments submitted to the Commission on the filing.

Question 27: Do you agree that with the basic principle that the "cost causer" should pay for transmission upgrades – that is, that when transmission upgrades are needed, the entities that made them necessary should pay?

Answer: Commission and court precedent adhere to principles of "cost causation" when considering whether a cost allocation approach is just and reasonable and not unduly discriminatory or preferential.

When transmission upgrades are needed to reliably interconnect individual new generation resources or to create capacity to satisfy individual requests for transmission service, long-standing Commission policy ensures that existing customers do not subsidize any costs caused by these new customers by requiring individual interconnecting generators and transmission service customers to pay the full cost of the upgrades they require (or "cause").

The requirements of Order Nos. 890 and 1000 provide for cost allocation of transmission facilities that are identified in the regional transmission planning process as needed to meet reliability requirements, provide economic benefits, or address transmission needs driven by public policy requirements enacted by federal, state, or local governmental authorities. Because these kinds of transmission facilities often provide broad regional benefits, Order No. 1000 adopted cost allocation principles based on the central principle established by the U.S. Court of Appeals for the Seventh Circuit that costs must be allocated in a manner at least roughly commensurate with benefits received. Order No. 1000 then provided each region the flexibility to design its own cost allocation approach, consistent with this principle.

Question 28: I recognize that you cannot address merits of specific compliance proceedings pending before the Commission. But I have a couple of questions I trust you can answer about the general policy behind FERC Order 1000:

a. A number of observers believe that FERC has overreached its statutory authority (under the Federal Power Act) – by effectively pursuing a preference for renewable-based electricity under Order 1000.

(This results from the Order's subsidization, or "socialization" of the cost of new long-distance transmission lines. Order 1000 allocates such costs very broadly, even though these lines are designed primarily to transmit wind power thousands of miles to faraway markets. The result is that consumers in states which do not need the power or otherwise benefit from the new lines have to help pay for them.)

Answer: In adopting Order No. 1000, the Commission used its authority to ensure that jurisdictional rates are just and reasonable and not unduly discriminatory or preferential to enact the reforms found in Order No. 1000. Consistent with that authority, the Commission's existing transmission policies are neutral with respect to the source of electricity generation.

Question 29: Shouldn't FERC transmission policy be neutral with respect to the source of electricity generation? Do you agree or disagree?
Answer: I agree that transmission policy should be neutral with respect to the source of electricity generation. FERC policies should be fuel neutral while allowing non-discriminatory access to FERC-jurisdictional markets.

Question 30: If you disagree, can you identify provisions in the Federal Power Act that authorize FERC to favor a particular source of generation over others?

Answer: See answer to question 29, above.

Question 31: If Congress wanted to express a preference for a particular generation source, don't you think it would have so stated – for example, by enacting a federal renewable portfolio standard? Isn't this Congress' prerogative – not FERC's?

Answer: FERC does not have the authority to enact a federal renewable portfolio standard.

Question 32: Do you support this aspect of Order 1000 – specifically that FERC has ordered states to plan for new transmission lines on the basis of undefined and unspecified "public policies" including environmental mandates?

Answer: I support requiring public utility transmission providers to establish procedures to identify transmission needs driven by reliability, economic benefits or public policy requirements, particularly needs established by state or federal laws or regulations.

Question 33: If so, can you direct me to the provision of the Federal Power Act that authorizes FERC to require states to conduct this type of planning?

Answer: The Commission relied on its authority to ensure that jurisdictional rates are just and reasonable and not unduly discriminatory or preferential to enact the reforms found in Order No. 1000. That authority is found in section 206 of the Federal Power Act. Order No. 1000 also relied on the Commission's authority pursuant to section 201(b)(l) of the Federal Power Act, which grants the Commission jurisdiction over the transmission of electric energy in interstate commerce, as well as jurisdiction over all facilities for the transmission of electric energy.

Question 34: Couldn't this policy result in the construction of new transmission lines --the need for which is premised on EPA rules that currently subject to challenge in the courts – which may be struck down? Wouldn't that be wasteful? How is this fair to consumers?

Answer: In Order No. 1000, the Commission required each local and regional transmission planning process to have a process for stakeholders to identify and consider transmission needs driven by public policy requirements established by state or federal laws or regulations. This requirement creates an opportunity for a region to decide whether to plan for a particular transmission need driven by a public policy requirement; it does not require a region to plan for every public policy requirement. I also note that under Order No. 1000, transmission planning regions may reevaluate their regional transmission plans each planning cycle to determine whether a transmission need still exists and whether a transmission project is still needed. I believe that this combination of opportunities and regional flexibility within the transmission planning process will benefit consumers.

SENATOR RON WYDEN

Question 1. The ultimate burden of high or volatile prices in the electric and natural gas market falls upon the consumer, either in the form of increased rates, or increased costs in the goods and services they use. That fact makes scrutiny of energy markets one of paramount and continued importance, and one that you have clearly taken seriously as FERC Director of the Office of Enforcement. Can you assure me that if you are confirmed you will continue to aggressively, fairly, and transparently implement FERC's authority to combat unlawful market manipulation in the natural gas and electric markets?

Answer: Yes, if confirmed, I would strive to protect consumers, ensure the integrity of the markets, and provide a level playing field for all market participants by using FERC's authority to pursue manipulation of the wholesale gas and electric markets.

Question 2. I view FERC Order 1000—where FERC has insisted that the Bonneville Power Administration and other governmental utilities in the Northwest agree to cede their transmission cost-allocation authority to FERC—as a significant overreach. Can you assure me that if you are confirmed you will support policies that keep the locus of Northwest electricity decisions in the Northwest as opposed to shifting authority to FERC headquarters in Washington, D.C.?

Answer: I recognize that FERC's relationship with Bonneville Power Administration (Bonneville) is different than its relationship with public utilities under the Federal Power Act, and I respect those differences. If confirmed, I would carefully consider the concerns you raise in your question, and the concerns raised by non-public utility transmission providers like Bonneville with respect to the implementation of Order No. 1000.

Question 3. The nation's electricity sector is in a period of transition, with significant shifts in the past decade due to the greater usage of renewables, lowered costs of natural gas, and many older units scheduled to come offline. One important effect of these changes has been decrease in carbon emissions from the power sector, a trend that needs to continue for our nation to move to a truly low-carbon economy. As the power sector continues to evolve in this manner, what challenges do you see coming up in the future as a result of this transition, and what role do you envision for the FERC in helping to manage the challenges that will come along with that transition?

Answer: As the electricity sector transitions to greater reliance on renewable energy and natural gas-fired generation, new pipeline and transmission infrastructure may need to be built and communication and coordination between the gas and electric industries may need to be improved. The FERC has taken a number of actions to better integrate renewable resources and address communications between gas and electric sectors, including issuing a final rule governing communications between the gas and electric industries and a proposed rule to improve the coordination and scheduling of natural gas pipeline capacity with electricity

markets. FERC also plays a critical role in permitting natural gas pipelines and incenting the development of both electric and natural gas infrastructure. As the sectors continue to transition, an appropriate role for the FERC would be to continue dialogue with states, RTOs, ISOs, NERC, EPA, other federal agencies, industry and other stakeholders and take action on cases that come before it in a fair and timely manner.

SENATOR AL FRANKEN

Mr. Bay

Question 1. I want to commend the Federal Energy Regulatory Commission (FERC) for issuing an order last year that effectively fast-tracked the ability of small wind projects to get connected to the grid. How would you continue to support the interconnection of community wind projects with the electric grid, and how would you ensure that community wind owners are offered fair rates by utilities?

Answer: As you note, last year, the Commission streamlined the interconnection process for small generating facilities and adopted reforms to its small generator interconnection procedures in response to changed circumstances in the industry. The compliance filings to that rule are due in August 2014. If confirmed, I look forward to reviewing those compliance filings.

Additionally, the Commission can allow independent regional transmission organizations to revise their interconnection procedures to improve efficiency in the interconnection process and remove barriers to interconnection. If confirmed, I believe the Commission should continue to consider such proposals.

To the extent that rates offered by a utility to community wind owners are FERC jurisdictional, FERC has a statutory responsibility to ensure that rates are just and reasonable.

Question 2. For large wind farms, are there other steps you would take to ensure efficient and cost-effective transmission of wind energy from places that generate the energy to places that need it?

Answer: In addition to the Commission's generator interconnection rules, Order No. 1000 should help ensure efficient and cost-effective transmission necessary to deliver energy from the generating resources to the load. If confirmed, I believe that the Commission should continue to be flexible in response to requests for rate treatment from developers of transmission projects under non-traditional business models.

Question 3. In Minnesota and across the Midwest and other areas of the country this past winter, we experienced a very serious propane shortage. I was pleased that FERC used its authority to prioritize shipments of propane on the Enterprise pipeline running from Mont Belvieu, Texas to distributors further north. This action helped get propane to those who

needed it. However, the Cochin pipeline, which has been transporting a very substantial amount of propane from Canada to the Midwest, is being repurposed to send other petroleum products in the opposite direction. Should FERC be given additional authorities to conduct a public interest determination before permitting the reversal of pipelines such as Cochin?

Answer: The Interstate Commerce Act (ICA) generally provides the Commission with jurisdiction only over the terms and conditions of tariffs of oil and product pipelines, including pipelines which ship propane and the rates the pipelines charge for those shipments. The Commission does not have jurisdiction over the entry, exit, ownership, construction or abandonment of oil and product pipelines because in the ICA, Congress determined oil and product pipelines should function as common carriers. As such, the decision to reverse the Cochin pipeline was a company business decision made in response to changing market conditions, outside the jurisdiction of the Commission. Given that the Commission has only used its emergency authority under the ICA once to address the propane situation this past winter, I believe it is worth evaluating FERC's existing authority before recommending that new authority be added. However, if I am confirmed, FERC staff would continue to monitor the propane markets. Further, I would ensure that FERC faithfully executes any additional jurisdiction given to it by Congress.

Question 4. Another issue during the propane shortage this past winter was that some pipeline terminals had long lines of truck drivers waiting to pick up loads of propane, while other terminals had no lines because truck drivers didn't know that propane was available there. Do you think it would be a good idea for FERC to improve transparency into pipeline operations so that we avoid this kind of confusion in the future?

Answer: Improving transparency into propane pipeline operations would be positive. The Commission does not currently have the authority under the Interstate Commerce Act to require propane pipelines to post operational flows or to require terminal operators to post propane supply information.

Question 5. Utilities installing wind turbines are often exempt from local zoning laws and can install 100-foot structures at will, but homeowners and businesses are subject to 35-foot or other height restrictions. What actions could FERC take to help homeowners and businesses who wish to install distributed generation projects such as community wind?

Answer: The Commission does not have jurisdiction over the installation of distributed generation projects such as community wind.

Question 6. The attacks on the Metcalf substation have shown that physical security of the electric grid is a critical problem. As you know, I wrote to FERC on this issue, and you responded by tasking the North American Electric Reliability Corporation (NERC) to develop a national reliability standard. Should NERC also provide input on an approach for

maintaining spare transformers that can be moved around the country as circumstances require?

Answer: The industry, through such efforts as the Edison Electric Institute's (EEI's) Spare Transformer Equipment Program, has been working to improve the ability of transformer owners to share spare transformers in the event of an attack. NERC also maintains an inventory list of spare transformers. In addition, over the last several years, the Department of Homeland Security and the Department of Energy have worked with the electric industry and a transformer manufacturer to design, build and demonstrate a "recovery transformer," which has undergone an encouraging operational test. The recovery transformer was designed to facilitate the quick transportation and installation that is so important when it is needed to restore service or reliability. If confirmed, I look forward to discussing these efforts with DOE, DHS, NERC, EEI, RTOs/ISOs, and other stakeholders.

Question 7. This reliability standard is intended to help safeguard the grid against attacks by humans. Do you believe that this standard would also provide adequate protection against extreme weather events?

Answer: In the proposed physical security standard, protection of identified substations may include resiliency or security measures. An example of a resiliency measure is the installation of a new substation that would make the electric grid less vulnerable to the loss of any one substation. It is premature for me to form a final opinion on this question. If confirmed, I would consider the proposed standard, which was filed with the Commission on May 23, 2014. Before forming my final opinion on the standard, I would consider the information contained in NERC's filing material and the public comments submitted to the Commission on the filing.

In addition, a wide range of current reliability standards are useful in protecting against the results of weather events, such as the transmission planning standards and the emergency preparedness and operations standards.

SENATOR JAMES E. RISCH

1. FERC took unprecedented action and sued the Idaho Public Utility Commission under Section 210(h) of the Public Utility Regulatory Policies Act (PURPA) in federal court. Although this case has been resolved, I am concerned about FERC taking similar action with states in the future. How do you believe FERC should interact with states? What do you believe the relationship between FERC and state regulators should be?

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).

2. What do you believe is FERC's role in relation to the Bonneville Power Administration?

Answer: I recognize that FERC's relationship with Bonneville Power Administration (Bonneville) is different from its relationship with public utilities under the Federal Power Act, and I respect those differences. For example, the Commission's ratemaking authority under sections 205 and 206 of the Federal Power Act does not apply to Bonneville. The Commission does have more limited jurisdiction over Bonneville, including pursuant to section 211A of the Federal Power Act to require an unregulated transmitting utility to provide transmission services. I agree with the Commission's statements that FERC should not take the exercise of its section 211A authority lightly, and I expect that the need to use that authority will be rare. Finally, the Commission has authority over Bonneville with respect to reliability pursuant to section 215 of the Federal Power Act.

3. Please share the definition of market manipulation and speculation that you use while employed at FERC?

Answer. The Office of Enforcement's enforcement efforts have followed the definition of market manipulation set forth in the Commission's Anti-Manipulation Rule (18 C.F.R Part 1c), the Commission's Order No. 670 implementing that Rule, and precedent developed under the Rule. In Order No. 670, the Commission set forth the requirements for finding a violation of the Anti-Manipulation Rule: "The Commission will act in cases where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission."

The Commission adopted the Anti-Manipulation Rule in order to implement Congress's prohibition against fraud and market manipulation as set forth in EPAct 2005, which was passed in the wake of Enron's manipulation of Western energy markets. The Commission's definition was patterned on the Securities and Exchange Commission's core anti-fraud and anti-manipulation rule – as EPAct 2005's prohibition against fraud and manipulation was patterned on and specifically references the Securities and Exchange Act of 1934. Although there are differences in the securities and energy markets, the Commission's enforcement-related matters look to securities law precedent on fraud and manipulation where applicable.

Following the Commission's implementation of the Anti-Manipulation Rule, there have been numerous public settlements and orders that have explained, often in great detail, the scope and application of the rule.

Speculation is not a defined term in the relevant FERC statutes and regulations but, generally speaking, speculation can simply mean trying to profit on price differentials based on market

fundamentals such as weather, energy supply factors, and many other circumstances. Speculation, by itself, is not a violation of the Commission's Anti-Manipulation Rule.

4. As everyone knows, a trade made in a market will have some effect on that market. What measures does the Office of Enforcement use to determine there was intent to manipulate the market?

Answer. The Office of Enforcement uses all the traditional tools of fact-gathering to determine whether a market participant intended to manipulate the market. Among the most important tools are depositions, in which Enforcement staff can question the market participant about why he or she was transacting in a particular way. Contemporaneous "speaking documents," such as emails, voice recordings, and instant messages, are also very useful – since these documents can reflect what the market participant was doing and thinking at the time of the conduct at issue. The transaction data can also be helpful in determining intent, particularly when it comes to cross-checking the data against the market participant's explanation for the conduct.

SENATOR DEAN HELLER

Question on FERC leadership transitions:

Mr. Bay:

There has been significant turnover and leadership changes at the Commission over the past couple years and in general, heavy transition frequently leads to a backlog or delays pending applications and work. I have heard consistently from industries that do business in my state that under Ms. LaFleur's chairmanship, the Commission has handled pending work in a timely manner.

1) Given your experience, do you believe you will be able to move directly into the Chair position and continue the timely consideration of pending licenses, permits, and applications?

Answer: Yes, if confirmed, I would be able to move directly into the Chair position and continue the timely consideration of pending licenses, permits, and applications. Infrastructure is one of my priorities. This work is too important not to be addressed in a timely manner. If confirmed, I would work closely with staff and the other Commissioners to ensure that FERC's consideration of pending licenses, permits, and applications is thorough, professional, and prompt.

2) If approved, will you want to restart consideration of matters that have already received some attention but have not been completed by the commission?

Answer: No, if confirmed, I would not restart consideration of matters that have already received some attention but have not been completed by the Commission. I commit to consider cases that

come before the Commission in a timely manner. Any new member of the Commission would arrive in the midst of ongoing proceedings. I believe that it would not be appropriate for a new member of the Commission to require consideration of such matters to be reset to their beginning because such an approach could result in unreasonable delays.

Question on Order No. 1000:

Mr. Bay and Ms. LaFleur,

Order No. 1000 creates obligations for neighboring transmission planning regions to develop procedures for joint identification and evaluation of regional and interregional transmission needs, potential facilities to address those needs, and a cost allocation methodology for allocating the costs of such facilities. The costs of regional and interregional transmission facilities are expected to be allocated to customers roughly commensurate to the benefits they receive. FERC gave the industry some flexibility to comply with very broad directives. It is my understanding that the compliance process has been messy, and getting the requirements of the order into effect has been a significant challenge that has consumed FERC's time and policy attention for over a year and counting.

1. In your view, how much flexibility and deference, if any, should FERC provide individual planning regions to develop and implement unique methods for allocating costs to the recipients of the benefits? Do you think FERC should mandate certain aspects of compliance for sensitive issues such as binding cost allocation, or simply defer to each region's direction?

Answer: In Order No. 1000, the Commission adopted minimum requirements for regional planning cost allocation, but otherwise gave each region significant flexibility to develop transmission planning processes that would meet its own unique regional needs. I believe that this approach strikes a reasonable balance between providing flexibility to account for different approaches to meeting different regions' needs, and the establishment of minimum requirements as necessary to ensure that the Commission fulfills its statutory responsibilities. The specific issue raised in your question regarding binding cost allocation is pending before the Commission. As a result, I cannot comment on it specifically.

2. As you know, the West has a predominance of non-jurisdictional transmission providers compared to other regions. Given their significant footprint and unique compliance status on one hand and the need for enhanced operational coordination and planning across the region on the other, how should FERC balance these factors in seeking to facilitate broad utility participation, on a comparable and non-discriminatory basis, in the regional and interregional planning processes formed under the order?

Answer: I recognize that FERC's relationship with non-jurisdictional transmission providers is different from its relationship with public utilities under the Federal Power Act, and I respect those differences. In Order No. 1000, the Commission recognized that many of the existing

regional transmission planning processes include both public and non-public utility transmission providers. Order No. 1000 encouraged, but did not require, non-public utility transmission providers to participate in regional transmission planning processes, noting that the success of the reforms called for in the rule would be enhanced if all transmission owners, including non-public utility transmission providers, participate.

In addition, the Commission provided regions flexibility to propose tariff provisions they believe are necessary to recognize the unique status of non-public utilities that seek to participate in the regional planning process. Several regions have done so. These proposals are pending before the Commission on rehearing and compliance in several dockets. Because the specific issues raised in your question regarding non-public utility transmission provider participation in Order No. 1000 regional planning processes are before the Commission in those dockets, I cannot comment on them at this time.

3. What role do you see for existing vertically electric utilities in future transmission development? What role do you see for new entrants in this area?

Answer: Vertically integrated utilities will continue to have an important role in transmission development. Under Order No. 1000, existing vertically-integrated electric utilities and new entrants each have the ability to choose what role they would like to play in future transmission development. Order No. 1000's non-incumbent developer reforms did not seek to define specific roles for existing utilities and new entrants; rather, Order No. 1000 simply sought to remove a barrier to entry to non-incumbent developers that the Commission concluded has the potential to undermine the identification and evaluation of more efficient or cost effective transmission projects and result in unjust and unreasonable rates or undue discrimination by public utility transmission providers. As a result, existing utilities and new entrants may participate in the regional planning processes and seek any role they choose with respect to future transmission development.

The Edison Electric Institute (EEI) has recently issued a report concerning transmission investments by its members. That report strongly suggests that EEI members will continue to play an important role in transmission, planning over 170 transmission projects (totaling over $60.6 billion in investment through 2024).

Order No. 1000's non-incumbent developer reforms apply only to transmission projects selected in a regional plan for purposes of cost allocation. As a result, new entrants can be expected to seek to develop these kinds of transmission projects at least in the future.

Question on Renewable Development

Mr. Bay and Ms. LaFleur

Geothermal energy is base load renewable power that plays an extremely important role in Nevada but gets too little attention nationally. It provides 24/7 power without emissions and, in

the case of binary geothermal, with negligible water consumption. Geothermal is a valuable energy resource and yet it is lagging behind other renewables sources in development.

1) What is your view of geothermal energy and the challenges it faces?

Answer: Geothermal resources are expected to contribute a growing amount of energy nationally. Geothermal resources generated 0.4 percent of electricity in 2013, with Nevada producing approximately 17 percent of the U.S. geothermal power from 15 percent of the total U.S. installed geothermal electricity capacity. In its recent *Annual Energy Outlook 2014*, EIA projects electric production capacity from geothermal resources to almost double over the next decade and to quadruple by 2040. According to EIA, Nevada has the country's largest amount of potential geothermal resources. Although site specific, the costs to install and operate geothermal generation are competitive with conventional and other renewable technologies. Because geothermal energy is inherently locational-constrained such that the best sites for geothermal energy may be far from load centers, one of the key challenges it faces is obtaining cost-effective transmission service.

The Commission has taken a number of actions to enhance the efficient development of transmission infrastructure for all resources. Order No. 1000 provides a mechanism for regional transmission planning and cost allocation. The Commission's Policy Statement on Capacity Allocation for Merchant Transmission Projects, issued in January 2013, provided additional flexibility to transmission developers to allocate new transmission capacity while preserving protections from undue discrimination for potential customers. Finally, the Commission issued a Notice of Proposed Rulemaking on Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities in May 2014. This Proposed Rule would ease these regulatory burdens by, among other things, granting a five-year safe harbor period to allow all phases of the project to be developed. Finally, last year, the Commission streamlined the interconnection process for small generating facilities and adopted reforms to its small generator interconnection procedures in response to changed circumstances in the industry. The compliance filings to that rule are due in August 2014. If confirmed, I look forward to reviewing those compliance filings.

2) What can FERC do to help our markets value exactly what geothermal provides—reliable clean energy?

Answer: In addition to ensuring transmission access, the Commission facilitates the sale of power by allowing sales at market-based rates upon a showing of lack of market power. This allows buyers and sellers, including geothermal sellers, the opportunity to value the energy and capacity of a given resource. In addition, in some regions of the country there are established markets which can facilitate the sale of resource output.

In October 2012, the Secretary of the Interior signed the Record of Decision finalizing a program to facilitate development of solar energy on public lands in six southwestern states. The Western Solar Plan provides a blueprint for utility-scale solar energy permitting in Arizona, California, Colorado, Nevada, New Mexico and Utah by establishing solar energy zones, incentives for

development within those zones, and a process through which to consider additional zones and solar projects. The Western Solar Plan established an initial set of 17 Solar Energy Zones, totaling about 285,000 acres of public lands, that serve as priority areas for commercial-scale solar development, with the potential for additional zones through ongoing and future regional planning processes. Two additional Solar Energy Zones were designated in 2013 in Arizona and California. Additionally, a programmatic environmental impact statement relating to the authorization of geothermal leasing in Nevada was completed in October 2008.

Energy development is critical to the economic development of the West but one of the primary barriers to development is access transmission.

3) What can FERC do to improve its permitting process to get transmission lines built on public lands in the West, so that all forms of energy development can proceed where it is suitable?

Answer: The Commission does not have permitting authority over transmission lines on public lands in the West, other than in the limited case of primary transmission lines that connect FERC –jurisdictional hydropower projects to the interstate electric transmission grid. While the Commission has limited backstop authority to site transmission projects under the Energy Policy Act of 2005, this authority only applies to transmission projects within National Interest Electric Transmission Corridors (NIETCs) designated by the Secretary of Energy, and only if a state in which a proposed transmission project is to be located withholds approval of the project for more than a year. While the Secretary of Energy initially designated two NIETCs, the designations were struck down by the U.S. Court of Appeals for the Ninth Circuit. The Secretary of Energy has not subsequently designated additional corridors. Because there are no NIETCs in place, the Commission has no ability to site transmission lines in the West or elsewhere.

4) Specifically, what can be done to improve access to transmission in these "solar and geothermal energy zones?"

Answer: The Commission's Order No. 1000, which I mention in response to Question 1, is a means to improve transmission access for these types of resources, as well as other resources.

Question on Wholesale Electric Market Reform

Mr. Bay and Ms. LaFleur,

It is my understanding that FERC is currently investigating the current centralized capacity markets to ensure they function efficiently and support the procurement and retention of resources necessary to meet future reliability and operational needs. In particular, FERC is examining whether rule changes are necessary so that these markets send the proper investment signals in light of structural changes impacting the power sector.

