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 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.

Question 2. 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 3. 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 4. 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 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 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 6. 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.

C. 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_pr ep.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.[1]

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.

<u>Question 44</u>. 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

[1] 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.

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.

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.").

Question 46. 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.