1) As the nation's energy supply becomes more diverse, how important do you think regional coordination and more efficient dispatch services will ensuring that variable energy resources like geothermal and solar power generation are cost-effectively integrated into the electric grid?

Answer: FERC policies should be fuel neutral while allowing non-discriminatory access to FERC-jurisdictional markets. However, more efficient dispatch services and regional coordination can help cost-effectively integrate all resources into the electric grid.

As you may have heard, the biggest electric utility in my state, NV Energy, is attempting to form a regional energy imbalance market with PacifiCorp, and California ISO.

2) What are your thoughts on the ongoing voluntary efforts in the West to explore potential customer, clean energy, and reliability benefits that can be achieved by implementing a regional energy imbalance market?

Answer: Several cases are pending before the Commission regarding the efforts to form an energy imbalance market in the West, so I cannot comment on the specific proposal. However, I note that over the past few years, the entities in the West have discussed the possible development of energy imbalance markets in several different settings. Commission staff has been willing to closely coordinate with market participants and the state commissions in the West and provide technical support when requested. If confirmed, I look forward to addressing these issues in subsequent Commission orders, and continuing to provide staff technical assistance to the West, as requested.

5) It has been contended that capacity markets should remain voluntary and that states and regions should make the decision whether or not to implement such a market, and if so, be allowed to design them to reflect the unique features of the relevant market. What's your view here?

Answer: Participation in an RTO or ISO is a voluntary decision for individual transmission owners. Any capacity market within an RTO or ISO should be designed to reflect the unique features of the relevant market and states, and states and regions have an important role in considering whether and how to implement a capacity market in the region. Each of the capacity markets overseen by the Commission were formed voluntarily and each of them developed to reflect the regional preferences of the market participants in those markets as well as the applicable state regulatory authorities.

Question on Electric Reliability:

Mr. Bay

It is my understanding that FERC and the North American Electric Reliability Corporation (NERC) have been making steady progress addressing both the day-to-day nuts and bolts activities necessary to keep the lights on, like tree trimming and relay setting coordination, and emerging threats, like cybersecurity, geomagnetic disturbances (GMD), and physical security. Acting Chairman LaFleur recently described the challenge going forward with respect to day-to-day issues as being to improve on the progress that FERC and NERC have made in setting priorities, developing and implementing reliability standards, mitigating compliance violations, and disseminating lessons learned. With respect to emerging issues, over the past year, FERC has issued or directed new or modified reliability standards for cybersecurity, GMD events caused by solar storms, and physically securing critical grid infrastructure.

1. As Director of FERC's Office of Enforcement, you have overseen a fairly aggressive enforcement posture. Do you have a view or vision for the NERC enforcement program? Does NERC set the right incentives to ensure strong reliability performance?

Answer. In 2007, NERC and the Regional Entities started enforcing reliability standards approved by the Commission. Since then, NERC and Regional Entity staff have become much more experienced in determining compliance and assessing penalties. While accumulating this experience, NERC and the Regional Entities have sought and received approval from the Commission for enforcement programs intended to streamline and make more efficient their enforcement activities while also ensuring consistent and adequate compliance. If confirmed, I would support efforts that achieve those goals, but I cannot prejudge the specifics of any proposal that has not yet come before the Commission.

As to the question of whether NERC has the right incentives to ensure strong reliability performance, NERC as the Electric Reliability Organization (ERO) has many tools and resources to accomplish this goal. An important, but by no means the only, tool is enforcing compliance with Commission-approved standards. In addition, NERC also possesses and uses tools outside the enforcement process like event analysis, issuance of reliability alerts, issuance of assessments of bulk-power system reliability and adequacy, standards development, and encouragement of best practices to strengthen reliability proactively. I believe NERC should deploy its whole range of tools and practices to ensure strong reliability performance. And, if confirmed, I would be open to considering whether there were additional measures that should be taken to ensure strong reliability performance.

2. Under your leadership, might we expect FERC to exercise a different role toward NERC on enforcement issues?

Answer. If confirmed, I would not expect the Commission to exercise a different role on NERC enforcement issues.

3. As Chairman, how would you weigh costs to customers in your evaluation of whether a particular proposed reliability standard provides an adequate level of reliability protection?

Answer: If confirmed, I would consider all appropriate factors in determining whether a proposed reliability standard is just and reasonable, not unduly discriminatory or preferential, and in the public interest. However, given the requirements of section 215, no standard should be approved that would allow less than adequate reliability.

4. How would you assess the state of FERCs' relationship with NERC? With respect to NERC's reliability standards development process and compliance and enforcement programs, what enhancements, if any, do you believe are necessary?

Answer: The current working relationship between FERC and NERC is professional and collaborative with the common goal of providing for the reliable operation of the bulk-power system. For the standards development process, there are rules in place that enable the Commission and NERC to address emerging issues, when necessary. This has been demonstrated recently by the order issued by the Commission directing NERC to submit a standard within 90 days to the Commission that addresses physical security. However, in times of national emergency requiring immediate action by the industry, the standards development process may not be sufficient to address such issues in a timely and certain manner, and this may warrant consideration of additional legislation. This type of directive and who has the authority to direct it will need further consideration. The authority to issue such a directive does not necessarily need to be FERC's. For compliance and enforcement, NERC has initiated programs such as "Find, Fix, Track, and Report" and the "Reliability Assurance Initiative." These programs are designed to ensure consistent and adequate compliance for the registered entities. If confirmed, I would support any efforts that achieve those goals, but cannot prejudge the specifics of any proposal that has not yet come before the Commission.

5. What do you believe are the most pressing threats to continued reliable operation of the nation's power grid and are those risk being appropriately mitigated? If not, what needs to happen in your opinion?

Answer: Both cyber and physical security of the power system are a concern to me. Compliance with the Critical Infrastructure Protection standards is a good foundation to help ensure a secure grid. However, compliance with the Critical Infrastructure Protection standards will not, by itself, necessarily protect against every potential threat. A key factor in mitigating the risks imposed by credible threats is accurate and timely information sharing between government and industry on the threats and vulnerabilities that could affect the reliable operation of the bulk-power system. This information sharing should also include any actionable steps that can be taken to minimize the effects of those threats. It is important that the government be able to share such threat, vulnerability, and mitigation information with industry without making such information available to potential wrongdoers. It is also vital that resiliency measures be in place to promote timely recovery and restoration of the bulk-power system in the event of a major incident.

In addition, the nation's bulk-power system is aging and many components of the grid are coming to the end of their lifecycle. This, along with other changes in the energy industry, is

leading to a cycle of investment in needed infrastructure. If confirmed, I believe it is important that the Commission use its authority in ways that promote the development of that infrastructure.

6. States view themselves as the front line for service quality issues, including cost recovery. What vision do you have for the boundaries between FERC and the states for reliability issues?

Answer: FERC's approval of the definition for "bulk electric system" establishes transparent and uniform criteria to determine what elements of the electric grid are subject to the Commission-approved mandatory reliability standards. The definition establishes a brightline threshold that includes facilities operated at or above 100 kV but also identifies specific categories of facilities and configurations as inclusions and exclusions to the definition of bulk electric system. Further, there is an "exception" procedure to add elements to, or remove elements from, the scope of coverage on a case-by-case basis. Finally, an entity can seek a Commission ruling on whether a facility is a local distribution or transmission facility. This process of identifying bulk electric system elements should help create a clear boundary between FERC and the states for reliability jurisdiction. Ultimately, the reliability of the electrical grid depends on the mutual efforts of states and the Commission within their respective scopes of responsibility.

7. How would you assess the degree of consultation occurring now between FERC and EPA on the reliability impacts of the latter agency's power sector regulations? Would you support creating a more formal and transparent federal interagency process to ensure that appropriate coordination occurs across the federal government?

Answer: 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. The agencies should continue this effort to ensure that the EPA is aware of any potential impacts its regulations may have on the reliability of the bulk-power system. If confirmed, I believe that the agencies should continue to work closely together, and, as with any issue relating to FERC's work, I would carefully consider any suggestions on what FERC can do to improve its processes.

Broader Question on FERC Strategic Plan:

Mr. Bay,

FERC recently updated its strategic plan. The two main goals of the new 2014-2018 Plan call for FERC to ensure that its rules and policy will result in just, reasonable, and not unduly discriminatory or preferential rates, terms, and conditions of jurisdictional service, and to promote safe, reliable, secure, and efficient infrastructure development.

1. As Chairman, what enhancements or changes, if any, to FERC's Strategic Plan would you consider making and why?

2. What changes, if any, do you think may be needed to FERCs' infrastructure development goal included in the plan?

Answer (1-2): If confirmed, I do not anticipate making any changes to the Strategic Plan and do not believe any changes need to be made to FERC's infrastructure development goal included in the Strategic Plan. As one of FERC's office directors, I had a role in the development of the strategic plan. The Commission's new Strategic Plan for the next five years appropriately focuses on its core statutory mission: ensuring that the Commission's rules and policies will result in just, reasonable, and not unduly discriminatory or preferential rates, terms, and conditions of jurisdictional service, and promoting safe, reliable, secure, and efficient infrastructure development. If confirmed, my priorities are in line with these goals. First, in approaching matters that come before the Commission, I believe that it is essential to be fair, balanced and pragmatic; to decide cases on the merits, based on the facts and the law; and to be consensus-oriented. Second, I believe that infrastructure and competitive markets are vitally important issues at the Commission. Right now, there is an important need for more infrastructure, both in terms of gas facilities and electric transmission, and FERC plays a critical role in permitting and incenting the development of that infrastructure. It will also be important to continue to look for ways to improve the efficiency of the markets and to deliver greater value to consumers in the competitive markets. Finally, the reliability of the grid is a primary responsibility for FERC. Not only does this responsibility encompass physical security and cybersecurity, but it includes gas-electric coordination issues as well.

SENATOR MIKE LEE

Question 1. Section 31(d)(3) of the Federal Power Act

In several recent cases, FERC enforcement staff seems to argue that section 31(d)(3) of the Federal Power Act allows the district court simply to affirm FERC's penalty determination by applying a deferential standard of review similar to that of the Administrative Procedure Act. However, the plain language of section 31(d)(3) seems to suggest that the district court may review *de novo* the law and the facts involved, meaning the district court owes no deference to FERC's determination and is not limited to the administrative record.

a. Please clarify whether it is your interpretation that section 31(d)(3) of the Federal Power Act grants an affirmative right to a trial *de novo*, or whether that same section limits the district court's review to the administrative record, similar to what is mandated in the APA.

Answer. FERC has set forth an interpretation of section 31(d)(3) in several recent federal court proceedings. The text of this statutory provision does not state that there is an affirmative right to a trial *de novo*. Instead, the text 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.

b. Does section 31(d)(3) give the district court authority to conduct its own discovery during its *de novo* review of the penalty assessment, separate and apart from the record developed by FERC through its administrative processes?

Answer. Yes.

c. In reviewing a penalty assessment under that section, should the district court should be limited to basing its review on the administrative record?

Answer. As noted above, FERC has argued in federal court that, in conducting the *de novo* review, the court can, and should, limit its review to the Commission's assessment order and the record and briefing underlying that order. Ultimately, the federal courts will decide what this statutory provision means, and FERC will of course abide by those decisions.

Question 2. FERC disclosure practice as compared to SEC practice

> During your hearing, you stated that the Commission's disclosure of materials was "consistent with SEC practice." Also, in response to my question of whether the Commission's disclosure practices "mirror that of the SEC", you stated, "I think it does."

a. Are these statements true? Is there anything you would add to these answers?

Answer. I think that my answers provided to your questions below shed further light on the similarities between FERC's enforcement-related disclosure practices and the SEC's practices.

In 17 CFR 201.230, the SEC provides the subject of a disciplinary proceeding the right to discover the documents, testimony, and expert reports obtained or prepared by SEC enforcement staff and its experts in the course of an investigation.

b. Please explain the difference, if any, between the discovery practice of the SEC as described in 17 CFR 201.230 and the regulations and current practice of Commission enforcement staff.

Answer. A key point about the SEC's 17 CFR § 201.230 is that this section applies to SEC administrative hearings, which occur only after SEC enforcement's recommendation to initiate proceedings. These rules, and the subpart in which they appear, make it clear that they do not apply earlier to investigations themselves. *See* 17 CFR § 201.100(b)("These rules do not apply to: Investigations, except where made specifically applicable by the Rules Relating to Investigations, part 203 of this chapter;"). SEC investigation rules are found in a separate section of the regulations, 17 CFR Part 203, Rules Relating to Investigations. FERC, like the SEC, has rules that apply to investigations (18 CFR Part 1b) and separate rules that apply to administrative hearings (18 CFR Part 385). Of course, both agencies are subject to applicable federal court rules on discovery when they appear in district court.

Focusing on investigations, the relevant, apples-to-apples comparison is between SEC Part 203 rules and FERC Part 1b rules. FERC investigation rules and SEC investigation rules are similar in various respects. Indeed, FERC's investigation rules were modeled after the rules of other government agency enforcement rules, including the SEC's rules. Neither sets of investigation rules focus on discovery practice, since investigations are primarily about the enforcement agency gathering facts – not discovery rules applying to subjects. One area of discovery that both agencies' rules address is a witness's right to inspect or obtain a copy of his own deposition transcript. These provisions are virtually identical, and both provide that the agency can deny a witness' request to procure a copy of his transcript for "good cause." *Compare* 17 CFR § 203.6 (SEC) ("A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees: *Provided, however,* That in a nonpublic formal investigative proceeding the Commission may for good cause deny such request.") *with* 18 CFR § 1b.12 (FERC) ("A witness who has given testimony in an investigation shall be entitled, upon written request, to procure a transcript of the witness' own testimony on payment of the appropriate fees, except that in a non-public formal investigation, the office responsible for the investigation may for good cause deny such request.").

Another area of similarity is that each agency may disclose information to a subject during an investigation and before the Commission (whether the SEC or FERC) decides that a settlement or an enforcement action is warranted (in other words, before the SEC or FERC administrative hearing rules would apply). Both agencies make these investigative stage disclosures at the discretion of Enforcement staff. The SEC, for example, states in its Enforcement Manual (available on the SEC website) that "Recipients of Wells notices occasionally request to review portions of the staff's investigative file. On a case-by-case basis, the staff has discretion to allow

the recipient of the notice to review portions of the investigative file that are not privileged." And further, "[i]n considering a request for access to portions of the staff's investigative file, the staff should keep in mind, among other things:

- Whether access to portions of the file would be a productive way for both the staff and the recipient of the Wells notice to assess the strength of the evidence that forms the basis for the staff's proposed recommendations.
- Whether the prospective defendant or respondent failed to cooperate, invoked his Fifth Amendment rights, or otherwise refused to provide information during the investigation.
- The stage of the investigation with regard to other persons or witnesses, including whether certain witnesses have yet to provide testimony, and whether there is a parallel criminal or regulatory investigation or proceeding that may be adversely affected by granting access to the staff's file."

FERC Enforcement staff, like SEC Enforcement staff, has discretion to provide access to non-privileged, relevant information to subjects during the investigation, and have routinely done so. Indeed, disclosure of information and candid discussion about the facts and the law with subjects and their counsel is a key part of how the Office of Enforcement approaches its investigations.

With respect to the rules governing administrative hearings, a subject in a FERC administrative hearing, similar to the SEC's practice, will have the right to obtain discovery of relevant, non-privileged documents FERC obtained during the investigation, as set forth in the discovery rules of Part 385. It is important to note that, consistent with FERC practice, many if not all of those relevant, non-privileged documents likely would have been produced to the subject long before the case was even set for administrative hearing. I note that with respect to the SEC's discovery rule, 17 CFR § 201.230(d) provides that "the Division of Enforcement shall commence making documents available to a respondent for inspection and copying pursuant to this section no later than 7 days after service of the order instituting proceedings." FERC practice has been to provide relevant, non-privileged materials to a subject before an Order to Show Cause is issued, a process that occurs many months (if not longer) before an order setting a matter for administrative hearing. I also note that the great majority of relevant information in a FERC investigation – and this is true of all the FERC cases that have been set for administrative hearing in the past and all cases that are currently set for administrative hearing – are documents and data that come from the subject's own files.

In *FERC v. Lincoln Paper & Tissue, LLC*, Commission staff filed a notice of filing of administrative record that stated: "[h]ere the administrative record includes: (1) the Commission's orders; (2) all briefs and materials submitted to the Commission in the Docketed Proceeding by the Commission's Office of Enforcement and Lincoln; and (3) all the information cited by the parties or by the Commission in the Docketed Proceeding.

c. In this case, were the parties granted access to materials related to the proceedings that were not cited by the parties or by the Commission in the proceeding?

Answer. Consistent with FERC's general investigation practices, Enforcement staff provided third-party materials relevant to the Lincoln matter before the Commission issued its Order to Show Cause. Lincoln therefore had access to those materials when preparing its response to the Order to Show Cause and continues to have them as the federal court reviews the Commission's Order Assessing Civil Penalty. Before the Order to Show Cause proceeding began, Enforcement staff briefed Commissioners in writing about the Lincoln matter at the time staff sought to obtain authority to settle the case. That is consistent with how the Commission approaches all of its Enforcement cases, and is an important part of the process of keeping Commissioners informed about Office of Enforcement investigations. Of course, that briefing is protected by attorney-client, work product, and deliberative process privileges, and was not shared with Lincoln.

d. Is this consistent with SEC practice?

Answer: I do not believe the SEC has a process similar to FERC's Order to Show Cause process, so it is difficult to make an exact comparison. However, as noted above, the SEC, like FERC, has a process for making documents available to subjects during the investigation phase. Also, the rules of SEC administrative hearings – like FERC administrative hearings and federal court proceedings – generally seem to require that the documents on which the agency bases its enforcement action be provided to the subject.

e. Would you support legislation or regulations that would require of FERC the same disclosure requirements that 17 CFR 201.230 requires of the SEC?

Answer: If confirmed, I would always be interested in considering if there are ways to make FERC's investigation procedures more efficient and fair, and that includes disclosure requirements, but for the reasons discussed above I do not see any reason for such additional legislation or regulations. When it comes to both investigations and administrative hearings, in an apples-to-apples comparison, FERC's disclosure requirements appear to be at least as robust as the SEC's requirements and at least as robust as other enforcement agencies' requirements (including the Department of Justice) of which I am aware.

f. Were there other disclosures in this case?

Answer: I think the answer to Question 2.c covers the disclosures that have been made to date.

Question 3. J.P. Morgan Settlement Agreement

On August 26, 2013, then Chairman Wellinghoff responded to a letter from Senators Warren and Markey concerning the JP Morgan Ventures Energy Corporation investigation and subsequent settlement. In their letter, Senators Markey and Warren asked why the Commission decided not to take any action against JP Morgan executives. In his response, Chairman Wellinghoff stated "[i]t is worth highlighting one aspect of the Settlement Agreement that imposed significant consequences on the individual traders involved in the alleged misconduct and that could not have been accomplished by taking the matter to trial."

a. The JP Morgan settlement agreement was signed on July 19, 2013. Given the fact that such a large settlement must have taken weeks, if not months to negotiate, did these individual traders know, before the agreement was signed, that the settlement agreement would impose such consequences?

Answer: Paragraph 7 of the settlement agreement memorialized that the three individual traders had been reassigned by JP Morgan and would no longer be engaged in FERC-jurisdictional trading. Because JP Morgan represented to FERC that these reassignments had already occurred before the settlement agreement was executed, I assume the individual traders – who were still employed by JP Morgan at the time of the settlement – were well aware of those actions. I do not know whether the individual traders knew of the specific language of the settlement agreement before the agreement was signed. The traders were represented by their own counsel (separate from counsel for JP Morgan) at that point.

b. When did settlement negotiations begin with J.P. Morgan?

Answer: Settlement discussions between JP Morgan and the Office of Enforcement are confidential, and I am not able to provide this answer.

c. Were allegations made against the individual traders at J.P. Morgan?

Answer: Settlement discussions between JP Morgan and the Office of Enforcement are confidential, and I am not able to discuss the content of such discussions. At the end of the investigative process, the Commission approved a settlement with JP Morgan but did not proceed against the individual traders.

d. Why did the Commission publicly identify the individual parties in the settlement order issued July 30, 2013, in Docket Nos. IN11-8-000 and IN13-5-000?

Answer: The Commission approved the settlement agreement with JP Morgan on July 30, 2013, and consistent with its longstanding practice, made the settlement agreement public at that time. The Commission has consistently striven to provide as much transparency as possible in its enforcement program, and a description of certain conduct by the principal actors was an important part of providing such transparency. I also note that the Commission unanimously approved all of the terms of the settlement as in the public interest, including the naming of individuals.

e. Please provide copies of, or links to, all official submissions, including pleadings and motions, to the Commission and to the Court of Appeals relating to the J.P. Morgan investigation and settlement.

Answer: I am providing links to all official submissions, including pleadings and motions, to the Commission and to the Court of Appeals, relating to the JP Morgan investigation and settlement which have been made public. There are a number of official submissions that were filed non-publicly with the Commission, and therefore remain confidential pursuant to the Commission's rules and regulations, and there are also filings that remain under seal with the Court of Appeals.

Magistrate Judge Order on subpoena enforcement (Nov. 29, 2012), vacated by D.C. Circuit (Aug. 8, 2013): http://www.leagle.com/decision/In%20Adv%20FDCO%20131125-000079.xml/F.E.R.C.%20v.%20J.P.%20MORGAN%20VENTURES%20ENERGY%20CORP

July 29, 2013 Notice of Alleged Violations: http://www.ferc.gov/enforcement/alleged-violation/notices/2013/jpmorgan-07-29-2013.pdf

July 30, 2013 Commission press release re settlement: http://www.ferc.gov/media/news-releases/2013/2013-3/07-30-13.asp#.U43MFPldWE4

July 30, 2013 Order Approving Stipulation and Consent Agreement: http://www.ferc.gov/EventCalendar/Files/20130730080931-IN11-8-000.pdf

Question 4. Access to Transcripts

a. At the hearing, you stated that the Commission could deny a request for a copy of a witness' transcript if there is a concern about "the integrity of the investigation." The standard, as it appears in 18 CFR 1(b)(12), is that the office responsible for the investigation may deny the transcript request "for good cause." Can you help shed light on what "good cause" means? What are some examples of good cause? What would constitute a concern regarding the integrity of the investigation?

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. 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.

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.

b. 18 CFR 1(b)(12) also provides that "[i]n any event, any witness or his counsel, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony." During your tenure at the Commission, has a witness or his counsel ever been prevented from inspecting the official transcript of the witness' testimony?

Answer: There have been a small number of instances, during my tenure at FERC, in which the Office of Enforcement has temporarily denied a request from a witness or his counsel to immediately inspect the official transcript of the witness's testimony. In those instances, the witness has been provided a copy of his deposition transcript at a later stage in the investigation, typically at the "preliminary findings" stage, which occurs well before the Commission must decide whether to issue an order to show cause. As I stated at the hearing in response to a similar question from Senator Murkowski, there is no question of *whether* the transcript will be released to the witness, but rather it is sometimes an issue of *when*.

This issue of timing 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.

c. You stated at the hearing that paralegals and assistants are allowed to take notes during depositions. Have you or any member of Commission staff under your direction ever prevented a paralegal, assistant, or attorney from taking notes at a deposition? Has it ever been suggested by you, or a member of Commission staff under your direction, that such note taking could be deemed uncooperative or otherwise frowned upon behavior?

Answer: I have never directed or suggested to any staff member that there was anything improper about a paralegal, assistant, or attorney taking notes during a deposition. I am aware of an investigation where a private attorney representing a subject attempted to circumvent a non-public Commission order by trying to create a verbatim transcript of the deposition as it was occurring. In that case, the witness and his attorney had been temporarily denied access to a transcript for good cause, and the attorney litigated the issue, non-publicly, before the Commission, arguing that 18 CFR § 1b.12 compelled the Office of Enforcement to provide *immediate* access to the transcript. The Commission rejected that argument, and the attorney's response was to bring two paralegals to the next round of depositions for the apparent purpose of creating a verbatim transcript using laptop computers. As I understand it, Office of Enforcement staff did object to any attempt to circumvent the Commission's order by creating a verbatim transcript. Following discussion, the paralegals were allowed to remain in the depositions and take as many notes as desired.

SENATOR JOHN BARRASSO

Question 1. At your confirmation hearing, I referenced an *Energy Law Journal* article entitled, "The FERC Enforcement Process: Time for Structural Due Process and Substantive Reforms," by William Scherman, former General Counsel of FERC, and two others. I cited Mr. Scherman's statement "that Enforcement Staff denies, in case after case, the existence of exculpatory or exonerating materials, only to…produce a subset of those materials too late in the process to be of use…in raising defenses." I also cited Mr. Scherman's statement that: "Enforcement Staff routinely fails to produce exculpatory documents." I then asked you the following question:

"Is it true that your staff has repeatedly failed to disclose exculpatory materials? If so, why have you failed to end this practice? Were you ignorant of what was going on by your staff or was your staff acting at your direction?"

You responded by stating that:

"Senator Barrasso, if those allegations were true, I would be very concerned. I do not believe those allegations are true however."

Answer: As I stated in the hearing, I asked the Commission to issue a formal policy of disclosing to a subject exculpatory evidence obtained in an investigation. Although I understood that Enforcement staff had a longstanding practice of disclosing such evidence, I felt that it was important for the Commission to formalize that practice through a written policy statement. It was one of my first initiatives as Director of the Office of Enforcement, and the Commission implemented my recommendation through a policy statement dated December 17, 2009.

The Commission's policy is modeled after the *Brady* policy that applies in criminal proceedings. Although the Commission recognized that there is no constitutional requirement to adopt such a policy in civil proceedings such as FERC enforcement investigations, and application of *Brady* principles varies among administrative agencies, the Commission agreed with my recommendation that such a policy was important in ensuring a fair enforcement process.

I take this policy very seriously and impress upon all of my staff members the importance of adhering to the policy. I reject the assertion made by the authors of the *Energy Law Journal* article that "Enforcement Staff routinely fails to produce exculpatory materials," and I am not aware of any instance in which staff has violated the policy.

I would add that it is not unusual for civil practitioners who have no criminal law experience to misunderstand the *Brady* doctrine and to disregard certain elements of the doctrine. As the Commission explained in its 2009 policy statement: "The rationale underlying *Brady* is not to supply a defendant with all of the evidence in the Government's possession which might conceivably assist in the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence known only to the Government. *Brady* is a rule of disclosure, not of discovery." One particularly important element of the *Brady* doctrine is that it does not apply to information already in the subject's possession or which can be obtained with reasonable diligence. 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. Another important element of the *Brady* doctrine is that it applies only to factual information and not to opinions.

It is not uncommon for counsel representing investigative subjects to characterize many categories of information as *Brady* material when, in fact, such information does not fall within the *Brady* doctrine and counsel are attempting to use the Commission's policy as a discovery device.

In their article, Mr. Scherman and his co-authors made the following statements about the Enforcement Staff and its actions regarding exculpatory materials.

A. **"[I]n many instances, Enforcement Staff has failed to produce exculpatory documents when requested."** Is this statement true (yes or no)? If "no," please provide evidence and explain in detail why this statement is not true?

Answer: This statement is not true. I am not aware of any instance in which Enforcement staff has failed to produce exculpatory documents when requested.

B. **"Enforcement Staff denies, in case after case, the existence of exculpatory or exonerating materials, only to belatedly produce a subset of those materials too late in the process to be of use to subjects in raising defenses or presenting their case to the Commission."** Is this statement true (yes or no)? If "no," please provide evidence and explain in detail why this statement is not true?

Answer: This statement is not true. I am not aware of any instance in which Enforcement staff has failed to produce exculpatory materials. I would challenge the authors' assertion that receiving exculpatory materials, at any stage, would be "too late in the process to be of use to subjects in raising defenses or presenting their case to the Commission." 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, the point at which the subject is asked to formally present its case before the Commission. Even if exculpatory information were discovered after the order to show cause stage (and I am not aware of any such instance), the subject would have the opportunity to use it in preparation for any adjudicatory proceeding.

C. **"Enforcement Staff routinely fails to produce exculpatory documents, either in response to general requests for Brady materials or in response to requests for particular categories of documents."** Is this statement true (yes or no)? If "no," please provide evidence and explain in detail why this statement is not true?

Answer: This statement is not true. I am not aware of any instance in which Enforcement staff has failed to produce exculpatory documents when requested.

D. **"Disturbingly, in some cases Enforcement Staff has only provided *exculpatory* materials after repeated, specific requests."** Is this statement true (yes or no)? If "no," please provide evidence and explain in detail why this statement is not true?

Answer: This statement is not true. I am not aware of any instance in which Enforcement staff only provided exculpatory materials after repeated, specific requests.

E. **"In at least one instance, Enforcement Staff used third-party documents in depositions that were classic *Brady* material. There, Enforcement Staff initially declined to produce the documents despite several specific requests. When Enforcement eventually produced some of the documents, it insisted that they were not *Brady* material and that it was only producing them as a 'courtesy.'"** Is this statement true (yes or no)? If "no," please provide evidence and explain in detail why this statement is not true?

Answer: The authors make a bald assertion without describing what they call "classic *Brady* material." I am aware of one instance in which Enforcement staff provided certain materials to counsel upon request, but stated that the materials were not *Brady* information and were being provided as a courtesy. In my view, staff's determination was correct. These documents did not constitute *Brady* material, "classic" or otherwise. In any event, as the *Energy Bar Journal* article notes, the materials were provided to be used as counsel wished. I would note that there is nothing unusual about a government attorney providing requested information to counsel, even where the material does not appear to fall within *Brady* and where there is no specific obligation to turn over the information at that time. The implication that this circumstance implies something improper is simply wrong.

F. **"Enforcement Staff has also, at times, disclosed only *inculpatory* evidence cited in the Enforcement Staff report or show cause order, rather than the *exculpatory* evidence required under *Brady*."** Is this statement true (yes or no)? If "no," please provide evidence and explain in detail why this statement is not true?

Answer: I am not sure I understand this assertion. If there were exculpatory materials in the case that is cited in the article, they would have been produced. The fact that inculpatory materials were produced reveals nothing about the existence or non-existence of exculpatory materials. In any event, I am not aware of any instance in which Enforcement staff has failed to produce exculpatory materials.

G. **"Enforcement Staff has also often failed to provide *Brady* materials obtained from third parties, in particular, from independent system operators and regional transmission organizations (ISOs/RTOs) and their market monitoring units (MMUs)."** Is this statement true (yes or no)? If "no," please provide evidence and explain in detail why this statement is not true?

Answer: The Commission's 2009 Policy Statement on Disclosure of Exculpatory Materials makes clear that, consistent with *Brady* case law and SEC and CFTC practice, Enforcement staff is not required to search for materials outside those it receives in discovery or as part of its investigatory activities: "Consequently, we will not require Enforcement staff to conduct any search for exculpatory materials that may be found in the offices of other agencies."

I 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. Staff appropriately declined to do so. 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.").

Question 2. In their *Energy Law Journal* article, Mr. Sherman and his co-authors state that "in no instance that we can recall has Enforcement Staff disclosed *Brady* materials without the subject first requesting such disclosure."
Has the Enforcement Staff ever disclosed *Brady* materials without the subject first requesting such disclosure? If so, please cite all the instances in which Enforcement Staff has provided *Brady* materials without the subject first requesting such disclosure since your tenure began in July 2009?

Answer: Any assertion that Enforcement staff discloses *Brady* materials only upon an investigation subject requesting such disclosure is incorrect. During my time as Director of Enforcement, Enforcement staff without any prior request has made disclosures of *Brady* materials. In many instances counsel for investigation subjects request *Brady* materials during early stages of the investigation – often before Enforcement staff has obtained and analyzed information provided by third parties that might potentially be subject to disclosure under the Commission's *Brady* policy. In those cases, of course, it is premature to provide *Brady* materials when staff has not yet obtained the potentially exculpatory documents or is still early in the stage of trying to determine whether the subject committed violations and, if so, which violations (and, therefore, whether the materials are potentially exculpatory with respect to those violations). However, Enforcement staff also does provide *Brady* materials to investigation subjects prior to receiving any request from the subject for such materials.

Under section 1b.9 of the Commission's regulations, information obtained during investigations, and the investigative proceedings themselves, are treated as nonpublic unless the Commission itself directs that such information be made public, the information is made public during the course of an adjudicatory proceeding, or disclosure is required by the Freedom of Information Act. Therefore, I cannot disclose the details of *Brady* disclosures made by Enforcement staff in specific investigative matters. But I can assure you that the article's suggestions and assertions about Enforcement's approach to *Brady* are incorrect.

Question 3. In a *Wall Street Journal* op-ed, entitled, "America's New Energy Prosecutors," William Scherman, former General Counsel of FERC, and two others explain that "[FERC's Enforcement] staff can communicate off-the-record with the commission during an investigation." They go on to say that "[Enforcement Staff] can present any information it wants, and claim the subject has engaged in all sorts of wrongdoing, with no record and no one to give the other side of the story."
I believe these off-the-record communications call into question FERC's commitment to the principle of due process. I also believe they are relevant to the matters from which you—if confirmed—should recuse yourself.
Given that there isn't a record of all the communications between you or your staff and the Commission, why would you—if confirmed—not agree to recuse yourself from all matters that are now before the Enforcement Staff and come before the Commission? Wouldn't this increase the public's confidence in your nomination?

Answer: The *Wall Street Journal* op-ed gives a truncated and misleading description of the Commission's process. The authors fail to mention that the Commission is provided with the

subjects' factual and legal arguments at every significant stage of the investigative process. First, when Enforcement staff seeks authority from the Commission to engage in settlement discussions with investigative subjects, it provides the Commission with all of the written submissions made by the subject in response to staff's preliminary findings. There is no limit placed on such submissions and sometimes they comprise hundreds of pages. Second, if there is no settlement and the matter moves forward to a notice under Rule 1b.19, the subject is given another opportunity to make a submission, which is also provided to the Commission. Third, if the Commission decides to issue an order to show cause, the subject is given another opportunity to make its arguments to the Commission, without limitation. Finally, in addition to these three separate stages in which the subject is invited to "give the other side of the story" (as the op-ed authors put it), an investigative subject has the opportunity to share its views with the Commission, in writing, on any aspect of the case and at any time throughout the course of the investigation. Throughout my time at FERC, subjects have taken this opportunity to communicate directly with the Commission.

With respect to communication between Enforcement staff and the Commission, the Commission specifically addressed the issue of when staff can communicate with the Commission during the investigative process, before I arrived at FERC in 2009. *See Ex Parte Contacts and Separation of Functions*, FERC Stats & Regs ¶ 31,279 (2008); 18 CFR §§ 385.2201 and 385.2202.

With respect to your questions about recusal, if confirmed, I would abide by all relevant ethics rules, in consultation with the Commission's Designated Agency Ethics Official (DAEO) and any other appropriate ethics authorities.

> **Question 4**. When conducting environmental reviews pursuant to the National Environmental Policy Act for natural gas pipelines, LNG export terminals, or related facilities, do you believe FERC should consider the potential for an increase in the domestic demand for natural gas as well as the potential environmental impacts associated with increased gas production? If so, please explain why.

Answer: Under the National Environmental Policy Act and the Natural Gas Act, the Commission examines the direct, indirect, and cumulative environmental impacts of energy projects that it authorizes. The Commission has not to date found it necessary to consider the potential for increased natural gas demand, beyond that intended to be served by the proposed project, in reviewing project applications. In order for the Commission to study the potential environmental impacts associated with increased gas production, those impacts must be reasonably foreseeable. Cumulative impacts must occur within the "region of influence" (e.g., same geographic area) of the project. Because the states, rather than the Commission, authorize the production of natural gas, primarily through consideration of drilling permits, and because it is generally not possible to predict the precise origin of gas that will flow through a particular project, the Commission has not, to date, addressed a case in which it found it appropriate to study production-related impacts beyond known impacts occurring in the vicinity of the proposed project. However, this issue is pending before the Commission, so I cannot comment on any specific proposal.

Question 5. When conducting environmental reviews pursuant to the National Environmental Policy Act for natural gas pipelines, LNG export terminals, or related facilities, do you believe FERC should consider greenhouse gas emissions for the entire life of such facilities? If so, please explain why.

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 6. Last month, in a speech to the U.S. Chamber of Commerce, Tony Alexander, President of First Energy, stated the following:
"In parts of the country, the electric system is also now being designed under the assumption that customers won't use electricity ... It's called demand response. And, as a result, while system emergency interruptions were not something electric customers have been used to in the past, since June I of last year, demand response customers in Ohio were called upon to curtail their use of electricity six times! To put that in perspective, no emergency curtailments were called in Ohio over the previous four years.
"Many businesses are now considering whether they can continue to interrupt their ability to manufacture the product they sell in order to accommodate the changes being made in the electric system. If they change their minds, all customers could be left with inadequate power supplies."
Do you believe Mr. Alexander has correctly characterized what is at risk with utilities relying on demand response programs?

Answer: On Friday, May 23, 2014, the Court of Appeals for the D.C. Circuit issued a decision vacating Order No. 745 addressing the Commission's jurisdiction over demand response. My understanding is that the Commission is in the process of reviewing that decision.

SENATOR LISA MURKOWSKI

Question 1. During our meeting last week, you told me that you did not ask to be designated as the Chairman of FERC if confirmed. When I asked you if you were willing to agree to serve on

the Commission as a Commissioner, but not Chairman, you responded that you did not know. Now that you have had some time to think about the question, I'd like to go back to that subject.

a. Would you have accepted the nomination to be a FERC Commissioner if the President had not also stated his intention to designate you as Chairman?

Answer: I do not know whether I would have accepted the nomination to serve on the Commission if the President had not also stated his intention to make me the Chairman.

b. Would you accept appointment to the Commission if the President were to change his designation?

Answer: It would not be appropriate for me to speculate on what I would do if I were designated for a position other than what the President has indicated.

c. If so, is your answer unconditional? Or would you be willing to serve only if you had the firm prospect of being designated Chair at some future time?

Answer: In light of my answer to 1.b, this question is not applicable.

Question 2. You told me that the President may have chosen you to join the Commission because you are from a western energy producing state and that, as with this Committee, it has been noteworthy over time that the Commission has had westerners from energy producing states in leadership.

a. What has been your signal achievement in advancing the cause of energy production or energy delivery infrastructure in the west?

Answer: The work of the Office of Enforcement (OE) is relevant to energy production and delivery in the West and elsewhere. With respect to western energy delivery, under my direction, OE led inquiries into two significant events: (1) the Southwest cold snap of February 1-5, 2011 in which 1.3 million electric customers were out of service at the peak of the event on February 2 and a total of 4.4 million gas and electric customers were affected over a three-state region that included Texas, New Mexico and Arizona; and (2) the Arizona-Southern California outages on September 8, 2011, in which a disturbance left 2.7 million customers without power. The inquiries resulted in reports that examined the causes of the outages and provided numerous recommendations for avoiding such problems in the future. These recommendations help bolster the reliability of gas and electric transmission in the west.

Energy producers are hurt by market manipulation because they depend upon the receipt of accurate price signals from the market. OE has brought several significant actions against manipulation of western power markets. The investigation of JP Morgan resulted in a $410 million settlement with $124 million in disgorgement being returned to consumers in CAISO. The Commission is also seeking enforcement of a $435 million penalty assessment against Barclays in the U.S. District Court for the Eastern District of California for its manipulation of electricity prices in the west. These actions help ensure the integrity of the markets and deter

manipulation, which, in turn, directly benefits producers and consumers in the West and elsewhere.

b. Why do you believe that you should go ahead of Chair LaFleur as Chair?

Answer: This decision was for the President to make, and he made it. I believe that there are a number of reasons that the White House could have considered. First, I have demonstrated my commitment to protecting consumers and ensuring a level playing field for all market participants. Second, since 2009 I have been immersed in the energy markets and have developed expertise in the wholesale physical energy markets, as well as their relationship with the financial markets. Third, I have significant leadership experience. At the age of 39, I was the US Attorney in New Mexico, which was one of the busiest US Attorney's Offices in the United States and which had more than 130 staff divided between two offices. At FERC, I lead an office of almost 200 staff divided among four Divisions. OE has developed an innovative market surveillance program and brought a series of significant enforcement actions. Fourth, I have a strong record of working in a bipartisan fashion and am committed to public service and good government. I clerked for a federal judge, worked at the State Department under the Reagan Administration, and went to the Justice Department under the first Bush Administration. Governor Susana Martinez has noted the way in which I worked closely with her to address public safety issues when she was the District Attorney in Dona Ana County, New Mexico. Senator Pete Domenici has also noted my bipartisan approach to good government. Fifth, I was confirmed once before by the Senate, and my confirmation was by unanimous consent. Finally, I add to the geographical diversity of the Commission, as I am a westerner from a major producer state. Energy, including energy production and research, is a cornerstone of New Mexico's economy.

c. You noted your work with the national labs as providing you with energy-related experience. Please explain more fully what type of work you performed for the national labs and how that work is relevant for the position for which you've been nominated.

Answer: New Mexico is fortunate to have two national laboratories, Los Alamos and Sandia. The Department of Energy oversees both laboratories, and the laboratories do research that can lead to technological innovation and breakthroughs that enhance the energy security of the United States. As U.S. Attorney, I worked closely with both laboratories on national security matters. After leaving DOJ, I was counsel to Sandia for several years and did an internal investigation into allegations involving management and security issues. My work with Los Alamos and Sandia is relevant in a number of respects. First, my involvement with national security matters has given me a keen awareness of the need to protect critical energy infrastructure from both physical and cyber threats. Second, given the sensitivity of information relating to potential threats and vulnerabilities, I also understand the importance of protecting classified and other sensitive information. I have considerable experience dealing with national security issues and classified materials. Third, having worked with national laboratories, I recognize what a tremendous resource they are. The Idaho National Laboratory, Oak Ridge, Los Alamos, Sandia, National Energy Technology Laboratory, National Renewable Energy Laboratory, and Pacific Northwest National Laboratory, among others, do the type of research and development that can bolster grid security and resiliency, energy storage, and a host of other

issues. There may be opportunities to work with the national laboratories or to leverage their research and development in a way that helps foster public-private partnerships and promotes safe, reliable, secure and efficient infrastructure.

Question 3. During our meeting and at the hearing, I asked you your reaction to a recent lengthy newspaper interview of Kevin and Rich Gates who have gone so far as to launch a website to educate the public about their experience at the hands of the Office you direct. Put simply, they assert that they have been denied basic fairness over a period of years.

a. You told me that you could not respond to my question and you cited the Commission's rules. Please tell us the Commission's rule that governs here.

Answer: Rule 1b.9 of the Commission's rules governing investigations (18 CFR § 1b.9) requires the Office of Enforcement to maintain confidentiality for investigative proceedings as well as materials and information obtained through the investigative process. Rule 1b.9 provides that the Commission may authorize disclosure of such information.

b. Please explain what it would take to relieve you of the obligation to remain silent about this case?

Answer: If the Commission authorized release of information about this case, I would be permitted to discuss at least certain aspects of the investigation.

c. Do you have any delegated authority as Director of the Office of Enforcement (OE) to make investigations or less formal inquiries public?

Answer: No, I do not have delegated authority as Director of the Office of Enforcement to make investigations or investigative inquiries public. (I do authorize the issuance of a Notice of Alleged Violation (NAV) as set forth in Commission orders, but this does not occur until the Commission has had the opportunity to review the NAV and the Commission retains the authority not to issue or to stay the issuance of the NAV in any given matter.)

d. If so, why isn't this authority available to you in this instance to enable you to answer my question?

Answer: As noted above, I do not have such authority.

e. Would your answers be affected if the subjects of the investigation were to waive confidentiality here?

Answer: No. There is no such "waiver" provision in the regulations.

Question 4. Returning to our meeting, you emphasized that the scope of the responsibilities of the Office of Enforcement were broader than one would assume given the title of the Office, and

that, as a consequence, your experience was broader than it seemed. For example, you told me that your office did merger review and analysis.

a. What role does your Enforcement Office have in merger review?

Answer: The Office of Enforcement has been involved in reviewing mergers on the front end and the back end, though primarily on the back end. As an example of front end review, the Office of Enforcement's Division of Analytics and Surveillance (DAS) recently assisted the Office of General Counsel and the Office of Energy Market Regulation in reviewing a merger filing from an analytical perspective. In particular, DAS analyzed documentation, such as contractual terms in power sale agreements and other merger filings, to provide insight into whether proposed mitigation measures could provide an opportunity for gaming or manipulation.

On the back end, the Office of Enforcement's Division of Audits and Accounting reviews jurisdictional entities' compliance with commitments made during a Federal Power Act section 203 filing seeking merger authorization, as well as compliance with the conditions imposed in the Commission order authorizing the transaction. The Commission order authorizing a merger transaction may (1) require the filers to hold customers harmless from any merger costs, incurred both before and after the merger, for a period of five years; (2) require a section 205 filing to recover any merger costs; (3) direct accounting for merger-related costs; and/or (4) establish certain filing requirements. Enforcement examines compliance with all such commitments, conditions, and accounting, and filing requirements. Enforcement also evaluates merger costs to ensure that they have not been or will not be included in wholesale customers' rates without Commission approval through a section 205 filing. Since 2009, Enforcement has performed seventeen merger compliance reviews, four of which are currently pending. These reviews have resulted in eighteen recommended actions and approximately $15 million in recovery to rate payers.

b. And what role have you played in merger review?

Answer: As the Director of the Office of Enforcement, I oversee the analytical work of the Division of Analytics and Surveillance, including its work as noted above. Similarly, as the Director, I review all audit reports conducted by the Division of Audits and Accounting, including those related to mergers, as noted above, almost all of which were issued under delegated authority by me.

Question 5. On March 8, 2012, you signed a Stipulation and Consent Agreement with a subsidiary of Constellation Energy Group, a company that at that same time was a party to an Agreement and Plan of Merger for which FERC's regulatory approval was required. In fact, the Stipulation and Consent Agreement makes reference to the merger transaction. The Stipulation and Consent Agreement was approved by the Commission on March 9, 2012. Are you aware of any information that would suggest a connection between the Enforcement Settlement you signed on March 8 and the approval of both the Enforcement Settlement and the merger itself on the very next day, March 9?

a. Are you concerned about the appearance of a quid pro quo in a connection between merger reviews and enforcement?

Answer: I would be concerned about the appearance of a quid pro quo in a connection between merger reviews and enforcement.

b. Are you aware of any information that would suggest a connection between the resolution of the enforcement matter and the approval of the merger?

Answer: As your question notes, the Stipulation and Agreement makes reference to the merger. To my knowledge, the Commission resolved the Exelon-Constellation merger consistent with the requirements of section 203 of the Federal Power Act, and the Commission approved the resolution of the enforcement matter consistent with the relevant Federal Power Act provisions and implementing regulations. Moreover, 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 was conducted separately by staff from the Office of Enforcement.

c. Did you, then-Chairman Wellinghoff, or anyone else at FERC to your knowledge ever indicate to the parties in the Exelon-Constellation merger that it would be prudent to settle the pending enforcement matter in order to get their merger approved?

Answer: To the best of my recollection, I did not indicate to the parties in the Exelon-Constellation merger that it would be prudent to settle the pending enforcement matter to get the merger approved. I do not know whether anyone else at FERC did so.

d. Why did the enforcement settlement specifically allow the companies to not have to pay the fines until the merger was approved?

Answer: The Commission determined that accepting the settlement, including this provision, would be in the public interest.

e. What assurances will you give us that if you are confirmed there will be no such connection in merger proceedings or market power review of any kind more generally?

Answer: Section 203(a)(4) of the Federal Power Act states:

> After notice and opportunity for hearing, the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

16 U.S.C. § 824b (a)(4). As such, the Commission must consider the public interest in its review of a proposed merger. Each proposed merger must be reviewed based on its own unique facts and circumstances. Thus, I cannot prejudge any matters that might be filed before the Commission. However, I can provide you assurances that if I am confirmed, Commission staff

would perform merger review and market power review in a manner that is consistent with all applicable statutes, regulations, and orders.

Question 6. In our meeting and at the hearing we discussed the likelihood that your enforcement work would lead to your recusal from a number of FERC considerations. You noted that if confirmed you would work with the Ethics counsel at FERC to determine how to proceed. Please consult with the appropriate Ethics counsel in preparing your written responses to the following:

a. Does FERC have a formal recusal policy for Commissioners that outlines a standard to disqualify a Commissioner in any proceeding in which the Commissioner's impartiality might be questioned? If so, please state the policy.

Answer: As requested, I consulted with the Office of General Counsel and the Designated Agency Ethics Official (DAEO) in preparing the response to this question. 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.

b. What standard would you impose upon yourself to determine if you should be disqualified from a Commission proceeding?

Answer: See answer to Question 6.a for the FERC standard recusal policy. If confirmed, I would not have a financial conflict as to any enforcement issue. However, you have asked whether my recusal would be necessary because of my current position as the Director of the Office of Enforcement (OE). Based on the individual circumstances of each particular matter, in consultation with the Designated Agency Ethics Official (DAEO), I would decide whether my recusal is required, including consideration of 5 CFR § 2635.502, which 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.

c. I understood you to say that you believe the largest set of proceedings from which you would have to recuse yourself is 43. Is that correct? How do you arrive at that number?

Answer: At the time of our discussion, there were 43 pending investigations in the Office of Enforcement. Under the most expansive potential application of the ethics rules, this appears to be the largest set of proceedings from which I could possibly need to recuse myself, if confirmed.

d. Do you believe your decision to decline to recuse yourself would be appealable? Should it be?

Answer: Depending on the facts and circumstances of the matter, my decision not to recuse myself, if I am confirmed, may be appealable.

e. If confirmed as Chair, do you believe it would be appropriate for you to participate in enforcement proceedings before the Commission? Please explain.

Answer: See answer to 6.a.

f. If confirmed as Chair, would you recuse yourself from a Commission proceeding if a party before the Commission requested you do so; citing an appearance of bias? How would you evaluate the request for recusal?

Answer: If a party before the Commission requested my recusal, I would consult with the DAEO and the relevant ethics rules.

g. Will you agree to work with the FERC General Counsel, the DOE IG, the Office of Government Ethics, and the Department of Justice to determine whether you should recuse from any and all cases in which you have been involved prior to taking the Oath of Office if confirmed?

Answer: 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. I understand that the DAEO may routinely consult with the Office of Government Ethics on any number of ethics issues, including any impartiality issue that could arise as a result of my prior service as the OE Director. In consultation with OGC and the DAEO, I would work with any other appropriate entities if specific circumstances warranted such consultation.

h. Will you agree that you will recuse yourself from all such designated investigations as recommended by those Federal officials?

Answer: See answer to 6.g.

i. If you will not agree, please provide a detailed and specific explanation for why not in the context of your statement at the hearing about the top priority to prevent actual conflicts of interest and the appearance of such conflicts?

Answer: See answers to 6.a, 6.b and 6.g. If confirmed, I am committed to avoiding any action that would present an actual conflict of interest or the appearance of a conflict. My recusal decisions on investigative matters will be guided by the applicable regulations and by consultations with FERC's Designated Agency Ethics Official. Consultation with the DAEO

and any other appropriate officials is critical to making such a determination, but the determination must be made on a case-by-case basis.

Question 7. Regarding the Production Tax Credit (PTC):

a. Some regional transmission organizations have dispatch rules which allow intermittent generators, such as wind power and solar power to participate in day-ahead markets. I have been told the current federal PTC allows wind generators to submit a zero dollar bid, or even a negative bid price, in these competitive markets. Do you believe it is appropriate for a wind generator to have the ability to submit a zero dollar bid, or even a negative bid price, into competitive markets? Does this practice harm other market participants and/or adversely impact the markets?

Answer: In RTO-administered markets, security-constrained economic dispatch finds the lowest cost of dispatching resources, based on their bids, to serve load while respecting transmission system limitations. In RTOs' competitive markets, a resource's bids are disciplined by competition and reflect the resource's incremental cost of energy production. A zero dollar bid by an intermittent resource is consistent with competitive bidding - it is consistent with the incremental cost of energy from the resource and usually reflects a resource's contractual obligation to produce its full output regardless of what the market clearing price is. A negative bid usually indicates that a resource is willing to continue to produce as long as it must pay less than its opportunity cost to do so.

A dispatch that assures customers will be served at least cost consistent with security constraints is achieved when all suppliers offer their resources on competitive terms. Thus, market rules that allow for self-scheduling by permitting a zero or negative bid support a competitive market outcome that provides electricity to customers at the least cost and allows RTOs to reliably manage their systems. Whether or not the PTC should be re-authorized is a decision for Congress, not FERC, to make.

b. Do you believe the PTC provides an unfair advantage to wind power producers over conventional fossil generation in these competitive markets?

Answer: Energy prices that reflect the true marginal cost of production are economically efficient. To the extent energy market prices become negative, such prices send an appropriate short-run signal that the system needs additional demand or less supply.

To date, Commission actions related to bidding by variable energy resources have focused on requests by RTOs/ISOs to ensure that these resources are able to bid their marginal cost, including all opportunity costs. Variable energy resources have historically not bid into Commission-jurisdictional energy markets and have instead simply accepted the real-time energy price. The PTC creates incentives to produce even when the real-time energy price is negative. When variable energy resources do not bid into the energy market, the market operator is forced to manually curtail the generator if too much energy is produced. This manual curtailment is economically inefficient, fails to send accurate price signals, and creates potential risks to system

reliability. Thus, the Commission has approved proposals that encourage variable energy resources to bid their true marginal cost, including opportunity costs, into the energy market.

A number of market and regulatory factors affect decisions by investors to construct new resources, including base load generation. Low prices in the energy markets inform investment decisions, but are only one data point. For example, investors may support construction of new resources in response to state resource adequacy and resource planning requirements or to ensure that resources with particular characteristics that meet identified system needs are available.

Question 8. January's polar vortex revealed that key systems relied on coal capacity slated for retirement to keep the power on. For example, I understand AEP relied upon 89 percent of the coal capacity that is slated for retirement next year, in order to meet demand. Chair LaFleur recently stated that during the polar vortex the electricity grid was "close to the edge" of breaking. Commissioner Moeller has said that "the power grid is now already at the limit." The Department of Energy estimates that EPA rules will force several hundred coal-based electricity plants to close, and pending rules for greenhouse gases could close another 100 power plants.

a. Do you believe that the cumulative impact of the regulations issued by EPA in recent years – and set to be issued in the years ahead – could have a serious impact on electric reliability? Please provide the facts that support your answer.

Answer: Based on information available at this time, I believe that the cumulative impact of EPA's regulations will be manageable. For example, 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 on reliability issues. As another example, reports on EPA's recent rules on utility usage of cooling water suggest that EPA has allowed significant flexibility on compliance approaches instead of requiring more rigid and costly approaches that might have contributed to significantly more power plant retirements. The EPA issued its proposal on greenhouse gas emissions on Monday 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. If confirmed, I believe that FERC must continue to work closely with the EPA throughout this process.

b. Should there be as GAO has recommend, a formal documented process for FERC and EPA to interact with respect to the impact of EPA rules on electric reliability?

Answer: My understanding is that FERC, EPA, and DOE have communicated often regarding the potential reliability impacts of 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. If confirmed, I am committed to working closely with the EPA and DOE.

c. If confirmed and designated as Chairman, what would you do to ensure grid reliability was a concern the EPA took into account when evaluating their proposed regulations? How would you ensure that FERC stands "shoulder-to-shoulder" with the EPA? Recognizing that the Chairman and not individual Commissioners direct the work of the Commission's staff, how would you, if you are confirmed as Chairman, administer the Commission with respect to the reliability impacts of EPA rules?

Answer: When EPA proposes new regulations, the Commission should carefully review the proposals 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. 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.

d. In general, widespread and persistent outages to the Bulk Power System are rare. However, as assets begin to retire, there is a quiet consensus that the risk of a "localized" reliability effect is growing. If true, would you find this impact acceptable if caused by federal policy? How do you define "localized effect"? Is there an industry-accepted definition?

Answer: I am not aware of an industry-accepted definition of "localized effect." But, your question appears to refer to "localized effect" as distinct from regional resource adequacy, and more based on the idea that even one or two resources may be important in maintaining reliability in a small area. Certainly, reliability issues can be caused in some small areas by the loss of even just one resource, unless addressed adequately and timely. I would be troubled if federal policy caused an unreliable supply of electricity in a large or small area.

e. If you are confirmed as Chairman, how would you expect the Commission to interact with NERC and the planning authorities on the question of the potential impact of EPA regulations on electric reliability?

Answer: The Commission engages regularly with NERC and the planning authorities on these (and other) topics. This communication is often informal, but at times occurs in Commission-led technical conferences, NERC-led meetings and conferences, and a variety of other fora. Also, Commission staff works with NERC and others on efforts such as NERC's annual Long-Term Reliability Assessment and Summer and Winter Assessments. I believe Commission staff

should continue these efforts and, as EPA moves forward on its greenhouse gas regulations for existing sources, staff should conduct outreach with NERC and planning authorities to ensure extensive sharing of information.

f. With the increased probability of coal plant retirements or mothballing decisions due to proposed environmental regulations and increasing competition from natural gas, a number of jurisdictions are looking at "reliability-must-run" (RMR) decisions for coal plants. Should FERC support RMR agreements in competitive markets even though these plants may not be able to generate electric power at competitive prices?

Answer: The Commission should support these agreements only as a last resort. RMR agreements can distort the price signals needed in competitive markets to elicit resources when and where needed, and should be used only when reliability needs cannot be met through other reasonable means.

Question 9. Regarding capacity markets:

a. What is the appropriate path forward with respect to organized and bilateral wholesale markets? Can and should they co-exist or should all utilities ultimately be in organized markets? What are your thoughts on a Standard Market Design proposal?

Answer: Organized and bilateral wholesale markets can co-exist. I believe that the work of the organized markets with respect to both transmission service and market operations contributes to FERC-jurisdictional rates that are just and reasonable and that are not unduly discriminatory or preferential. Importantly, I also recognize that participation in an RTO or ISO is a voluntary decision for individual transmission owners, as it should be.

With respect to a path forward for the organized markets, last summer the Commission released a staff white paper detailing the capacity market designs in PJM, New York ISO and ISO-New England. On September 25, 2013, the Commission convened a well-attended technical conference to explore issues associated with the design and operations of the centralized capacity markets in the eastern RTOs/ISOs. Following that technical conference, the Commission issued a number of questions and invited interested industry participants to submit written comments. The Commission received over 50 sets of comments. The Commission is carefully reviewing those comments in determining how to move forward. If confirmed, I look forward to participating in any consideration of these issues that may come before the Commission.

I do not believe in Standard Market Design. Instead, I believe in an approach that allows each region to take into account that region's individual needs.

b. Do you believe that the wholesale electricity markets operated by regional transmission organizations are achieving net benefits for consumers as compared to those regions without RTOs?

Answer: Commission policy is that RTO membership is voluntary. However, those areas with RTOs have seen significant benefits associated with RTO membership, including greater price transparency, access to more efficient ancillary and balancing services, more efficient transmission grid management, and decreased opportunities for discriminatory transmission practices.

c. Do you think that there is a sufficient level of transparency in pricing and other relevant data from the electricity markets, particularly those operated by RTOs?

Answer: I believe that FERC provides a good deal of transparency in pricing and other relevant data from the electricity markets. The Commission requires sellers of wholesale services to make quarterly reports detailing transactions. This information is publicly available roughly one month after the quarterly submission. In addition, information on available transmission is required to be posted by public utility transmission providers. Apart from these Commission-led requirements, the RTOs and ISOs provide significant price transparency, with pricing data publicly available on their websites. However, while I believe that the Commission is providing significant transparency, if confirmed I am always willing to look for possible ways to provide additional transparency into its markets.

d. Is FERC's oversight of electricity markets sufficient to ensure that the wholesale electric rates meet the "just and reasonable" standard of the Federal Power Act?

Answer: I believe that FERC's oversight of electricity markets is sufficient to ensure that the wholesale electric rates meet the "just and reasonable" standard of the Federal Power Act.

e. What steps can FERC take to ensure that the capacity markets do not hinder local and state resource decisions?

Answer: The issue of how capacity markets can support local and state resource decisions was a key issue in the Commission's September 25, 2013 technical conference on capacity markets and the follow-up questions. The Commission is considering this issue as it reviews the capacity markets. If confirmed, I look forward to participating in any consideration of these issues that may come before the Commission.

f. Do you believe a 3-year capacity market commitment period used by RTOs is the appropriate time period to capture the value of capacity?

Answer: The issue of an appropriate commitment and forward period in centralized capacity markets was addressed in the staff white paper and at the technical conference. The Commission is considering this issue as it reviews the capacity markets. If confirmed, I look forward to participating in any consideration of these issues that may come before the Commission.

g. Do you believe the RTO capacity markets are attracting and/or retaining baseload power resources?

Answer: Capacity markets have played an important role in attracting and retaining an array of resources, including capacity from generation, imports, transmission and demand resources, needed to ensure that reliability requirements are met. The centralized capacity markets are designed to facilitate entry of new resources as needed, as well as provide appropriate price signals for the orderly retirement of older, less efficient resources. PJM recently reported that its base residual auction for 2017/2018 procured about 4,800 MW of new combined cycle generation.

h. In regions of the country that have de-regulated retail electricity sales, such as in New England, the Mid-Atlantic, and New York, FERC has approved mandatory capacity markets to ensure enough generating capacity to meet load. Do you support capacity markets in regions where most states still regulate retail electricity sales?

Answer: The Commission has found a range of resource adequacy constructs to be just and reasonable, including constructs in the regions covering the Midwest (MISO), California (CAISO) and the centralized capacity markets in the eastern Regional Transmission Organizations. In certain of these regions, states chose to restructure and others did not. Where states have restructured, the regional transmission organization or independent system operator in that region has designed capacity markets to meet the region's resource adequacy obligation.

i. I have heard concerns from the Northeast Public Power Association (NEPPA) about problems with the ISO-NE's centralized capacity market – namely the "Minimum Offer Price Rule" – that can limit the ability of states and consumer-owned utilities to "self-supply" their capacity obligations and to receive capacity "credit" for generating resources that they sponsor, build, or buy to meet their customers' resource needs. NEPPA argues that this puts its consumers at risk of having to pay twice for the same capacity – once for the new renewable capacity, and again for auction selected capacity that the state or consumer owned utility neither wants nor needs. Do you believe the Minimum Offer Price Rule creates a disincentive for small entities like public power utilities to develop new generating capacity?

Answer: The concern you raise was discussed at length at the Commission's September 25, 2013 technical conference on capacity markets and was the subject of extensive written comments following the technical conference. The Commission is still considering how to proceed with information gathered in that process and if confirmed, I look forward to participating in any consideration of these issues that may come before the Commission.

j. You have a unique perspective in that you work extensively with Independent Market Monitors (IMM) in each ISO. Does the IMM role need to be expanded? Reduced? Do you view the IMM's role as ensuring competitive market conditions and economic efficiency, or as more as an entity focusing on keeping rates low?

Answer: In the Commission's Policy Statement on Market Monitoring Units, the Commission recognized that "MMUs perform an important role in assisting the Commission in enhancing the competitiveness of ISO/RTO markets." Further, in 2008, the Commission issued Order No. 719, Wholesale Competition in Regions with Organized Markets, which adopted regulations setting

forth more specifically three core functions that the IMMs for each of the RTOs/ISOs must perform: (1) to identify and notify the Office of Enforcement (OE) of market participant behavior that requires investigation, including suspected tariff violations and market manipulation; (2) evaluating existing and proposed market rules, tariff provisions, and market design elements and recommending proposed rule and tariff changes; and (3) reviewing and reporting on the performance of wholesale markets to the ISOs/RTOs and the Commission. Although I primarily have worked with the IMMs with respect to their first core function, I believe all three functions are important and helpful to the Commission. While I support the role of IMMs as currently implemented by the Commission, if confirmed I would keep an open mind on proposals that could enhance their effectiveness.

Question 10. What is your over-arching regulatory philosophy?

a. How far should FERC seek to evolve its role beyond the authorities specifically given it by Congress? For example, how, if at all, would you use FERC's authorities to see that an RTO is formed in the Western Interconnection?

Answer: As an administrative agency, FERC is a creature of statute. FERC must respect and by law may not exceed the authority provided to it by Congress. I believe that the work of regional transmission organizations (RTO) and independent system operators (ISO) with respect to both transmission service and market operations contribute to FERC-jurisdictional rates that are just and reasonable and that are not unduly discriminatory or preferential. Importantly, I also recognize that participation in an RTO or ISO is a voluntary decision for individual transmission owners. If confirmed, I do not anticipate using FERC's authority to change this precedent.

b. In your opinion, where is the federal/state jurisdictional divide?

Answer: Both the federal government and the states have vital roles to play with respect to the critical issues of energy policy now facing the Nation. At the federal level, I take seriously the statutory authority assigned to FERC by Congress, while also recognizing that the Department of Energy and other federal agencies have their own distinct responsibilities with respect to energy policy. I also believe that it is essential for FERC to build and maintain a strong relationship with state regulators, respecting the longstanding and ongoing role of the states, particularly with respect to the development of needed electric infrastructure. For example, under FPA sections 205 and 206, the Commission ensures that the rates, terms and conditions of sales for resale of electric energy and transmission service in interstate commerce by public utilities are just, reasonable, and not unduly discriminatory or preferential. This authority is fundamental to the Commission's mission, involving a balance between protecting consumers and promoting and protecting investment in needed infrastructure. In exercising this authority, however, the Commission must always be cognizant of states' roles, including regulation of retail sales and local distribution of electricity. Similarly, the Commission does not have a role in authorizing the construction of new generation facilities other than non-federal hydroelectric facilities; regulation of such construction is the responsibility of state and local governments.

c. Is it the role of FERC to decide or direct "environmental performance" and "energy efficiency goals"?

Answer: No. It is the role of FERC to ensure that the rates, terms and conditions of sales for resale of electric energy and transmission service in interstate commerce by public utilities are just, reasonable, and not unduly discriminatory or preferential. FERC policies should be fuel neutral while allowing non-discriminatory access to FERC-jurisdictional markets.

d. Who should decide which groups are allowed to participate?

Answer: See response to Question 10.c.

e. How would this process weigh environmental performance and energy efficiency against customer rates?

Answer: See response to Question 10.c.

f. In your opinion, what are the greatest challenges facing the bulk electric system today?

Answer: One challenge is ensuring adequate reliability in the face of aging infrastructure, cyber and physical security threats to the grid, and a changing resource mix. New pipeline and transmission infrastructure needs to be built, and communication and coordination between the gas and electric industries should be improved. The FERC has taken a number of actions to address communications between gas and electric sectors, including issuing a final rule governing communications between the gas and electric industries and a proposed rule to improve the coordination and scheduling of natural gas pipeline capacity with electricity markets. FERC also plays a critical role in permitting natural gas pipelines and incenting the development of both electric and natural gas infrastructure. As the sectors continue to transition, an appropriate role for the FERC would be to continue dialogue with states, RTOs, ISOs, NERC, EPA, other federal agencies, industry and other stakeholders, to take action on cases that come before it in a fair and timely manner, and to promote reliability of the grid.

g. If confirmed, what would your top priority be as chair of FERC?

Answer: 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. In terms of substantive matters, my priorities would reflect my belief that infrastructure, competitive markets, and reliability are vitally important issues at the Commission. Right now, there is an important need for more infrastructure, both in terms of gas facilities and electric transmission, and FERC plays a critical role in permitting and incenting the development of that infrastructure. It will also be important to continue to look for ways to improve the efficiency of the markets and to deliver greater value to consumers in the competitive markets. Finally, the reliability of the grid is a primary responsibility for FERC. Not only does this responsibility encompass physical security and cybersecurity, but it includes gas-electric coordination issues as well.

Question 11. At our meeting and at the hearing, we discussed the recent *Energy Law Journal* article that asserts numerous due process and substantive violations in FERC enforcement.

a. How do you respond to the claim that FERC's enforcement process raises "serious fundamental due process and substantive concerns"?

Answer: I have reviewed this article and discussed it with my colleagues in the Office of Enforcement. My view is that the article is fundamentally flawed. Unfortunately, some of the legal and factual errors are quite glaring, for example, the article confused SEC administrative hearing and investigation rules; failed to describe FERC's actual investigation process and the significant transparency provided in that process; failed to discuss the significant transparency, guidance, and analysis of how the Commission has implemented and applied Congress's prohibition against market manipulation in FERC-jurisdictional markets; made various statements of law for which they provided no legal authority; and numerous other errors and unsupported assertions.

Throughout my time at FERC, and my entire career, I have always tried to see how the rules and policies in government can be made more efficient, workable, and fair. And I have always been committed to the core, fundamental principle of protecting due process rights while serving in the United States Attorney's Office, as a law professor, and at FERC. If confirmed, I would be open to considering how FERC can improve the way it does its work and always willing to listen to market participants who have constructive suggestions. But this article's allegations of due process and substantive violations in FERC enforcement, and the analysis underlying those assertions, are wide of the mark.

b. Has the Commission adopted a definition of market manipulation? What definition does the Commission use to identify market manipulation?

Answer: The Office of Enforcement's efforts have followed the definition of market manipulation set forth in the Commission's Anti-Manipulation Rule (18 C.F.R Part 1c), the Commission's Order No. 670 implementing that Rule, and precedent developed under the Rule. In Order No. 670, the Commission set forth the requirements for finding a violation of the Anti-Manipulation Rule:

> The Commission will act in cases where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission.

The Commission adopted the Anti-Manipulation Rule in order to implement Congress's prohibition against fraud and market manipulation as set forth in EPAct 2005, which was passed in the wake of Enron's manipulation of Western energy markets. The Commission's definition was patterned on the Securities and Exchange Commission's core anti-fraud and anti-manipulation rule – as EPAct 2005's prohibition against fraud and manipulation was patterned

on and specifically references the Securities and Exchange Act of 1934. Although there are differences in the securities and energy markets, the Commission's enforcement-related matters look to securities law precedent on fraud and manipulation where applicable.

Following the Commission's implementation of the Anti-Manipulation Rule, there have been numerous public settlements and orders that have explained, often in great detail, the scope and application of the rule.

c. Should a person or company be liable for acting consistently with the governing market rules? If so, under what circumstances?

Answer: In Order No. 670, which implemented EPAct 2005's prohibition against market manipulation, the Commission stated: "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 the Final Rule." The Office of Enforcement has not recommended that the Commission settle any matter or authorize any enforcement action inconsistent with this principle during my time as Director of Enforcement – and the Commission has not taken any action inconsistent with this principle during this time.

It is also important to 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 regulations, it is also true that a finding of market manipulation does not require any violation of a specific market rule or tariff. The Commission has made this clear many times, including in the Order approving the *JP Morgan* market manipulation settlement (issued in July 2013). There, the Commission stated:

> Market manipulation under the Commission's Rule 1c is not limited to tariff violations. That Rule 1c is not so limited is by design. In the wake of Enron's schemes in the CAISO market, the Energy Policy Act of 2005 gave the Commission "broad authority to prohibit manipulation" and "an intentionally broad proscription against all kinds of deception, manipulation, deceit and fraud."' Both the breadth of Congress' authorization to the Commission and the breadth of the Anti-Manipulation Rule itself are a response to what courts have long recognized: the impossibility of foreseeing the "myriad means" of misconduct in which market participants may engage. For that reason, as the Commission observed in 2006, "[N]o list of prohibited activities could be all-inclusive." Instead, as Order No. 670 emphasizes, fraud is a question of fact to be determined by all the circumstances of a case, not by a mechanical rule limiting manipulation to tariff violations. (Footnotes omitted)

So while a market participant should not be liable for acting in a manner that is explicitly contemplated in Commission-approved rules and regulations, the absence of a violation of market rules is not a defense to market manipulation.

d. Do you believe FERC investigations should be reformed to follow guidelines similar to those adopted by the SEC?

Answer: While I think it is always useful to look to other enforcement agency practices, and to keep an open mind on whether FERC's enforcement practices can be improved, I don't believe FERC investigation practices should be changed to resemble the SEC's more than they already do. I give an overview of certain aspects of the Commission's investigation practices in my answer to your Question 40, and I would like to incorporate my response to that question here. But I would also like to note the similarities between SEC and FERC investigation practices – because I think the law review article you reference in this question rests on a serious legal error on this point (and other points). The rules governing SEC investigations, in fact, are similar in a number of respects to the rules governing FERC investigations. Indeed, FERC's investigation rules were modeled after other government agency enforcement rules, including the SEC's rules. And the more lengthy and detailed rules governing SEC administrative hearings also bear some similarity (though there are of course numerous differences) to the rules governing FERC administrative hearings. But it would be wide of the mark to suggest that investigative rules and administrative hearing rules should look similar to one another – as I believe this law review article does. Investigations are different than hearings, and they require a host of different rules, policies, practices, and guidelines, especially when it comes to the matter of discovery. In short, if the thought is that FERC investigation practices should be changed to look like SEC administrative hearing practices, then I do not think that would be a good idea.

I would also like to emphasize that on the important issue of disclosure of information, I do not believe there is a significant difference between FERC rules and SEC rules – either on the investigation side or the administrative hearing side. (And, of course, both agencies are subject to the same set of procedural and discovery rules when they appear in federal courts.) If anything, as I describe in my answer to your Question 40, FERC's process of exchanging information and views with investigative subjects is at least as robust as the SEC's.

e. The law review article asserts when individuals are under FERC investigation, FERC enforcement does not have to provide access to deposition transcripts or provide the information – even if exculpatory -- to individuals that has been shared with the Commission. Is this true, and if so, do you personally believe individuals should have access to their deposition transcripts and information that was shared with Commissioners?

Answer: No, I disagree with the article's assertion. The Commission regulation governing access to transcripts is 18 CFR § 1b.12, which provides:

> Transcripts, if any, of investigative testimony shall be recorded solely by the official reporter, or by any other person or means designated by the investigating officer. A witness who has given testimony in an investigation shall be entitled, upon written request, to procure a transcript of the witness' own testimony on payment of the appropriate fees, except that in a non-public formal investigation, the office responsible for the investigation may for good cause deny such request. In any event, any witness or his counsel, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

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. This is made on a case-by-case, witness-by-witness basis and is carefully reviewed. In the small number of cases when a request for a transcript is temporarily denied, the transcripts are provided to the subjects well before the Commission would consider an Order to Show Cause, much less issue an order finding a violation or assessing a penalty. As for exculpatory materials, the Commission's policy (which I recommended that the Commission adopt) requires disclosure of exculpatory materials to subjects – and Enforcement staff understands the importance of following that policy.

It may also be useful to note that the SEC's rules and policies on transcript access are virtually identical to FERC's, as reflected in the SEC investigation rules. *See* 17 CFR § 203.6 (SEC) ("A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees: *Provided, however,* That in a nonpublic formal investigative proceeding the Commission may for good cause deny such request.").[1]

f. Should subjects of non-public investigations have the same access to the Commission as the Enforcement staff at an earlier stage in the proceedings than today? If so, when should parity be imposed? If not, why not?

Answer: The Commission has issued "ex parte" and "separation of functions" rules, *see* 18 CFR §§ 385.2201 and 385.2202, providing that Enforcement staff working on the investigation should be "walled off" from participating in a Commission decision on an enforcement action at the Order to Show Cause (OSC) stage, and not earlier. These rules were implemented before I arrived at the Commission in 2009. *See Ex Parte Contacts and Separation of Functions*, Stats & Regs ¶ 31,279 (2008). The Commission also decided that the protection of walling off Enforcement staff at the OSC stage went beyond what was required by law, but that adopting this procedure would afford subjects of investigations additional due process protections. *See Energy Transfer Partners L.P.*, 121 FERC ¶ 61,282 (2007). I am aware of U.S. Supreme Court precedent stating that "[i]t is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law." *Withrow v. Larkin*, 421 U.S. 35, 56 (1975).

[1] I also note that the CFTC has a similar provision in its investigation rules. 17 CFR § 11.7(b) ("*Copies of testimony or data.* A person compelled to submit data or evidence in the course of an investigatory proceeding shall be entitled to retain or, upon payment of appropriate fees as set forth in the Schedule of Fees for records services, 17 CFR Part 145b, procure a copy or transcript thereof, except that the witness may for good cause be limited to inspection of the official transcript of his testimony."). A CFTC Enforcement official recently stated publicly that the CFTC follows the practice of delaying access to depositions transcript until later in the investigation to avoid coordinated testimony among witnesses.

I note that Commission regulations and policy provide investigation subjects with the ability to inform the Commission of their views about an investigation. Two aspects of the Commission's rules are important to highlight here. First, at the time that Enforcement staff seeks Commission authority to settle a matter, staff provides the Commission with the subject's (often lengthy and detailed) response to staff's preliminary findings. This means that well before the Commission would ever be in a position to find that any subject has committed a violation or should be assessed a penalty, the Commission is made aware of the subject's views about an investigation and its potential defenses. Second, any investigative subject can communicate in writing to the Commissioners directly about any aspect of the investigation and at any time during the investigation. If subjects believe there is something important to say about the facts, law, conduct of the investigation, or anything else, they have the right to make the Commissioners aware of their concerns at any time. Numerous subjects have done so in a variety of matters.

Question 12. Regarding FERC's role:

a. Do you believe FERC is a policy-making institution?

Answer: As an administrative agency, FERC is a creature of statute. FERC must respect and by law may not exceed the authority provided to it by Congress.

b. Do you believe FERC's mission is to implement Congressional policy as reflected in the specific statutes the agency is responsible for implementing?

Answer: Yes.

c. Do you believe FERC should establish policy that is not found in its authorizing statutes?

Answer: FERC cannot establish policy that is outside of the authority given to it in its authorizing statutes.

d. Is it the role of a FERC commissioner or the FERC Chairman to draft legislation?

Answer: No. However, any FERC Commissioner, including the Chairman, can provide technical expertise to Congress on draft legislation if requested.

e. Is it the role of a FERC commissioner or the FERC Chairman to advise Congress on legislation?

Answer: See answer to Question 12.d.

f. Does FERC play a role to decide which power plants are built? If FERC has no direct role in making resource decisions, where do you believe that authority is vested?

Answer: Under Part I of the Federal Power Act (FPA), FERC has the responsibility to authorize the construction of non-federal hydroelectric generation projects and overseeing their operation and safety. With the exception of non-federal hydroelectric facilities, FERC does not have a role in authorizing the construction of new generation facilities. Regulation of such construction is the responsibility of state and local governments.

g. Do you agree it is within the Commission's role to ensure that new resources have access to the grid along with "fair" markets? Do you agree that rules regarding grid access and the development of market rules can be used to direct resource and fuel decisions? Please explain.

Answer: I believe that FERC policies should be fuel neutral while allowing non-discriminatory access to FERC-jurisdictional markets.

h. What advice do you have for Congress on legislation to transition the generation fleet from fossil fuels to renewable resources?

Answer: I do not have any advice at this time.

Question 13. Regarding natural gas:

a. Do you believe the U.S. electricity and natural gas markets face new supply or price risks as a result of the shale gas production boom?

Answer: The increase in shale gas production is a positive development for the U.S. consumer and economy, providing supplies of relatively low cost and clean burning natural gas for the foreseeable future. Natural gas supply risks come from the need to build out pipeline and processing infrastructure at a pace to keep up with expanding production and demand. Growth in gas fired power generation does present some challenges that need to be addressed, primarily in the realm of gas/electric coordination. High gas and electric prices during the recent polar vortex events highlight the need for coordination between gas and electric markets.

b. Does the shale gas revolution raise the prospect of an overreliance on a single fuel for U.S. power generation? What would this mean for electric reliability?

Answer: Reliability is enhanced by an adequately diverse fuel supply. For example, natural gas supplies may be constrained in peak circumstances by pipeline capacity limits, hydropower may be limited during a drought, and coal supplies may be affected if rail or barge shipments are curtailed or if coal piles are frozen. The prospect of "overreliance" on natural gas for power generation is an issue that requires careful consideration. The significance of natural gas as a generation fuel has increased over the last decade, and is expected to continue in the near future. Unlike some other fuels, natural gas is not usually stored on-site. This increases the importance of continually available natural gas transportation to maintain reliable generation. In addition, as pointed out in NERC's 2013 "Special Reliability Assessment: Accommodating an Increasing Dependence on Natural Gas for Electric Power," there are other competing uses for natural gas

that may affect gas availability, such as winter heating, manufacturing, exporting, and use as a transportation fuel. As NERC points out, not only is this a national issue to consider, but it can affect different areas of the country to varying degrees. This issue is included in the electric industry's planning for reliable generation for the future, and the natural gas industry is working with the electric sector to better understand the other's needs in order to provide reliable service to the customers of both sectors. The Commission also has made significant efforts to facilitate better coordination between the two industries.

c. Does the shale gas revolution raise the prospects for distributed electricity generation, with municipal and other customers opting for combined heat and power, and residential customers perhaps embracing new fuel cell technologies? What are the implications for electric utility rate bases?

Answer: The use of combined heat and power (CHP) and fuel cells may be facilitated by lower natural gas prices that can follow from greater shale gas production. New and efficient central station gas-fired generation can be less costly to operate as well. However, most CHP and fuel cell technologies are or would be connected to local distribution company systems. Additionally, these technologies are promoted by various state policies such as renewable portfolio standards. While FERC oversees access to natural gas pipelines and electricity transmission in interstate commerce, irrespective of the technology, local distribution of natural gas and electricity is regulated by the states. What is allowed in rate base varies by state.

d. What in your view are the reliability implications of increasing natural gas use for electricity generation, especially in the Northeast? Are existing federal policies and initiatives adequate to ensure gas-electric interdependency does not become a reliability problem in the future?

Answer: The increased use of natural gas as a generation fuel requires study, monitoring and proactive efforts to maintain reliability. FERC and industry are engaged in the work needed to maintain reliability, and this work must continue. Generation using natural gas fuel is a key component of energy policies. Today, economics make natural gas generation the fuel of choice for many new generation resources.

e. Is FERC doing enough to ensure that gas-electric coordination does not become a problem in terms of reliability or excessive price volatility? Does FERC have sufficient authority to impose and enforce any necessary solutions?

Answer: The issue of gas-electric interdependencies has been a major focus of the Commission for several years. In 2012, the Commission held a series of technical conferences around the country to gain insight into regional issues and approaches, followed by technical conferences on two over-arching issues discussed at each technical conference: communications and scheduling. In 2013, the Commission issued a Notice of Proposed Rulemaking (NOPR), followed by a Final Rule, Order No. 787, allowing interstate natural gas pipelines and electric transmission operators to share non-public operational information to promote the reliability and integrity of their systems. In March of 2014, the Commission issued a NOPR to gather public comments on its proposals to revise the natural gas operating day and practices used by interstate pipelines to

schedule natural gas transportation service. The proposed revisions include starting the natural gas operating day earlier, moving the Timely Nomination Cycle later, and increasing the number of intra-day nomination opportunities to help shippers adjust their scheduling to reflect changes in demand.

The NOPR provides 180 days for the natural gas and electric industries to reach consensus on standards, including any modifications to the Commission's proposed revisions through the North American Energy Standards Board.

The Commission also initiated investigations under section 206 of the FPA into the day-ahead scheduling practices of the regional transmission organizations and independent system operators to determine if they are just and reasonable and to ensure that these entities' scheduling practices correlate with any revisions to the natural gas scheduling practices that may be adopted by the Commission in a Final Rule stemming from the NOPR. In a third order, the Commission initiated an NGA section 5 show cause proceeding requiring all interstate natural gas pipelines to revise their tariffs to provide for the posting of offers to purchase released pipeline capacity in compliance with 18 CFR § 284.8(d) of the Commission's regulations, or to otherwise demonstrate full compliance with that regulation.

The Commission has also asked staff for quarterly reports through 2014 on industry efforts and initiatives on gas-electric coordination. Those reports are posted on the Commission's website.

The Commission is still considering the various proposals on gas-electric coordination, and I do not have any reason to believe at this time that there is a need for additional authority in this area. However, if confirmed, I would consider whether the Commission needs additional authority.

f. Do you believe that natural gas is a "transitional fuel"?

Answer: I believe that natural gas is an important fuel source for generation and will continue to be a significant part of this nation's energy mix. See response to Questions 10 and 11.

g. What do you think the North American natural gas market will look like in 20 years, and what would be the positive and negative aspects of such a future in terms of energy prices, reliability, and the environment?

Answer: In 20 years, the North American natural gas market may be substantially larger than it is now. Growth in consumption may come from gas fired power generation, industry (as both a fuel and a feedstock), and as exports to other countries. Natural gas may also be put to new uses, particularly in transportation, with some commercial vehicle fleets and locomotives converting to LNG and CNG (compressed natural gas). Plentiful natural gas, in the U.S., and increasingly likely, overseas, should promote fuel reliability and help moderate natural gas prices.

h. Does FERC have a role in encouraging the development of gas pipeline infrastructure to serve regions of increasing demand but with limited logistics?

Answer: FERC certificates new natural gas facilities and therefore will have a role in the development of gas pipeline infrastructure to serve regions with increasing demand. Over the past 10 years, FERC has certified 93.1 Bcfd of capacity in new pipelines and expansions, 1,053.7 Bcf of storage capacity, and nearly 37 Bcfd of LNG regasification capacity. The Commission has also approved 2.76 Bcfd of LNG liquefaction capacity at one terminal. The Commission is also currently considering 19.8 Bcfd of pipeline capacity in pending applications and another 9.8 Bcfd of pipeline capacity in pre-filing.

Question 14. Regarding natural gas permitting and infrastructure:

a. In your opinion, how effective is FERC's process for permitting of natural gas infrastructure in terms of timing, addressing all the issues, adequacy of FERC resources, and relationship with other agencies involved?

Answer: If confirmed, I am committed to ensuring that FERC's review is thorough, professional and timely. Moreover, I am always willing to look for possible additional ways to streamline the process.

b. In conducting its environmental reviews of pipelines and LNG export terminal facility applications, to what extent should FERC consider potential impacts to groundwater or potential greenhouse gas emissions associated with "induced" natural gas production? Should the reviews also consider downstream impacts such as carbon dioxide emissions from the combustion of natural gas?

Answer: The Commission examines the direct, indirect, and cumulative environmental impacts of energy projects that it authorizes, as required by the National Environmental Policy Act and the Natural Gas Act. The Commission has not to date found it necessary to consider the potential for increased natural gas demand, beyond that intended to be served by the proposed project, in reviewing project applications. In order for the Commission to study the potential environmental impacts associated with increased gas production, those impacts must be reasonably foreseeable. Cumulative impacts must occur within the "region of influence" (e.g., same geographic area) of the project. Because the states, rather than the Commission, authorize the production of natural gas, primarily through consideration of drilling permits, and because it is generally not possible to predict the precise origin of gas that will flow through a particular project, the Commission has not, to date, addressed a case in which it found it appropriate to study production-related impacts beyond known impacts occurring in the vicinity of the proposed project. This issue is pending before the Commission, so I cannot comment on the specific proposal.

c. What is your view of prescriptive deadlines for FERC pipeline permit review as proposed under H.R. 1900? Do you believe deemed approval for cooperating agency permits after a 90-day deadline under H.R. 1900 would be an appropriate way to ensure timely agency compliance?

Answer: With respect to H.R. 1900, while I have not had the opportunity to study the bill in detail, I concur with Commission staff who had stated that they believe that the Commission can

meet the deadlines proposed in the bill, provided that they are supplied with a complete application that is ready to be processed. I share the concern expressed by Commission staff that, while it is a laudable goal to encourage agencies with roles in the project review process to complete their tasks in a timely manner, establishing overly prescriptive deadlines could result in agencies either denying authorization or imposing burdensome conditions, in order to avoid waiving their authority.

d. How might FERC's permitting process be affected if infrastructure permit applications increase for shale gas pipelines and LNG export terminals?

Answer: See answer to Question 14.a.

Question 15. Regarding natural gas exports:

a. How should FERC prioritize its review of LNG export infrastructure permit applications?

Answer: The Commission processes multiple applications simultaneously and moves projects forward when it has all the information necessary to act on them, rather than establishing a "queue" based on a set of priorities.

b. Do you think FERC should consider evaluating LNG permit applications collectively rather than individually on a project-by-project basis?

Answer: I am not aware of any efficiencies to be gained by evaluating LNG applications collectively, because my understanding is that each such project is unique. However, I am open to considering such an approach if it would appear warranted.

c. The export of natural gas commodity from the United States requires a permit from DOE under the Natural Gas Act. (As stated above, FERC must separately approve the terminal facilities.) If the exports are destined for a country with which the United States does not have a free trade agreement (FTA), DOE must, among other things, make a public interest determination before granting or denying the permit. Some in Congress have expressed concern that DOE has been too slow to process LNG export applications to non-FTA countries. What do you think of proposals that would transfer permit authority for natural gas commodity exports from DOE to FERC? What do you think about proposals that would simply repeal the need for natural gas export authorization?

Answer: If confirmed, I would ensure that FERC faithfully executes any additional jurisdiction given to it by Congress.

d. If FERC were given LNG commodity export authority, what kind of rules and resources would the Commission have to put in place in order to effectively exercise such authority? How long would it take to put these in place?

Answer: Applications to export natural gas raise issues distinct from those germane to the siting of facilities. However, if confirmed, I would ensure that FERC faithfully executes any additional jurisdiction given to it by Congress.

Question 16. Regarding oil pipelines:

a. Do you believe that Presidential Permit authority for cross-border oil pipelines should be transferred from the State Department to FERC?

Answer: I do not have an opinion on whether such authority should be transferred to the Commission. However, if confirmed, I would ensure that FERC faithfully executes any additional jurisdiction given to it by Congress.

b. There is much interest in re-purposing underutilized gas pipelines into oil pipelines to relieve congestion and gain additional capacity. What are your thoughts on repurposing underutilized gas pipelines into oil pipelines? If you agree with the concept, how can FERC best address application delays?

Answer: I do not have an opinion on the concept of repurposing of gas pipelines into oil pipelines. The Commission has no role in siting or approving the construction of oil pipelines. With respect to the pipelines that would be removed from use for natural gas transportation as part of the conversion, the Commission would process any application for abandonment that is filed. Under Section 7(b) of the Natural Gas Act, the Commission would examine all relevant aspects of the public interest associated with the proposed abandonment, with continuity of service to existing natural gas customers being an important consideration. The Commission would also examine any environmental impacts associated with the proposed abandonment of the facilities.

Question 17. President Obama has said that he will do what it takes to fight climate change "with or without Congress."

a. What actions can and should FERC take to cap greenhouse gas emissions as the law stands right now? What do you view is the Commission's role in capping greenhouse gas emissions?

Answer: I do not believe that FERC has a role in capping greenhouse gas emissions. FERC's role is to evaluate its market rules to ensure that they are able to accommodate any changes in policy from Congress or other agencies. Any changes in FERC rules should be fuel neutral while allowing non-discriminatory access to FERC-jurisdictional markets.

b. What could be the long-term implications of stricter carbon dioxide controls on U.S. electricity supplies, consumer price, and reliability? Would the market need any changes in FERC regulation to adapt to such a future?

Answer: The long-term implications of greenhouse gas controls may depend, in part, on how the controls are implemented, the ability of industry to adapt, and the development of new technology. Under the Federal Power Act, FERC's statutory responsibility is to ensure adequate reliability and just and reasonable rates. If confirmed, I would 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. If confirmed, I believe that FERC must continue to work closely with the EPA throughout this process..

c. If the U.S. adopts policies that require CCS, what role should FERC play, if any, in ensuring that interstate pipelines can be constructed to carry carbon dioxide from sources to sequestration sites? Should carbon dioxide pipeline permit authority be added to FERC's existing gas pipeline permit authority? Why or why not?

Answer: The states currently have jurisdiction for permitting pipelines to transport carbon dioxide. Thus, FERC currently would have no role with respect to those pipelines. If confirmed, I would ensure that FERC faithfully executes any additional jurisdiction given to it by Congress.

d. The Administration recently issued standards for evaluating the social cost of carbon emissions. Should FERC consider or apply these values (or any proxy for the value of greenhouse gas emissions or other so-called avoided externalities) in the administration of its responsibilities to approve rates under the Federal Power Act, PURPA, and/or the Natural Gas Act?

Answer: If confirmed, I have no plans to consider or apply these values in the administration of the Federal Power Act, PURPA, and/or the Natural Gas Act.

e. Should the Commission consider potential climate change impacts when evaluating a new license or a re-license for a hydroelectric facility?

Answer: Any substantial information regarding climate change should be given due consideration in the Commission's environmental analysis and in any license order. I agree with the Commission's conclusions that the effects of a project on environmental resources in the project area can be effectively studied and evaluated using conventional hydrologic studies, monitoring techniques, and predictive models, and that the Commission's standard license reopener article would be a means for making changes to the license if any unanticipated adverse environmental effects occur during the course of the license.

Question 18. With regard to renewable resources:

a. Do you believe that a transmission line utilizing local renewable electricity resources in one state under a Renewable Electricity Standard can be shown to have regional benefits in another state without such requirements?

Answer: Transmission facilities may produce a variety of types of benefits, including enhanced reliability, reductions in congestion that allow a consumer access to a wide variety of generating

resources, and addressing transmission needs driven by public policy requirements. It is possible that consumers in a state that has not adopted a renewable electricity standard may receive reliability or economic benefits from construction of a transmission line. In Order No. 1000, the Commission provided transmission planning regions substantial flexibility to determine how to identify benefits and corresponding beneficiaries of new transmission facilities.

b. Do you believe that increased renewable electricity penetration requires greater amounts of conventional dispatchable generation to provide back-up capacity for grid stability?

Answer: The Commission and industry stakeholders continue to take steps to reduce the amount of back-up capacity needed to integrate variable energy resources. While these steps may not eliminate the need for back-up generation, they have the potential to mitigate any increase. Such steps include reforming Commission-jurisdictional rules in order to minimize the need for reserves (or back-up generation) needed to integrate variable energy resources, requiring all resources that provide a specific form of back-up capacity (frequency regulation) to be paid based on the amount and quality of the service provided and allowing greater bilateral trading of imbalance energy and operating reserve services.

c. How might the expectation of increasing usage of natural gas for power generation affect the future growth prospects for renewable electric generation?

Answer: The availability of low priced natural gas has the potential to complement renewable energy generation. The EIA forecasts that shale gas production will increase by 56 percent by 2040 and electric power generation will comprise 33 percent of the increase in natural gas consumption. In terms of new investment, natural gas fired generation has relatively low capital costs, higher projected utilization, and higher flexibility compared to other technologies. If natural gas prices remain low, this should exert downward pressure on wholesale electric prices. Renewable generators have incentives to enter the market, but do not necessarily provide the type of flexibility that markets need, such as ramping capabilities. An increase in natural gas fired generation may provide the type of enhanced market flexibility, such as fast ramping and ability to start and stop quickly, that is needed to manage the variability of some renewable electric generation. Renewable electric generation will benefit from this enhanced ramping ability which may improve utilization of renewables, increasing their profitability.

d. Section 210 of PURPA provides that FERC rules for setting rates for utility purchases from qualifying facilities (QFs) shall be "…just and reasonable to the electric consumers of the electric utility….and [shall not] exceed a rate which exceeds the incremental costs to the electricity utility of alternative electric energy." This incremental cost is commonly referred to as "avoided cost." Do you believe the determination of avoided cost should include a value for the social cost of carbon as recently determined by an interagency Task Force (or some other proxy value for the cost of avoided externalities) when PURPA is applied to QFs?

Answer: In 2010, the Commission discussed compensation in PURPA avoided cost rates for costs that could be characterized as "environmental externalities." Specifically, the Commission stated:

> The Commission has previously found that an avoided cost rate may not include a "bonus" or "adder" above the calculated full avoided cost of the purchasing utility, to provide additional compensation for, for example, environmental externalities above avoided costs. But, if the environmental costs "are real costs that would be incurred by utilities," then they "may be accounted for in a determination of avoided cost rates."

Commission precedent thus holds that any recognition of the costs of environmental externalities in PURPA avoided cost rates must be based on a finding that those costs are real costs that would be incurred by a utility. If confirmed, I do not at this time see a reason to depart from this precedent.

e. If the interconnection of a QF requires a utility to add additional equipment and control measures, could the cost of such measures be excluded from the determination of the avoided cost ceiling applicable to utility purchases from such QF?

Answer: Under the Commission's regulations, while a QF is separately obligated to pay the costs of interconnecting, such costs may not additionally be reflected in the calculation of the PURPA avoided cost rate. The Commission's regulations have long provided that a QF is "obligated to pay any interconnection cost[s] . . . on a nondiscriminatory basis." 18 C.F.R. § 292.306(a) (2013). In Order No. 69, the Commission explained that "all costs which are shown to be reasonably incurred by the electric utility as a result of interconnection with the [QF] will be considered as part of the obligation of the [QF]." In practice, the purchasing electric utility often may pay for the construction of the interconnection in the first instance, but would then recover those costs from the QF. The Commission's regulations also define what costs constitute interconnection costs, but the relevant regulation expressly provides that "[i]nterconnection costs do not include any costs included in the calculation of avoided costs." 18 C.F.R. § 292.101(b)(7) (2013).

f. What factors should be considered in evaluating the capacity value of a QF that relies on intermittent renewable fuels as compared to alternative base load and peaking facilities that are fully dispatchable? How do these factors affect the determination of avoided cost?

Answer: The Commission has recognized that QFs that rely on variable energy resources may have a capacity value. For example, the Commission has stated that, while a single wind turbine's output may be so uncertain that it has no capacity value, a dispersed wind system may have capacity value in the aggregate. The Commission's regulations set forth the factors to consider in determining the avoided cost. However, precisely how avoided costs are determined is up to each state regulatory authority or nonregulated utility.

g. Assuming the average size of a residential rooftop solar facility is far below 1 MW in capacity and the facility is owned by the homeowner, are such facilities QFs under PURPA? Does the avoided cost ceiling established by PURPA apply to utility payments for the surplus power that the rooftop solar facilities produce and sell to utilities? Would your conclusion change if the facilities were leased to the homeowner by a company that

specialized in constructing and leasing such facilities? And if the facilities are not QFs, what, if any, provisions of the Federal Power Act would apply to the lessor?

Answer: Under the Commission's regulations, there is no minimum size for a QF. The Commission has exempted from filing requirements a QF that is 1 MW or smaller, which would include a typical residential rooftop solar facility. In 2009, the Commission addressed whether a FERC-jurisdictional sale took place when a rooftop solar facility made no net sales over a monthly billing period. The Commission stated:

> The Commission has explained that net metering is a method of measuring sales of electric energy. Where there is no net sale over the billing period, the Commission has not viewed its jurisdiction as being implicated; that is, the Commission does not assert jurisdiction when the end-use customer that is also the owner of the generator receives a credit against its retail power purchases from the selling utility. Only if the end-use customer participating in the net metering program produces more energy than it needs over the applicable billing period, and thus is considered to have made a net sale of energy to a utility over the applicable billing period, has the Commission asserted jurisdiction.

The Commission also explained that the fact that the rooftop solar facilities at issue were owned by a company that specialized in such facilities but were leased to, rather than owned by, a residential homeowner did not change the Commission's conclusion.

I recognize that net metering issues are receiving increased attention in recent months at both the state and federal levels. If confirmed, I look forward to participating in any consideration of these issues that may come before the Commission.

Question 19. Regarding energy efficiency/demand response:

a. Given an increased probability of coal plant retirements, do you think that non-generation resources like energy efficiency and demand response can meet reliability goals in the same way as generation resources?

Answer (a – b): On Friday, May 23, 2014, the U.S. Court of Appeals for the D.C. Circuit issued a decision vacating Order No. 745 and addressing the Commission's jurisdiction over demand response. My understanding is that the Commission is in the process of reviewing that decision.

b. Do you think it is appropriate to call on demand resources in competitive markets that may curtail service from some customers rather than calling on a call plant generating resource to produce actual power?

Answer: see Answer to 19.a.

c. Do energy efficiency and demand side programs diminish revenues at a time when the electric utility industry is being asked to invest in new electricity generation and delivery infrastructure?

Answer: On Friday, May 23, 2014, the U.S. Court of Appeals for the D.C. Circuit issued a decision vacating Order No. 745 and addressing the Commission's jurisdiction over demand response. My understanding is that the Commission is in the process of reviewing that decision. However, a number of market dynamics are putting downward pressure on wholesale electricity prices. There is a robust discussion about the relative importance of these potential drivers. I have not developed an opinion on the relative importance of any potential driver.

Question 20. Regarding transmission:

a. Do you believe FERC has authority under the Federal Power Act to allocate costs for new transmission to entities that (1) have neither customer nor contractual relationships with a transmission builder and that (2) do not need the capacity provided by the line?

Answer: In Order No. 1000, the Commission relied on the provisions of the Federal Power Act - sections 205 and 206 - that obligate the Commission to ensure that jurisdictional electric rates are just and reasonable and not unduly discriminatory or preferential. In addition, the Commission explained that section 201(b)(1) of the Federal Power Act grants the Commission jurisdiction over the transmission and electric energy in interstate commerce, as well as jurisdiction over all facilities for the transmission of electric energy.

It also is important to note that a key principle underlying the cost allocation reforms in Order No. 1000 is that only those that benefit from new transmission facilities selected under the Order No. 1000 planning process should be allocated the costs of those facilities under the region's cost allocation method. As the Commission found in Order No. 1000, those who benefit from a new transmission facility under Order No. 1000 do not necessarily have a contractual relationship with the utility or developer building that facility. Electricity flows over the transmission grid according to the laws of physics, and not pursuant to voluntary agreements of those who provide and receive transmission service. A robust grid with additional capacity and alternative paths for flows of electricity helps bolster grid reliability and reduces congestion in a way that may lower costs for consumers. Therefore, reliability benefits, for example, may be realized in the absence of voluntary arrangements. In addition, Order No. 1000 directed public utility transmission providers to consult with their stakeholders in developing cost allocation methods that would appropriately identify the beneficiaries of new transmission facilities in their region in a clear, up front manner. Thus, Order No. 1000 provided each transmission planning region the flexibility to develop a regional cost allocation method, as long as the method was consistent with certain cost allocation principles, including that the costs be allocated roughly commensurate with benefits.

b. Do you believe the Federal Power Act authorizes FERC to exercise jurisdiction over transmission planning conducted by federal agencies, such as the Bonneville Power Administration?

Answer: It is important to note that Order No. 1000 does not require federal power marketing administrations, such as the Bonneville Power Administration (Bonneville), or municipal or cooperative utilities that are not subject to the Commission's ratemaking authority under section 205 and section 206 of the Federal Power Act to participate in transmission planning processes. Instead, with respect to such entities, the Commission only encouraged such participation, reiterating its statement from Order No. 890 that transmission planning processes are likely to be more effective with participation by all relevant transmission owners. Thus, Bonneville can and will make its own decision about whether to participate in a regional transmission planning process pursuant to Order No. 1000.

c. Do you believe the Federal Power Act gives FERC jurisdiction, either directly or indirectly, over transmission planning by municipal or cooperative utilities that are not otherwise subject to the Commission's jurisdiction?

Answer: See answer to Question 20.b. above.

d. Does the Federal Power Act provide FERC with the authority to mandate transmission planning and/or coordination requirements?

Answer: In Order No. 1000, the Commission acted pursuant to section 206 of the Federal Power Act to correct deficiencies in transmission planning and cost allocation processes so as to ensure that the rates, terms, and conditions for Commission-jurisdictional services are just and reasonable and not unduly discriminatory or preferential.

e. What are your views on financial incentives for transmission system development? Have existing transmission rate structures provided enough incentives to promote transmission system construction? Why or why not?

Answer: Investment in transmission facilities in real terms declined significantly between 1975 and 1998. While investment increased somewhat after 1998, expansion of the interstate transmission grid in terms of circuit miles in 2005 was only 0.5 percent. Transmission expansion was still lagging behind demand growth. In July 2006, pursuant to the directive of Congress in Section 1241 of Energy Policy Act of 2005, the Commission issued Order No. 679, allowing utilities to seek rate incentives on a case-by-case basis. Incentive rates remain bounded by the "zone of reasonableness" governed by the Federal Power Act, thus protecting transmission customers against excessive rates.

Since adoption of these regulations, the Commission has received over 80 applications for rate incentives for transmission projects, representing thousands of miles of high-voltage transmission facilities. These facilities will permit the interconnection of many thousands of megawatts of additional generation capacity.

Overall, investment in transmission facilities appears to be increasing in recent years. Since the issuance of Order No. 679, the landscape of the power industry and the context in which Order No. 679 was developed have changed. Perhaps the biggest change is the robust increase in transmission investment and a consistent upward investment trend throughout the decade, both

actual and projected. The Edison Electric Institute (EEI), which represents approximately 70 percent of the U.S. electric power industry, reported that since 2000, transmission investment among its members has significantly increased, investing approximately $14.8 billion in 2012 alone, with projected spending of $64.2 billion through 2016.

f. Setting aside incentive adders, should base Return on Equity (ROE) in transmission rates represent the Commission's best estimate of the current cost of equity capital invested in transmission facilities?

Answer: A base return on equity for the subject company represents the Commission's estimate of the investors' required return on equity associated with investing in firms of comparable business and financial risk. The base return on equity must be sufficient to assure confidence in the firm's financial integrity, to maintain the firm's credit, and to attract capital. If confirmed, I would take seriously the Commission's responsibility to balance consumer and investor interests by providing returns on equity that are sufficient to attract investment while protecting consumers from excessive rates. Also, the Commission ensures that the rates resulting from a return on equity incentive are just and reasonable pursuant to section 205 of the Federal Power Act and the directive of Congress in Section 1241 of Energy Policy Act of 2005.

g. If confirmed as Chair, how do you plan to address the increased complaints seeking to lower FERC-authorized ROEs?

Answer: Each case presents unique material issues of fact that must be carefully considered based on the evidence in the record. Many of these cases are pending before the Commission. The specific issues raised in your question regarding how to address the complaints seeking to lower FERC-authorized ROEs are before the Commission in those dockets, and thus I cannot comment on them at this time. However, if confirmed, I would take seriously the Commission's responsibility to balance consumer and investor interests by providing returns on equity that are sufficient to attract investment while protecting consumers from excessive rates.

h. Do you believe transmission developers need regulatory certainty to ensure adequate capital in order to continue this long-term investment?

Answer: I believe providing certainty as to appropriate cost recovery methods, cost allocation, and available incentives for investments in transmission facilities will encourage investment in critical transmission infrastructure.

Question 21. Regarding FERC Order 1000:

a. A key provision of FERC Order 1000 would require local and regional transmission planning processes to consider transmission needs driven by public policy requirements established by state or federal laws or regulations. In your opinion, will the implementation of Order 1000 diminish the authority of states in transmission permitting and siting?

Answer: No. The Commission stated in Order No. 1000 that nothing in that rule is intended to preempt or otherwise conflict with state authority over the siting, permitting, and construction of transmission facilities or over integrated resource planning and similar processes. The Commission recognized that the states have a significant jurisdictional role in siting, permitting and construction of transmission, and explained that nothing in the rule involves an exercise of siting, permitting or construction authority. Rather, the transmission planning and cost allocation requirements of Order No. 1000 apply to the processes used to identify and evaluate transmission system needs and potential solutions to those needs, which does not involve the exercise of any traditional state authorities with respect to transmission permitting, siting and construction.

b. Previously, the National Association of State Regulatory Commissioners (NARUC) issued a resolution specifying a number of concerns about FERC's implementation of Order 1000, including that it "inappropriately infringes on State authority reserved by Congress over integrated resource plans, generation and transmission decisions, assurance of resource adequacy and reliability, and authorization and construction of new facilities…." Do you agree or disagree with NARUC's concerns about Order 1000?

Answer: See answer to Question 21.a. As the Commission explained in Order No. 1000, the rule does not preempt or infringe on any traditional authority reserved to the states with respect to transmission permitting, siting and construction, integrated resource planning, and related matters.

c. Order No. 1000 promotes "non-incumbent" transmission developers to own new transmission lines. Do you think that an increase in non-incumbents could impede the vertical integration of incumbent utilities?

Answer: No. Vertical integration is a policy choice within the authority of state and local regulators, not the Commission.

d. It is my understanding that multiple states have passed legislation to block these new FERC non-incumbent requirements. Given the opposition demonstrated by these states, do you believe it is appropriate for the Commission to continue to impose its non-incumbent requirements?

Answer: The Commission stated in Order No. 1000 that nothing in that rule is intended to preempt or otherwise conflict with state authority over the siting, permitting, and construction of transmission facilities or over integrated resource planning and similar processes. Accordingly, state and local regulators are not preempted from passing legislation or local laws restricting the ability of non-incumbent transmission developers to provide service in a particular territory. The Commission's recent orders on compliance with Order No. 1000 have recognized the existence of these state laws and allowed regions to account for them in the design of their regional planning process.

e. Section 217(b)(4) of the Federal Power Act requires FERC to exercise its authority "in a manner that facilitates the planning and extension" of the transmission system "to meet

the reasonable needs of load-serving entities…." Do you believe Order No. 1000 is consistent with this section of the FPA?

Answer: Yes. In Order No. 1000-A (at P 168), the Commission explained that the reforms of Order No. 1000 are consistent with Section 217(b)(4) because they will enhance the transmission planning process for all interested parties, including load-serving entities. A regional transmission planning process that identifies transmission solutions that are more efficient or cost-effective than what may be identified in the local transmission plans of individual transmission providers is beneficial to load-serving entities as well as other interested parties.

f. Before the U.S. Court of Appeals' D.C. Circuit, FERC argued the Commission decided to issue Order 1000 based on "theoretical" concerns about future market conditions. Please explain FERC's rationale for this argument. Do you believe this is an appropriate way for FERC to exercise its authority?

Answer: In *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006), the court held that FERC may rely solely on a theoretical threat to take action to ensure just and reasonable rates if it can show how the threat justifies the costs that the rules would create. Consistent with this holding, in Order No. 1000 the Commission concluded that the narrow focus of current planning requirements and shortcomings of current cost allocation practices create an environment that fails to promote the more efficient and cost-effective development of new transmission facilities, and that addressing these issues now is necessary to ensure just and reasonable rates in the future. However, the Commission did not rely on this "theoretical threat" alone. It also cited substantial evidence of additional, and potentially significant, investment in new transmission facilities projected to be needed in the future to meet reliability needs and integrate new sources of generation. Among other things, the Commission cited findings by the North American Electric Reliability Council (NERC), the Electric Reliability Organization under section 215 of the Federal Power Act, showing a sharp recent increase in transmission investment in response to changes in the generation resource mix. In addition, the Commission noted a projection by the Brattle Group, in a study commissioned by the Edison Electric Institute, that $298 billion in transmission facilities will be needed over the period from 2010 to 2030. Based on this and other substantial evidence, the Commission found it critical to act now to address deficiencies to ensure that more efficient or cost-effective investments are made as the industry addresses its challenges.

g. Do you believe the Commission has sufficiently studied the cost and reliability consequences to customers of building long-distance transmission in this country? Have these studies also looked at the impact of relying on local resources?

Answer: Order No. 1000 set forth the minimum requirements for regional transmission planning processes. It is through these processes that public utility transmission providers will study the cost and reliability consequences to customers of proposed new transmission facilities. Order No. 1000 also requires that regional transmission processes consider transmission, generation and non-generation alternatives on a comparable basis. Thus, these processes provide the appropriate venue for considering the impact of relying on local resources.

h. Do you support a preference for long-distance transmission of wind power over solar power?

Answer: FERC policies should be fuel neutral while allowing non-discriminatory access to FERC-jurisdictional markets. I am not aware of any provision of federal law or any FERC regulation that establishes a preference for long-distance transmission of wind power over solar power.

i. Do you believe Order 1000 is appropriate in the electric industry where distributed generation is gaining ground?

Answer: As noted above, the local and regional planning processes established pursuant to Order Nos. 890 and 1000 must consider transmission, generation and non-generation alternatives on a comparable basis when choosing how to meet local and regional needs. All resources, including distributed generation, may be considered in those processes.

j. Please define the term "beneficiary pays" in the context of transmission cost allocation. Should "benefits" be measured and defined with real specificity in order to be fairly allocated?

Answer: The Commission in Order No. 1000 declined to impose a one-size-fits-all definition of benefits or beneficiaries, instead providing each region with the opportunity to develop cost allocation methods that are appropriate for the region. Instead, the Commission adopted broad cost allocation principles to guide the regions. These principles require the costs of transmission facilities be allocated roughly commensurate with the estimated benefits of those facilities, and that no costs may be allocated to entities that receive no benefits. This "roughly commensurate" standard is drawn from the Seventh Circuit Court of Appeals' holding in *Illinois Commerce Commission v. FERC*, which addressed a 2008 Commission ruling allocating transmission costs in the PJM region. The court stated that the Commission is not required "to calculate benefits to the last penny, or for that matter to the last million or ten million or perhaps hundred million dollars." Rather, the Commission must "compar[e] the costs assessed against a party to the burdens imposed or benefits drawn by that party," and articulate why "the benefits are at least roughly commensurate" with the costs.

Question 22. Regarding cybersecurity:

a. How can FERC help modernize and harden the infrastructure and systems of the electric grid?

Answer: Section 215 requires mandatory reliability standards for the reliable operation of the bulk-power system. The responsible users, owners and operators of the bulk-power system would then determine the best way to satisfy the requirements. The Commission and NERC, which is the Commission-certified Electric Reliability Organization, monitor compliance with the requirements. The Commission recently approved a version of the cybersecurity standards that will require some form of protection for all bulk-power system cyber assets. The

Commission also directed NERC to develop a physical security standard. In addition to standards activities, FERC also works with regulated entities and other governmental agencies on a collaborative basis by sharing best practices and information to promote timely identification of and development of solutions to potential physical and cyber security threats to the electric grid.

b. Do you think that FERC needs additional statutory authority to fully secure the transmission system against physical and cyber threats? If so, what might this additional authority be?

Answer: In the current NERC standards development process, there are rules in place that enable the Commission and NERC to act to address any emerging issues, when necessary. This has been demonstrated recently by the order issued by the Commission directing NERC to submit a standard to the Commission within 90 days that addresses physical security. However, in times of national emergency that may require immediate action by the industry, the standards development process may not be sufficient to address such issues in a timely and certain manner. This type of directive and who has the authority to direct will need further consideration. The authority to issue such a directive does not necessarily need to be FERC's.

c. In your opinion, are states adequately securing the distribution system against physical and cyber threats? Please explain.

Answer: I do not have enough information to comment on the adequacy of the specific security measures that are required and in place on the distribution systems. However, if confirmed, I look forward to continuing the Commission's collaborative working relationship with the states and NARUC to determine how to adequately secure the grid from physical and cyber threats, while also respecting jurisdictional differences.

d. To what extent are grid reliability and grid security linked, especially when it comes to the cybersecurity of power grid control systems?

Answer: Both grid reliability and grid security are important in maintaining the reliable operation of the bulk-power system. Compliance with the standards should ensure that the system is operated such that elements of the bulk-power system remain within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements.

e. Are you committed to upholding the NERC stakeholder process that Congress called for in the 2005 Energy Policy Act?

Answer: Yes. The Commission's Order No. 672 states that ERO rules must provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing a reliability standard and otherwise exercising its duties. I support the Commission's requirement and am committed to ensuring fair representation of all views in the process.

Question 23. With regard to smart grid systems:

a. Given that many demand-side resources function at the retail level, will transactive energy pricing capabilities bring FERC regulation to areas currently under state jurisdiction?

Answer: While changes in the way electricity is provided on the grid may raise novel jurisdictional questions, any such questions will need to be decided based on FERC's current authorities in the Federal Power Act and PURPA unless other authorities are provided to FERC by Congress. I also note that on Friday, May 23, 2014, the U.S. Court of Appeals for the D.C. Circuit issued a decision vacating Order No. 745 and addressing the Commission's jurisdiction over demand response. My understanding is that the Commission is in the process of reviewing that decision.

b. Will the transactive grid, with its ability to provide real-time price signals, bring retail competition to states under traditional cost of service regulation? Could a transactive energy grid eventually make FERC the sole electricity regulator?

Answer: State officials, public utility commissions and other state agencies determine the best methods to serve the public interest, protect consumers and ensure the provision of safe, reliable utility retail service in their respective jurisdictions. While changes in the way electricity is provided on the grid may raise novel jurisdictional questions, any such questions will need to be decided based on FERC's current authorities in the Federal Power Act and PURPA unless other authorities are provided to it by Congress. As noted previously, FERC can only exercise the authority given to it by Congress.

c. What are the implications of "smart grid" technologies for the wholesale electric grid in terms of efficiency, reliability, and security? Do FERC policies reflect these implications and/or concerns?

Answer: In its March 19, 2009 Proposed Policy Statement and Action Plan, the Commission recognized that "Smart Grid advancements … will bring new efficiencies to the electric system through improved communication and coordination between utilities and with the grid, which will translate into savings in the provision of electric service." The Commission further noted that "[t]hese technologies will also enhance the ability to ensure the reliability of the bulk-power system." The Commission in its July 16, 2009 Smart Grid Policy statement noted that "cybersecurity is essential to the operation of the smart grid and that the development of cybersecurity standards is a key priority. Cybersecurity and physical security are ongoing concerns for both the Commission and the electricity industry …". The Policy Statement stated that the Commission believes that the development of cybersecurity standards is a key priority in protecting the electricity grid and requires a demonstration of sufficient cybersecurity protections in proposed smart grid standards to be considered in a rulemaking proceeding under the Energy Independence and Securities Act.

Question 24. Regarding power markets:

a. What impact do you think JPMorgan Chase's exit from physical commodities trading may have on the electricity markets?

Answer: While it is difficult to say how one entity's exit will affect other market participants, in almost all cases the books of entities that choose to exit commodities markets are bought by other entities. JPMorgan Chase sold its commodities assets to Mercuria, a Swiss privately held international commodity trading company and active participant in wholesale power markets, for $3.5 billion in March of this year. As banks exit commodities trading in general, it appears that there is willing capital to assume their existing positions.

b. Is there sufficient clarity under current law to provide regulatory oversight of, and enforcement against, cross-market manipulation?

Answer: Yes, I believe there is sufficient clarity. Congress, in EPAct 2005, gave FERC broad, robust anti-fraud and anti-manipulation authority, and since then FERC has worked hard to implement and apply that authority. I think FERC's legal authorities and precedent, including when it comes to cross-market manipulation, is clear and known to market participants who participate in trading and transacting in electricity and natural gas contracts that are within FERC's jurisdiction or affect FERC jurisdictional-markets. There is one area in particular where it would be useful for FERC to have more clarity, and that concerns the decision by the U.S. Court of Appeals for the District of Columbia Circuit last year in *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013). In *Hunter*, the court ruled that the CFTC's exclusive jurisdiction over futures contracts deprives FERC of authority to bring an action based on manipulation in the futures market, even if the activity affected prices in the physical markets for which FERC has exclusive jurisdiction. Although the Commission reads the *Hunter* decision as narrow in scope, some market participants interpret the decision more broadly to cover not only manipulation in the futures market, but also many additional transactions and products, including those squarely within FERC's jurisdictional markets. A legislative fix to eliminate uncertainty on this matter could provide additional clarity and help ensure that FERC has the full authority needed to police manipulation of wholesale physical natural gas and electric markets.

c. How does the inclusion of banks in commercial energy enterprises affect utility ratepayers? How might the exit of large banks from these commercial businesses impact the functioning of electricity markets?

Answer: Theoretically, when a market has a higher number of market participants with ample capital and significant trading volumes, it is thought to be more liquid and therefore capable of reaching a more efficient pricing outcome. The current wholesale electricity markets were designed with this in mind. Allowing banks (or any other source of capital) to participate in wholesale electricity markets increases the likelihood that market outcomes will be efficient. Financial entities continue to play many roles in the wholesale electricity markets – they provide liquidity for hedging and market making, as well as trading speculatively, all of which can create better outcomes for suppliers and consumers alike. Enhanced market efficiency should result in benefits to utility ratepayers. However, when a market participant commits fraud or market manipulation, utility ratepayers are harmed.

Question 25. Do you believe it is appropriate for FERC to have a consumer advocacy office?

Answer: The Federal Power Act provides for an Office of Public Participation within the Commission. However, Congress has never appropriated funds for that Office. At this time, I do not see a need for an Office of Public Participation to be funded. FERC has a robust comment policy and takes into account all timely comments received. In addition, I believe that a variety of offices within FERC ensure that consumers' interests are protected.

Question 26. A new trend in the electric utility industry is the emergence of pure play transmission companies, or "transcos." Transcos present new questions about how financial models are and should be regulated. To finance transcos, some private equity firms and FERC-regulated transmission companies have purchased transmission assets from state-regulated utilities and created holding companies to assume significant debt. FERC subsequently assumes jurisdiction, but financial models are regulated differently by states and by FERC. States are typically more restrictive, but FERC allows firms to earn equity level returns for the debt of the holding company – a practice known as double leverage.

a. In your view, how do transco financial models affect consumer interests? Do transcos use double leverage to attain a higher return on equity? Does this practice hurt consumers?

Answer: As an initial matter, the concept of double leveraging is not unique to transcos. In the vertically-integrated utility context, a holding company helps to finance the operations of its subsidiaries, which may include financing the subsidiary with a combination of debt and equity from the holding company (i.e., double leveraging).

Although some have claimed that the transco financial model may be considered more expensive than a state-regulated utility model because transcos tend to have capital structures with higher equity ratios, the Commission has previously found that this financial model results in benefits for consumers. "By eliminating the competition for capital between generation and transmission functions and thereby focusing only on transmission investment, the transco model responds more rapidly and precisely to market signals indicating when and where transmission investment is needed." Additional transmission investment leads to improved electric reliability, improved access to power markets, and ultimately, reduced overall costs of delivering electric power. Second, the Commission has "long recognized that the [transco] business model can bring significant benefits to the industry. Their for-profit nature with a focus on the transmission business is ideally suited to bring about: 1) improved asset management including increased investment, 2) improved access to capital markets given a more focused business model than that of vertically-integrated utilities, 3) development of innovative services, and 4) additional independence from market participants." Finally, a transco's financial model may lead to stronger credit ratings that attract a larger pool of investors. Those ratings produce immediate off-setting benefits in the form of cheaper debt.

b. What role does the Commission play in oversight of financial models? What role should it play?

Answer: As a practical matter, the Commission will authorize the use of a certain financial model (i.e., determining the appropriate capital structure to be used in formula rates) based on the factors discussed in the response to Question 26.a, in order to ensure just and reasonable rates under section 205 of the FPA. In addition, the Commission reviews applications for authorization to dispose of jurisdictional assets to form transcos under section 203 of the FPA, and only grants such authorization upon a finding that the transaction is consistent with the public interest. One of the factors that the Commission considers to determine whether a proposed transaction under section 203 is consistent with the public interest is whether there will be any adverse rate impact. As discussed in response to Question 26.a, in evaluating the impact of the transco financial model on rates, the Commission has generally found benefits that more than offset the increase in rates related to use of the transco financial model. In addition, the Commission performs audits to ensure that utilities use the appropriate capital structure, rates of return, and allowance for funds used during construction in determining rates charged to consumers.

c. Is the dissidence between state regulation and federal regulation problematic? Please explain.

Answer: The objectives of state regulation and federal regulation are primarily the same – just and reasonable rates for consumers and market participants. In the case of the formation of transcos from the transmission assets of state-regulated utilities, the transactions were simultaneously considered by both state and federal regulators to ensure that each transaction was consistent with their respective statutory responsibilities and the policies they apply to carry out those responsibilities. Moreover, in applying its policies and practices in the context of transco formation, the Commission takes into consideration the positions of state regulators where they intervened and commented in the proceedings before the Commission, along with the positions of all other parties to the proceedings.

Question 27. What do you believe are the three largest threats to baseload generation?

Answer: Baseload generation are those resources, regardless of technology or fuel type, that are needed to meet baseload demand for energy. To meet real-time demand for electricity, system operators need to be able to dispatch not only baseload, but also intermediate and peaking resources as needed. Today, all generating resources are facing competitive pressures in the wholesale market, as well as physical and cyber security concerns.

Question 28. Do you consider hydropower to be a renewable resource?

a. Please state your views on hydropower as an energy resource, including its contribution and value to the nation's energy mix.

Answer: I consider hydropower to be a renewable resource. I believe that hydropower is an important part of the nation's energy mix. According to the Energy Information Administration, in 2013, hydropower accounted for about approximately seven percent of total electricity generation in the U.S. and over half of the generation from all renewables.

b. What are your thoughts on the issue of reliably integrating intermittent renewable resources onto the grid? What roles can both conventional hydropower and pumped storage play in addressing these problems?

Answer: Any significant change in a utility's resource portfolio requires careful analysis to avoid unforeseen reliability problems. This includes the addition of large amounts of renewable resources, which have different operating characteristics compared to most traditional resources. Renewable generation can be less predictable than traditional resources, but both are subject to sudden interruptions of generation. Ramping up or down dispatchable power sources to follow variable generation is an important consideration. Both conventional hydropower and pumped storage can be valuable resources for a utility with such a portfolio.

Question 29. Please summarize any ethics charges that have been filed against you.

a. What is the current status of those ethics charges?

Answer: I refer the Committee to the Questionnaire I completed previously and note that I am not aware of any ethics charges that have been filed against me.

b. Are any ethics charges still pending?

Answer: No ethics charges are pending.

Question 30. Since your nomination, have you met with CEOs of entities regulated by FERC or a CEO of a trade association comprised of companies that are regulated entities?

Answer: Since my nomination, I have met with the CEOs of WECC, Reliability*First*, Peak Reliability, the North American Transmission Forum, and INGAA.

a. How many of these types of meetings have you had this year?

Answer: I met with each CEO on one occasion after January 1, 2014.

b. How many such meetings have you had since you were nominated?

Answer: All of the meetings occurred after my nomination (which was on January 30, 2014).

c. In any of these meetings, did you ask for support for your nomination? If so, in approximately how many?

Answer: I did not ask any of the CEOs to support my nomination. WECC, Reliability*First*, Peak Reliability, and the North American Transmission Forum provided me with briefings on reliability-related work that they were doing or changes within their respective organizations. I had lunch with INGAA's CEO not in his capacity as head of INGAA but in his capacity as a former FERC Commissioner.

Question 31. On March 13, 2014, the Wall Street Journal in the story headlined *"U.S. Risks National Blackout From Small Scale Attack: Federal Analysis Says Sabotage of Nine Key Substations Is Sufficient for Broad Outage,*" referenced an unreported analysis by FERC (hereafter "FERC Study") to support the article's conclusions. Please answer the following questions:

a. Have you participated in a meeting directly related to the FERC study? If yes, please list the date, location, participants and documents used in the meeting. Were any post-meeting summaries or memoranda generated as a result of the meeting? If so, please describe the documents, including the author, date and conclusions.

Answer: No.

b. Have you participated in a meeting indirectly related to the FERC study? If yes, please list the date, location, participants and documents used in the meeting. Were any post-meeting summaries or memoranda generated as a result of the meeting? If so, please describe the documents, including the author, date and conclusions.

Answer: No.

Question 32. Regarding your employment status:

a. When you first became the Director of the Office of Enforcement at FERC in 2009, was the position designated as a career position or a senior executive service position? What is the current designation of the Director position—career or political?

Answer: When I came to FERC in 2009 the position of Director of the Office of Enforcement was designated as a non-career track senior executive service position. It remains non-career track to this day.

b. While you were working at FERC, did you engage in any discussions (written or verbal) to change the designation of the position of the Director of the Office of Enforcement to a career position? If so, when did the discussion(s) take place? Who participated in the discussion(s)? Did you request the position re-designation? If not, who did?

Answer: To the best of my recollection, at some point after my first year at FERC, the Chief of Staff asked me if I wanted to try to convert to a career track position. I believe there were a number of reasons for this, including the fact that the position of Director of OE (and its predecessor organizations) had historically been career track and the desire for programmatic

continuity. The Chief of Staff explored this with me on more than one occasion, but I declined because I was taking a series of leaves of absence from UNM School of Law, and it was unclear to me how much longer I could stay. Eventually, after I was unable to take another leave of absence, I resigned from the UNM faculty in May 2012. The Chief of Staff began the effort to convert the position to career track in late 2012. The discussions were verbal and were with the Chief of Staff.

c. Did FERC engage in an effort to change the designation of the position of the Director of the Office of Enforcement to a career position? If yes, please describe the actions taken by FERC. Who participated in the effort? Did the position designation change? If so, list the date in which the position was re-designated.

d. Was the Director of the Office of Enforcement position re-opened for others to apply after you began in 2009? If so, describe the steps you took to re-apply for the Director of the Office of Enforcement position.

Answer (c and d): Yes. FERC publicly posted the position as a career-track on USAJobs on November 29, 2012. The posting closed on December 28, 2012. Human Resources in the Office of Executive Director is responsible for FERC job postings. Recognizing that I was not assured of being selected, I prepared and submitted an application in response to that posting, as would any other interested candidate. My application was selected within FERC from among the applications received, and consistent with standard practice for FERC applicants for a career senior executive service position, I worked with staff in FERC's Office of the Executive Director to submit my application to the Office of Personnel Management (OPM). However, OPM then determined that my position could not be re-designated as a career senior executive service position. As a result, and as noted in my response to part (a) above, I remain a non-career member of the senior executive service.

Question 33. Regarding energy imbalance markets:

a. The Northwest Power Pool (NWPP) is evaluating actions to improve the efficiency of the use of resources, and is also considering implementing an Energy Imbalance Market (EIM). The goal of an EIM would include: "local control, avoiding scope creep of energy imbalance market functions or geography … and minimizing the risk of any expansion of FERC jurisdiction over non-jurisdictional entities." Do you believe an EIM can achieve these goals?

Answer: First, FERC is a creature of statute and must respect, and by law may not exceed, the authority provided to it by Congress. Thus, no energy imbalance proposal approved by FERC could provide FERC jurisdiction over otherwise non-jurisdictional entities. However, non-jurisdictional entities may voluntarily choose to participate in FERC-jurisdictional markets. Further, energy markets of any kind are voluntary. It is voluntary as to whether an entity chooses to participate, and it is voluntary as to the nature of the market that the participants choose to propose. Each of the energy imbalance markets overseen by the Commission were formed voluntarily, and each of them developed to reflect the regional preferences of the market participants in those markets as well as the applicable state regulatory authorities. States and

regions have an important role in whether or not to implement such a market, and such markets should be designed to reflect the features of a region. The Commission's interest in an energy imbalance market extends to whether rates are just and reasonable, and whether the terms and conditions of service in such a market are not unduly discriminatory or preferential, as required under section 205 of the Federal Power Act. Regarding the ability of entities to participate in an energy imbalance market while limiting the scope of the Commission's jurisdiction, in 2012 a Commission staff white paper was provided to those considering an energy imbalance market in the NWPP footprint to address the jurisdictional concerns of non-jurisdictional entities that might wish to participate in such a market. That white paper set forth a number of ways that the Commission has shown accommodation and flexibility to the participation of non-public utilities in Commission-jurisdictional markets.

b. Do you believe NWPP's potential actions to reduce FERC jurisdiction suggests the Commission has acted in recent years to expanded its jurisdiction?

Answer: I cannot speculate on the motivations of the entities in NWPP. However, FERC is a creature of statute and must respect and by law may not exceed the authority provided to it by Congress. Thus, no energy imbalance proposal approved by FERC could provide FERC jurisdiction over otherwise non-jurisdictional entities. However, non-public utilities may voluntarily choose to participate in FERC-jurisdictional markets.

Question 34. The Federal Power Act gives FERC exclusive jurisdiction over the sale for resale of electric energy in interstate commerce; however states are given the authority to regulate distribution services and retail sales to end-users. As additional distributed generation options are incorporated onto the grid, the distribution system has moved from a one-way system to a two-way system; which can impact transmission networks and power flows into different states. Should FERC modify their jurisdictional responsibilities over distributed generators sales for resale? If so, please explain.

Answer: The Commission's jurisdictional responsibilities, as relevant here, are defined by the Federal Power Act and the requirements of PURPA. The Commission cannot itself modify its jurisdiction. Only Congress can make such jurisdictional changes. While changes in the way electricity is provided on the grid may raise novel jurisdictional questions, any such questions will need to be decided based on FERC's current authorities in the Federal Power Act and PURPA unless other authorities are provided to FERC by Congress.

Question 35. Current members of the Commission have discussed problems in the manner in which FERC maintains the confidentiality of security information.

a. Do you believe the current provisions of the Freedom of Information Act (FOIA) are adequate to protect confidential security information? If no, please explain how the Commission should protect confidential security information from public disclosure.

b. Do you believe the current provisions of FOIA protect CEII information, or do you believe a FOIA exception is required?

Answer (a and b): I have not been involved in discussions at FERC with respect to the physical security of the electric grid. However, my understanding is that sensitive energy infrastructure security information provided to FERC could be subject to disclosure under the Freedom of information Act (FOIA), and that public release of such information could harm the grid. While major revisions to FOIA should not be necessary, a specific exemption from FOIA would help keep such information safe from unwarranted disclosure.

Several FOIA exemptions may be relevant to protecting confidential security information. Recently, the U.S. Court of Appeals for the District of Columbia Circuit has issued a decision that seems to support the use of FOIA exemptions to protect certain confidential security information, ruling that law enforcement purposes include proactive steps designed to prevent criminal activity and to maintain security. Nonetheless, because the application of FOIA is subject to individual review by each federal district court in which FOIA litigation may be filed, another court may reach a different conclusion. Further, to the extent that FERC shares such information with industry on a need-to-know basis, this distribution of information outside of the federal executive branch could diminish the Commission's claim that such selectively shared information can be withheld under FOIA.

To achieve certainty in this area, a statute clearly establishing protections for this information would be useful. Ideally, any FOIA fix would provide FOIA protection for information while allowing the Commission to share information with those outside the federal executive branch that need to know it to protect their assets.

Question 36. FERC has issued decisions to authorize net metering on a monthly basis. At the same time, states and state commissions are developing net metering policies that allow customers to carry over any net sales from month to month.

a. Do you believe states and state commissions are acting inconsistently with Commission decisions?
b. If so, has the Enforcement Office taken any action to enforce FERC's decisions on net metering? Please explain.

Answer (a and b): The Commission has not required a specific billing period that a state or state commission must use if the state or state commission decides to permit net metering, therefore there are no Commission decisions on this issue to enforce.

Question 37. Regarding markets:

a. Do you agree that to show price manipulation, the FERC has to prove that a trader intended his actions to create an artificial price?

Answer: I do not agree, as the Commission has held, most recently in the 2013 *Barclays* Order Assessing Civil Penalties, that "artificial price" is not an element of a market manipulation claim. I also note that the Commodity Futures Trading Commission (CFTC) previously was required to prove an artificial price in order to demonstrate manipulation, which imposed a significant burden on the CFTC's anti-manipulation efforts in court. Therefore, one of the provisions in the Dodd-Frank Act provided the CFTC with enhanced enforcement authority by eliminating the

artificial price requirement and modeling a new CFTC anti-manipulation provision on EPAct 2005's language. In sum, proving artificial price or an intent to create an artificial price is not required under the anti-manipulation provisions of the Federal Power Act, Natural Gas Act, or the Commission's Anti-Manipulation Rule.

b. What is the difference between market power manipulations and fraud based manipulation?

Answer: These terms are not reflected in the text or underlying purpose of the prohibition against market manipulation Congress enacted in EPAct 2005. As noted in my response to your Question 11, the Commission's Order No. 670 sets forth the following requirements for finding a violation of the Anti-Manipulation Rule (18 C.F.R. Part 1c):

> The Commission will act in cases where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission."

If an entity engages in conduct that meets these requirements, that conduct violates the Commission's Anti-Manipulation Rule.

c. How does FERC define "actions that impair a well functioning market"? Is an impact on price an impact on a well-functioning market?

Answer: The Commission discussed the concept of impairing a well-functioning market in Order No. 670, which implemented EPAct 2005's anti-fraud and anti-manipulation provisions. There, the Commission said: "The Final Rule prohibits the use or employment of any device, scheme, or artifice to defraud. The Commission defines fraud generally, that is, to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market. Fraud is a question of fact that is to be determined by all the circumstances of a case." (Order No. 670 P 50) (footnote omitted).

Since Order No. 670, the Commission has issued numerous orders explaining further what type of manipulative conduct can interfere with a well-functioning market (when such conduct meets all elements of the anti-manipulation rule). The most recent example is the Commission's Order Establishing Hearing in the BP manipulation matter. *See BP America Inc.*, 147 FERC ¶ 61,130 at P 36-38 (issued May 15, 2014). Two other recent examples are the Order Assessing Civil Penalties in *Barclays Bank PLC*, 144 FERC ¶ 61,041 at P 32, 56-57 (issued July 16, 2013) and the Order Approving Stipulation and Consent Agreement in the JP Morgan matter, *In re Make Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068 at P 24-81 (issued July 30, 2013). All of these orders – and, during my time as Director of the Office of Enforcement, every other order approving a settlement in a market manipulation case – were unanimous.

It is important to emphasize that FERC's Anti-Manipulation Rule does not rest on a standalone finding that the market has been impaired – whether through conduct that impacts price or other types of conduct affecting FERC-jurisdictional markets. Rather, all three elements of the Anti-Manipulation Rule (quoted in my answer directly above) must be met.

d. Has the Commission given market participants notice of this definition? If so please cite where and when.

Answer: The Commission has given such notice, in Order No. 670 and subsequent orders such as the *BP*, *Barclays*, and *JP Morgan* orders cited in my answer directly above.

e. Do you agree that every consummated trade in the gas or electric market has some impact on the market or at least on price?

Answer: At a general level, all transactions have some impact on the marketplace, but some types of transactions are likely to have more of a direct impact on prices than others.

f. Can you identify a consummated trade in the gas or electric market that does not have any impact on price?

Answer: Consistent with my answer to your question above, generally speaking, all transactions have some impact on the marketplace, but some types of transactions are likely to have more of a direct impact on prices than others.

Question 38. Regarding enforcement fines:

a. List any mitigation factors the Enforcement Staff considers before recommending a fine.

Answer: Enforcement staff is open to consideration of any mitigation factor that may be relevant under the particular facts and circumstances of an investigation. The Office of Enforcement considers mitigation and other factors, in the first instance, in terms of whether to open an investigation at all. As set forth in the Commission's 2008 Policy Statement on Enforcement, these factors are:

- Nature and seriousness of the alleged violation,
- Nature and extent of the harm, if any,
- Efforts made to remedy the alleged violation,
- Whether the alleged violations were widespread or isolated,
- Whether the alleged violations were willful or inadvertent,
- Importance of documenting and remedying the potential violations to advance Commission policy objectives,
- Likelihood of the conduct recurring,
- Amount of detail in the allegation or suspicion of wrongdoing,
- Likelihood that staff could assemble a legally and factually sufficient case,
- Compliance history of the alleged wrongdoer, and
- Staff resources.

These and other factors (listed in response to the next question) also help us analyze whether to proceed with an investigation once it has been opened, as well as whether to seek a civil penalty. When the Office of Enforcement recommends a civil penalty, it looks to the mitigating factors reflected in the Commission's 2010 Penalty Guidelines and the Commission's 2008 Policy Statement on Enforcement.

b. What mitigating factors may Commissioners consider when deliberating a fine?

Answer: The Commission may consider any mitigating factor that is relevant under the particular facts and circumstances of a case. These mitigating factors are reflected in the Commission's 2010 Penalty Guidelines and the Commission's 2008 Policy Statement on Enforcement. Among other things, the Commission routinely considers the following mitigation factors: whether a subject had an effective compliance program; the steps the subject has taken to correct the violation; whether the violation was an isolated incident; whether the subject self-reported the violation; whether the subject relied on staff guidance; whether the subject agreed to avoid a trial-type evidentiary hearing; whether the subject accepted responsibility for a violation; and the subject's financial condition and inability to pay. The Commission is free to consider any other mitigating factors it thinks appropriate in a given case.

c. If appointed to the Commission would you always follow the Penalty Guidelines adopted by FERC for all cases?

Answer: The Commission's Policy Statement on Penalty Guidelines explains (at P 32) that the Guidelines "may not always account for the specific facts and circumstances of every case. This is an inevitable feature of a guidelines-based approach to determining penalties. It may be appropriate to depart from applying the Penalty Guidelines where they do not account for significant circumstances surrounding a violation, which is why we include the flexibility to depart as necessary." If confirmed, I would follow this philosophy and believe that departures from the Penalty Guidelines may be appropriate in some cases.

d. Could there be instances where the specific facts and circumstances of a case would mandate a departure from applying the Penalty Guidelines? If yes, please describe scenarios where a departure from applying the Penalty Guidelines would be appropriate.

Answer: As explained in response to the previous question, the Commission's Policy Statement on Penalty Guidelines explains (at P 32) that the Guidelines "may not always account for the specific facts and circumstances of every case. This is an inevitable feature of a guidelines-based approach to determining penalties. It may be appropriate to depart from applying the Penalty Guidelines where they do not account for significant circumstances surrounding a violation, which is why we include the flexibility to depart as necessary." A particularly strong showing on the mitigation factors described in my response to Question 38.b may warrant a departure, but this will depend on the overall facts and circumstances of a given case. For example, if a subject showed exemplary cooperation and voluntarily instituted exemplary compliance improvements, that could justify (again, depending on the overall circumstances of a case) a civil penalty on the

lowest end of the range or even a downward departure. Conversely, depending on the subject's conduct, the facts and circumstances of a given case could justify an upward departure.

I also note that the Penalty Guidelines state that the "Commission will reduce the penalty below that otherwise required to the extent that imposition of such penalty would impair [the entity's] ability to disgorge profits." Further, the "Commission may impose a penalty below that otherwise required if the Commission finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum required by" the guidelines range and full amount of disgorgement required.

e. In cases of fraud, where the Penalty Guidelines are imposed, do you believe there is a possibility of a penalty being increased twice based on the duration of the fraud? If no, please explain. If yes, how would you remedy this problem?

Answer: I do not believe that the Penalty Guidelines provide for increasing a penalty twice based on the duration of the fraud. The majority of the Commission has the same view. In determining the Base Violation Level, the Guidelines take into account the loss caused by the fraud, the volume or duration of the violation, and any threat to market transparency. As discussed above, to the extent that application of the Penalty Guidelines produces a penalty range that is inappropriately high given the particular facts and circumstances of a case, the Commission has the discretion to depart from that range and impose a lower penalty.

Question 39. With respect to sharing information with the subjects of investigation, you testified that if the case proceeds to the show cause stage staff will share information with the subject of the show cause order.

a. Please identify each case where this occurred and provide a complete list of all of the information provided.

Answer: Since I have been at FERC, the Commission has issued eight Orders to Show Cause relating to enforcement: *Barclays*, *BP*, the four Day-Ahead Load Response Program matters (*Lincoln*, *Rumford*, *CES*, *Silkman*), *Deutsche Bank*, and *Kourouma*. In all cases, Commission staff provided relevant, non-privileged third-party information to the subjects. (Most of the relevant materials in these and other investigations comes from the subject's own files, which is why I use the phrase third-party information.) The materials include data from trading platforms (like IntercontinentalExchange or NYMEX), data or information from RTOs/ISOs, deposition transcripts, emails and instant messages, company documents, and any other kind of relevant, non-privileged document, depending on the case. While I cannot provide a complete list of every document submitted in every one of these cases, as the list would reveal non-public information under Commission regulation 18 CFR § 1b.9, I can assure you that providing relevant, non-privileged documents in connection with and before the Order to Show Cause phase has always been the Office of Enforcement's policy and practice since I have been the Director. I would also like to note that these Orders to Show Cause have in all cases included detailed discussions of the relevant facts, depositions, and data, allowing subjects to know the

factual bases underlying the potential violations – and to refer to documents, data, and deposition transcripts that have already been produced to them.

b. Has any of the information provided ever been provided prior to the Show Cause order?

Answer: In every one of these cases, most if not all of the information was provided before the Order to Show Cause was issued – whether during the preliminary findings process, the Wells notice process, or at some other time during the investigation.

Question 40. You stressed in the hearing that the subject of an investigation gets a preliminary findings letter and can respond. At the same time you testified that OE does not share any information with the subject until the show cause order, which comes months later.
Would you agree that the subject does not have whatever information OE might be willing to provide when they provide their response to the preliminary findings letter? In that case, do they have that information when they respond to the Wells notice OE has issued?

Answer: In case there was any confusion about my testimony, please let me clarify that the Office of Enforcement in fact provides subjects with considerable information before the issuance of an Order to Show Cause (in addition to the information available to the company from its own files, from public sources, and otherwise). And this includes a great deal of information during the preliminary findings stage, so that the subject does have the information needed to respond to those findings. Particularly in larger cases, or where there is a significant dispute over the factual or legal issues, subjects often prepare very lengthy, detailed written responses to FERC Enforcement preliminary findings, and their detailed responses reflect that they are well aware of the issues in the investigation.

It may be helpful if I gave a summary of the Office of Enforcement's investigation process in terms of how it shares information with subjects of investigations and how they communicate with Enforcement staff and the Commission. During the investigation process (that is, before a matter is litigated before an Administrative Law Judge or a federal court), the Office of Enforcement explains its view of the case (and describes the principal evidence that supports it) to a subject on three separate, formal occasions: (a) in Preliminary Findings, (b) in a "Wells notice" under Rule 1b.19, and (c) in a Report attached to an Order to Show Cause (if the Commission chooses to issue such an Order). At each stage, the Office of Enforcement provides extensive information about its view of the case and the evidence that supports it. In each case, the subject has the opportunity to provide a written response.

Apart from these formal mechanisms for sharing information and views about the investigation with subjects, and getting their responses, Office of Enforcement staff has been encouraged, whenever possible, to have open and candid discussions with subjects and their counsel from the very outset of the investigation. Office of Enforcement attorneys and analysts do, in fact, have these kinds of discussions all the time – to share their views with subjects about the case and to see if there are ways to resolve investigations efficiently and in the public interest.

Further, the subject always has the opportunity to share its views with the Commission, in writing, on any aspect of the case and at any time throughout the course of the investigation. Throughout my time in Enforcement, subjects have taken this opportunity to communicate in writing with Commissioners.

It also my understanding that the amount of information that the Office of Enforcement provides to subjects at each of these three stages is typically greater than the SEC provides in its Wells notices. SEC rules about Wells notices require only that its Enforcement Division "identify the specific charges the staff has made a preliminary determination to recommend to the Commission" and give the subject the opportunity to respond. SEC Division of Enforcement, *Enforcement Manual* 23 (2013). In contrast, the preliminary findings letters and presentations typically include a great deal of information that goes above and beyond notification of the specific charges by including detailed legal and factual discussion, analysis, and underlying evidence.

In FERC Enforcement investigations, the most significant information (such as emails, instant messages, trading data, and spreadsheets) often comes from the files of the company under investigation, and is thus available to the company from the outset of the case. To the extent that trading data from a marketplace operator are relevant, those data are often provided to the subject at an early stage in an investigation. In addition, when doing so would not jeopardize the integrity of the investigation, subjects are also allowed to immediately obtain copies of their deposition transcripts. (This is what occurs in the great majority of cases.) In the unusual case in which the integrity of the investigation could be compromised by immediate access, the subject will be allowed to obtain a copy of the transcript at a later stage, and well before the matter goes to litigation.

Finally, I would like to highlight in particular the Order to Show Cause process. An Order to Show Cause is not a finding of a violation, but the start of a process in which the Commission identifies potential violations and notifies the subject of a potential civil penalty or disgorgement amount. Then the subject has an opportunity to respond, by putting forth to the Commission any facts and legal issues it believes counters a finding of a violation or imposition of a penalty, and only after considering that response does the Commission decide whether to allow an enforcement action to proceed. Moreover, the decisions of whether to issue an Order to Show Cause and whether to allow an enforcement action to proceed remain exclusively with the Commission – not Enforcement staff. Indeed, under Commission regulations, once an Order to Show Cause is issued, Enforcement staff working on the investigation are "walled off" from communicating with the Commission except through publicly-filed briefs.

In sum, subjects of investigations have a great deal of information about the facts and the law, and have had many opportunities to engage with Enforcement staff and the Commission, throughout the course of the investigation. These information exchanges, and exchanges of views, occur long before the Commission authorizes an enforcement action in court. And once such an enforcement action proceeds in court (whether at an administrative hearing or federal court hearing), the subject will of course have whatever discovery rights those court rules allow. There may be opportunities to improve on this process, and, if confirmed, I would be committed to considering any such improvements. But I would say that, in my experience, FERC provides

at least as much information and exchange of views with subjects as other enforcement agencies (whether the Securities and Exchange Commission or the Department of Justice).

Question 41. Please identify and detail every case where OE has materially changed its position on an investigation from what is set forth in a preliminary findings letter and a Wells notice. In any of these cases, has OE provided the target with a full and complete administrative record provided at that time?

Answer: Under section 1b.9 of the Commission's regulations, 18 C.F.R. § 1b.9, information obtained during investigations, and the investigative proceedings themselves, are treated as nonpublic unless the Commission itself directs that such information be made public, the information is made public during the course of an adjudicatory proceeding, or disclosure is required by the Freedom of Information Act. Therefore, I cannot disclose the details of specific instances in which the Office of Enforcement materially changed its position on an investigation from what is set forth in preliminary findings and a 1b.19 letter (similar to the SEC's Wells notice). However, there have been numerous instances during my time as Director of Enforcement where the Office of Enforcement materially changed its position after issuing preliminary findings or a 1b.19 letter. In certain cases, Enforcement closed entire investigations of subjects after issuing a Wells notice and/or preliminary findings. In other cases, Enforcement decided to no longer pursue certain alleged violations described in a Wells notice and/or preliminary findings, while still pursuing other alleged violations. In other cases, Enforcement continued to pursue all the violations described in a Wells notice and/or preliminary findings, but materially changed its view of the scope and impact of the alleged wrongdoing in ways that changed, among other things, Enforcement's penalty recommendation.

The administrative record in an enforcement action is developed through the Order to Show Cause (OSC) proceeding before the Commission under part 385 of the Commission's regulations, 18 C.F.R. Part 385. The OSC proceeding is the process through which the Commission can assess civil penalties, and occurs after the preliminary findings process and Wells process. Therefore, there is not an administrative record to provide subjects during the preliminary findings and Wells processes, irrespective of whether the Office of Enforcement has materially changed its views. Probably for this reason, I am not aware that any investigative subject has asked for an administrative record until after the Commission has concluded its OSC process. Also, although much of the information relied on by the Office of Enforcement in alleging violations is produced by the subjects themselves and therefore is in their possession, it is Enforcement staff's practice to provide investigation subjects at the time of the preliminary findings or Wells notice with relevant third-party information (including third-party depositions transcripts, documents, and data).

Question 42. Has the Commission ever provided a subject at any time the full administrative record? For purposes of these questions, please define the term "administrative record" as the DOJ of Justice does in the Guidance to Federal Agencies on Compiling the Administrative Record.http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf). Does OE fully comply with these guidelines?

Answer: The 1999 Guidance cited in your question is not binding on FERC. In 2008, the Department of Justice authored a memo noting the improper use that some parties have made of this 1999 Guidance. The 2008 DOJ Memo said:

> As explicitly stated in the [1999] document, it was intended only as internal Department of Justice guidance, and did not create any rights, substantive or procedural, nor did it limit the 'otherwise lawful prerogatives of the Department of Justice or any other federal agency.' As was stated in a recent brief by the Department of Justice, the 1999 memorandum 'does not represent a formal policy of the Department of Justice, nor even an official directive of the Environment and Natural Resources Division (ENRD).

The 2008 DOJ memo also stated:

> It has come to our attention, however, that outside parties have sought to use this 1999 document in litigation against federal agencies, and have argued that it supports a particular composition of the administrative record, or a particular process for its assembly. This memorandum serves to clarify that the January 1999 document does not dictate any requirement for, or otherwise provide binding guidance to, federal agencies on the assembly of the administrative record.

For Enforcement matters, at least since I joined the Commission, the Commission has only had to submit an administrative record in three matters: the Day-Ahead Load Response Program market manipulation matters (*Lincoln*, *CES*, and *Silkman*) pending in federal district court, in which the Commission has filed a petition for the court to review the Commission's Orders Assessing Civil Penalties. In those cases, the Commission filed an administrative record that fully covered the facts, records, and materials underlying those Orders. I think the approach the Commission took in compiling these administrative records was the right one, based on the Commission's view of the Federal Power Act section 31(d) review procedure and based on the Orders Assessing Civil Penalties themselves. However, ultimately, the court will decide what the administrative record should look like – and it will do so in a case of first impression, as this is the first time any such record has been compiled in a section 31(d) case based on a post-EPAct 2005 investigation and enforcement action.

Question 43. Senator Lee quoted the following from the *Energy Law Journal* that "…FERC recently said its enforcement 'is under no obligation to provide any response' to the 'legal and factual arguments' raised by subjects." At the time, you appeared to dispute that quote. Were you unclear or do you dispute the quotation? Isn't the quotation from a major Commission Order in Docket No. IN-8-08-000? Have you reviewed the Order? Did you do so before it was issued? Do you disagree with the Commission order on the point you and Senator Lee were discussing? Would you act to change the process if confirmed?

Answer: When I was asked at the hearing by Senator Lee about this *Energy Law Journal* excerpt, I did not recall it because (1) the source of the quote was not identified, and (2) it was not my quote. I now recognize this partial quote from the unanimous Commission Order

Assessing Civil Penalties against Barclays Bank and four individual traders. 144 FERC ¶ 61,041 (issued July 16, 2013). The *Energy Law Journal* article selectively quotes from the Commission's order in a way that distorts the Commission's conclusion.

I am very familiar with the *Barclays* Order from the Commission, but I had no role in reviewing the Order before it was issued. In fact, pursuant to the Commission's rules governing "Ex Parte Contacts" and "Separation of Functions," 18 CFR §§ 385.2201 and 385.2202, I was "walled off" as a "non-decisional" employee when the Order was being written, and had no role in its formulation.

Following is the full paragraph from which the selected excerpts were taken:

> Barclays argues that its ability to respond to the Order to Show Cause has been prejudiced by OE Staff's refusal to respond to certain arguments raised by Respondents in their prior submissions to OE Staff. This reflects a misunderstanding of the purpose of the Commission's investigative procedures. The preliminary findings letter and Rule 1b.19 process are intended to provide the subject of an investigation with both general notice of the nature of the violations alleged by OE Staff, and the opportunity to adduce arguments and evidence that could change OE Staff's views on whether a violation occurred. The process is also intended to ensure that OE Staff's views are as informed as possible before an investigation matures to the point that OE Staff recommends that the Commission issue an order to show cause. In short, while OE Staff shall give consideration to the legal and factual arguments put forward by the subject of any investigation, it is under no obligation to provide any response. Thus Barclays was not prejudiced merely because OE Staff declined to share in detail its views on each argument Respondents raised in their prior submissions. Instead, under the procedures of section 31(d)(3) of the FPA, which have been invoked by Respondents here, in their answers to the Order to Show Cause Respondents have had the opportunity to respond to the allegations included in the Staff Report and those arguments have been considered in this proceeding. They are, in fact, addressed below. (Emphasis added).

I agree with the Commission's Order on this point, and disagree with the manner in which it was selectively quoted by the authors of the *Energy Law Journal* article. Because the authors have unfairly portrayed the Commission's process, it is important to fully understand what the process actually provides. Following is a brief description of that multi-step process as it was followed in the *Barclays* case.

Before the *Barclays* matter ever came before the Commission, Enforcement staff provided detailed preliminary findings to the subjects on June 10, 2011. Staff granted the subjects' request for extra time to respond, and the subjects filed voluminous submissions on August 29, 2011. Barclays submitted an 86-page response, with numerous attachments, and the individual subjects submitted their own lengthy responses (Connelly, 48 pages with attachments; Brin, 36 pages with attachments; Levine, 34 pages; Smith, 35 pages). Enforcement staff carefully considered the submissions, concluded that the subjects had committed violations, and sought authorization from the Commission to engage in settlement discussions. When seeking settlement authorization, staff made available to the Commission all of the subjects' submissions.

The Commission granted settlement authority, but discussions did not lead to any resolution, so staff proceeded to the next stage of the process by sending the subjects a letter under 18 CFR 1b.19 on May 3, 2012. Barclays and the individual subjects responded with another set of voluminous submissions on June 11, 2012. After considering the submissions, Enforcement staff then prepared a detailed, 67-page Enforcement Staff Report and Recommendation for submission to the Commission, along with all of the prior submissions from the subjects. After considering the Enforcement Staff Report and the subjects' submissions, the Commission unanimously issued an Order to Show Cause and Notice of Proposed Penalty on Oct. 31, 2012. Pursuant to its ordinary practice, the Commission attached the full Enforcement Staff Report to its Order to Show Cause, so that the subjects would have another full opportunity to respond to staff's factual findings and legal conclusions. After requesting and receiving additional time to respond, Barclays and the individual subjects filed lengthy responses on Dec. 14, 2012. Enforcement staff filed its reply on Jan. 28, 2013, at which point the matter was fully briefed and ready for the Commission's determination. After considering the matter for nearly six months, the Commission unanimously issued an Order Assessing Penalties on July 16, 2013.[2]

The *Energy Law Journal* authors are experienced FERC practitioners who understand the process, but in their selective quote of the *Barclays* Order, they chose to omit any reference to either (1) the preliminary findings and 1b.19 stages of the process, or (2) the Order to Show Cause process itself, in which the subjects are informed of Enforcement staff's detailed findings and are given a full opportunity to make any arguments they would like to make for the Commission's consideration.

If confirmed, I would be open to any constructive suggestions on how to improve the enforcement process. But on this particular point, the *Energy Law Journal* article gives a misleading impression about a portion of the process that needs no apparent fix.

Question 44. Have you had any communication of any kind with former Chairman Wellinghoff since he left the Commission? If so, please list each such communication and detail what was discussed or communicated. Did former Chairman Wellinghoff have any role in your nomination? If so, please provide each detail of your knowledge of what Mr. Wellinghoff's role was in your nomination.

Answer: I have not had any communication of any kind with former Chairman Wellinghoff since he left the Commission. The trade press has reported former Chairman Wellinghoff as saying he did not contact the White House on my behalf, and I have no knowledge that he did. You would have to ask him what he did or did not do with respect to my nomination. I can say that the White House first contacted me in January 2013 and asked me to do an informational meeting. This was followed by a second meeting in February 2013. At that meeting I was asked to list several positions for which I wished to be considered. I listed being on the Commission as one of my interests.

[2] Because the Barclays respondents invoked their right under the Federal Power Act to seek federal district court review of the Commission's assessment, they will now be entitled to another set of processes as determined by the court.

Question 45: You told the Committee that the assertions in the ELJ article on "Brady" material were not true. Please explain why that is the case with a specific response to each of the ELJ allegations regarding OE's implementation of Brady.

Answer: As I stated in the hearing, I asked the Commission to issue a formal policy of disclosing to a subject exculpatory evidence obtained in an investigation. Although I understood that Enforcement staff had a longstanding practice of disclosing such evidence, I felt that it was important for the Commission to formalize that practice through a written policy statement. It was one of my first initiatives as Director of the Office of Enforcement, and the Commission implemented my recommendation through a policy statement dated December 17, 2009.

The Commission's policy is modeled after the *Brady* policy that applies in criminal proceedings. Although the Commission recognized that there is no constitutional requirement to adopt such a policy in civil proceedings such as FERC enforcement investigations, and application of *Brady* principles varies among administrative agencies, the Commission agreed with my recommendation that such a policy was important in ensuring a fair enforcement process.

I take this policy very seriously and impress upon all of my staff members the importance of adhering to the policy. I reject the assertion made the authors of the *Energy Law Journal* article that "Enforcement Staff routinely fails to produce exculpatory materials," and I am not aware of any instance in which staff has violated the policy.

I would add that it is not unusual for civil practitioners who have no criminal law experience to misunderstand the *Brady* doctrine and to disregard certain elements of the doctrine. As the Commission explained in its 2009 policy statement: "The rationale underlying *Brady* is not to supply a defendant with all of the evidence in the Government's possession which might conceivably assist in the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence known only to the Government. *Brady* is a rule of disclosure, not of discovery." One particularly important element of the *Brady* doctrine is that it does not apply to information already in the subject's possession or which can be obtained with reasonable diligence. 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. Another important element of the *Brady* doctrine is that it applies only to factual information and not to opinions.

It is not uncommon for counsel representing investigative subjects to characterize many categories of information as *Brady* material when, in fact, such information does not fall within the *Brady* doctrine and counsel are attempting to use the Commission's policy as a discovery device.

Following are specific responses to the allegations made in the *Energy Law Journal* article:

A. "[I]n many instances, Enforcement Staff has failed to produce exculpatory documents when requested."

Answer: This statement is not true. I am not aware of any instance in which Enforcement staff has failed to produce exculpatory documents when requested.

B. "Enforcement Staff denies, in case after case, the existence of exculpatory or exonerating materials, only to belatedly produce a subset of those materials too late in the process to be of use to subjects in raising defenses or presenting their case to the Commission."

Answer: This statement is not true. I am not aware of any instance in which Enforcement staff has failed to produce exculpatory materials. I would challenge the authors' assertion that receiving exculpatory materials, at any stage, would be "too late in the process to be of use to subjects in raising defenses or presenting their case to the Commission." 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, the point at which the subject is asked to formally present its case before the Commission. Even if exculpatory information were discovered after the order to show cause stage (and I am not aware of any such instance), the subject would have the opportunity to use it in preparation for any adjudicatory proceeding.

C. "Enforcement Staff routinely fails to produce exculpatory documents, either in response to general requests for Brady materials or in response to requests for particular categories of documents."

Answer: This statement is not true. I am not aware of any instance in which Enforcement staff has failed to produce exculpatory documents when requested.

D. "Disturbingly, in some cases Enforcement Staff has only provided *exculpatory* materials after repeated, specific requests."

Answer: This statement is not true. I am not aware of any instance in which Enforcement staff only provided exculpatory materials after repeated, specific requests.

E. "In at least one instance, Enforcement Staff used third-party documents in depositions that were classic *Brady* material. There, Enforcement Staff initially declined to produce the documents despite several specific requests. When Enforcement eventually produced some of the documents, it insisted that they were not *Brady* material and that it was only producing them as a 'courtesy.'"

Answer: The authors make a bald assertion without describing what they call "classic *Brady* material." I am aware of one instance in which Enforcement staff provided certain materials to counsel upon request, but stated that the materials were not *Brady* information and were being provided as a courtesy. In my view, staff's determination was correct. These documents did not constitute *Brady* material, "classic" or otherwise. In any event, as the *Energy Bar Journal* article notes, the materials were provided to be used as counsel wished. I would note that there is nothing unusual about a government attorney providing requested information to counsel, even where the material does not appear to fall within *Brady* and where there is no specific obligation

to turn over the information at that time. The implication that this circumstance implies something improper is simply wrong.

F. "Enforcement Staff has also, at times, disclosed only *inculpatory* evidence cited in the Enforcement Staff report or show cause order, rather than the *exculpatory* evidence required under *Brady*."

Answer: I am not sure I understand this assertion. If there were exculpatory materials in the case that is cited in the article, they would have been produced. The fact that inculpatory materials were produced reveals nothing about the existence or non-existence of exculpatory materials. In any event, I am not aware of any instance in which Enforcement staff has failed to produce exculpatory materials.

G. "Enforcement Staff has also often failed to provide *Brady* materials obtained from third parties, in particular, from independent system operators and regional transmission organizations (ISOs/RTOs) and their market monitoring units (MMUs)."

Answer: The Commission's 2009 Policy Statement on Disclosure of Exculpatory Materials makes clear that, consistent with *Brady* case law and SEC and CFTC practice, Enforcement staff is not required to search for materials outside those it receives in discovery or as part of its investigatory activities: "Consequently, we will not require Enforcement staff to conduct any search for exculpatory materials that may be found in the offices of other agencies."

I 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. Staff appropriately declined to do so. 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.").

Does OE make the determination as to what Brady materials in OE's possession are covered by Brady and must be produced, and when the material is produced?
To what extent, if at all, has the Commission itself ever been involved in that process.
If the Commission has been involved been, please identify every instance where the Commission has been involved.
You further stated that when you came to the Office of Enforcement that it was "upon your recommendation that the FERC adopt Brady policy".
Please provide documentation to the Committee to support this answer.

Answer: In the first instance, Enforcement staff makes the determination as to what materials in Enforcement's possession are covered by *Brady* and must be produced, and when the material is produced. Because *Brady* determinations are made during the investigative phase, before the Commission is required to formally act on a particular enforcement matter, the Commission is

rarely involved in addressing *Brady* issues. However, as with any other subject that may arise during the investigative process, the Commission's policies allow any investigative subject to communicate directly with the Commission, at any time and on any topic, as long as the communication is in writing. On several occasions involving non-public investigations, the Commission has been required to assess the application of the *Brady* doctrine. I have attached documentation to support my statement that the Commission adopted its *Brady* policy upon my recommendation.

Question 46: Please explain the position OE has taken in federal litigation with respect to de novo review of enforcement findings? What order of the Commission is reflected in the positions? Has the Commission authorized these positions? Has the Chair authorized them?

Answer: In the market manipulation matters pending in federal courts (Barclays, and the three related Day-Ahead Load Response Program cases), the Commission, through the Office of Enforcement, has sought federal court affirmance of the Commission's civil penalty assessment orders. The Commission directed staff to seek affirmance of these orders upon the subjects' failure to pay the assessed penalty. In implementing this direction, Commission staff has sought to obtain affirmance in a manner most consistent with the text of Federal Power Act section 31(d)(3). This statute provides that, when a subject elects the federal court penalty assessment review option, that: "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." As Enforcement staff has stated in its pleadings, this statutory provision clearly provides that the federal court reviewing the penalty has the authority to review the law and the facts underlying the penalty assessment *de novo*. All the Commissioners have been briefed on Enforcement's federal court review proceedings.

Question 47: During the hearing, in response to Sen Alexander, you said that you could not remember if order 670 provided a complete defense to a manipulation allegation if a market participant complies with a FERC rule or tariff. Paragraph 67 of Order No. 670 provides: "The availability of safe harbor presumptions of compliance and affirmative defenses will be the same as is currently the case under the Market Behavior Rules. Thus, 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 the Final Rule. 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."

Thus, isn't it true that:

- There is no complete defense?
- The Commission has the discretion to determine whether the action or transaction is "explicitly contemplated" by a FERC rule or regulation?

- Even if the Commission makes such a determination, then it is still only a presumption that the action or transaction is not market manipulation?

Since order 670 was adopted, has the Commission ever applied the safe harbor to any action or transaction. Please list

Answer: The Commission has stated in Order No. 670 that "[i]f 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 the Final Rule." The Office of Enforcement applies this principle as it analyzes the three elements that must be established to find a violation of the Commission's Anti-Manipulation Rule. In so doing, during my time as Director of the Office of Enforcement, staff has not recommended that the Commission settle any matter or authorize any enforcement action inconsistent with this principle – and the Commission has not taken any action inconsistent with this principle during this time.

The Commission, as part of its enforcement role, does have to make a judgment about whether a market participant is acting in a manner explicitly contemplated in Commission-approved rules and regulations, just as it has to make a judgment about whether a subject violated Commission rules. If the Commission finds that a subject has violated a rule or regulation and should be assessed a civil penalty, that finding and assessment (assuming the subject decides not to settle) will be reviewed in federal court (whether district and/or appellate court).

Because of the non-public nature of the Commission's investigations and the fact that many investigations are terminated for a number of different reasons, I am not able to provide a complete list of investigations in which this language in Order No. 670 was a reason (or one of the reasons) for closing the investigation. Nevertheless, I can state that whether a subject acted in a manner explicitly contemplated in Commission-approved rules and regulations is one of the many important considerations that staff analyzes in determining whether to open an investigation in the first place, and continues to play an important role in the decision whether to terminate an investigation once it has been opened.

As a result of its thorough 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 2 resulted in staff opening investigations. And staff's review of relevant facts and circumstances does not end there. Even after investigations are initiated, many are ultimately closed with no action (as reported each year in the annual Enforcement Report).

In short, matters referred to the Commission are carefully analyzed, and Enforcement staff considers all relevant facts and defenses in determining whether to pursue an investigation and whether to recommend that the Commission find a violation and assess penalties.

Question 48: [On behalf of Senator King] Would you describe to the Committee the process for setting the amount of fines in an enforcement action; specifically, does the Office of

Enforcement initially set the amount, which is then approved by the Commission? Additionally, does the Commission account for the nature and scale of a business when setting the amount of fines?

Answer: In September 2010, the Commission adopted Penalty Guidelines to provide greater fairness, consistency, and transparency in the enforcement program. The Office of Enforcement follows these Penalty Guidelines in calculating a proposed civil penalty and makes a recommendation to the Commission based on that calculation. The Commission makes the ultimate determination on the civil penalty to be assessed against an investigative subject. The size of a business is a specific component of a Penalty Guidelines calculation.

The Commission emphasized in its Penalty Guidelines policy statement that an assessment of a civil penalty will depend on the particular facts and circumstances of a case, and the Commission maintains the discretion to depart from the Guidelines as necessary. In exercising that discretion, the Commission may take into account such factors as the entity's size, structure, and financial resources, as well as the burden that the penalty would impose on the entity.

SENATOR JEFF FLAKE

Question 1. You state in your testimony that regulatory certainty is critical to investors when making investment decisions. If confirmed as Chair of FERC, how would you plan to ensure a stable regulatory environment at FERC and encourage investment?

Answer: If confirmed, I would ensure regulatory certainty through clear, plainly-written, consistent and timely orders that are decided on the merits, based on the facts and the law. The timely issuance of Commission orders will provide investors with the opportunity to know and understand the Commission's determinations before making their investment decisions. I believe that adequate regulatory predictability means that the rules that govern organized wholesale electric markets should be fuel neutral while allowing non-discriminatory access to FERC-jurisdictional markets. Such rules result in efficient price signals that market participants can rely on, which in turn will encourage investment decisions. Moreover, regulation of the capacity and energy markets which ensures competitive outcomes and reduces volatility in prices will produce a more stable investment environment. Finally, providing certainty as to appropriate cost recovery methods, cost allocation, and available incentives for investments in transmission facilities will encourage investment in critical transmission infrastructure. These factors, among others, will provide regulatory certainty and the proper incentives for investors.

Question 2. Environmental Protection Agency ("EPA") regulations are having a significant impact on the nation's energy portfolio. With plant retirements and the prospect of stringent EPA rules on the horizon, plant retirements are occurring and more are likely. Those retirements could have a corresponding impact on the reliability of the electric grid. To what extent do you believe EPA should consider the impact its regulations will have on reliability of the grid?

Answer: FERC, EPA, and DOE have communicated often regarding the potential reliability impacts of 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. The agencies should continue this effort to ensure that EPA is aware of any potential impacts its regulations may have on the reliability of the bulk-power system. The agencies also have adopted a more formal and transparent process regarding the issue of "fifth-year" extensions of compliance obligations under EPA's rules on power sector emissions of mercury and air toxics. Under this process, EPA has stated its intent to consider input from FERC and others on such requests, and FERC has issued a policy statement describing its process for voting on and communicating its recommendations to EPA. If confirmed, I am committed to working closely with the EPA and ensuring that reliability remains a priority at FERC.

Question 3. If confirmed as Chair, how would you ensure that EPA considers reliability issues going forward?

Answer**:** When EPA proposes new regulations, the Commission should carefully review the proposals 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. 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, but the Commission has a similar, and no less important, responsibility to help maintain the reliability of the bulk-power system. The key is open communication and a strong working relationship.

Question 4. In your testimony, you mentioned that you would have to recuse yourself from 43 enforcement matters currently pending before the Commission. How many total matters, enforcement and otherwise, are currently pending before FERC right now?

Answer: At the time of my hearing, there were 43 pending investigations in the Office of Enforcement. Under the most expansive potential application of the ethics rules, this appears to be the largest set of proceedings from which I could possibly need to recuse myself, if confirmed.

There are approximately 5,253 matters currently pending before the Commission. This number consist of all matters that are pending Commission action in every area of the agency, including Energy Projects, Electric Reliability, Policy and Innovation, Energy Market Regulation, matters before the General Counsel, and Enforcement matters.

Accordingly, when accounting for the entire body of pending matters before FERC, even taking the broadest approach to recusals, I would only potentially be recused from approximately 0.8 percent (less than 1 percent) of the matters pending before the Commission.