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JON WELLINGHOFF NOMINATION

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

THE NOMINATION OF JON WELLINGHOFF TO BE A MEMBER OF THE FEDERAL ENERGY REGULATORY COMMISSION

DECEMBER 18, 2007

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JON WELLINGHOFF NOMINATION

TUESDAY, DECEMBER 18, 2007

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 10:41 a.m. in room SD–366, Dirksen Senate Office Building, Hon. Jeff Bingaman, chairman, presiding.

OPENING STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

The CHAIRMAN. Why don't we go ahead and get started. I know Senator Domenici is on his way and will be here very shortly, but let me get the hearing started; we've got several Senators that have been kind enough to come.

The committee meets, this morning, to consider the nomination of Jon Wellinghoff to be a member of the Federal Energy Regulatory Commission for the term ending June 30th of 2013. Mr. Wellinghoff has appeared before the committee before; that was a year and a half ago, when we considered his nomination for his present term, scheduled to expire in June. The committee favorably reported his prior nomination by voice vote in June 2006. The Senate confirmed him by unanimous consent in July 2006.

Before being appointed to the Federal Energy Regulatory Commission, Mr. Wellinghoff served two terms as the State of Nevada's consumer advocate for customers of public utilities. Senator Reid would have liked to have introduced Mr. Wellinghoff this morning, but is unable to be here, because of the press of other business. He's asked me to note his strong support for Mr. Wellinghoff. Without objection, a written statement by Senator Reid will be included in the record.

[The prepared statement of Senator Reid follows:]

PREPARED STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM NEVADA

I want to thank Chairman Bingaman and Ranking Member Domenici for scheduling this hearing today, particularly given the incredible amount of work to come out of this Committee in recent weeks.

I originally recommended Commissioner Wellinghoff for this position because I firmly believed that the energy problems facing our nation called for a nominee of Jon's caliber and experience.

I trusted that Jon would put his three decades worth of experience in energy markets to work to benefit the American consumer. That experience included not only included time back here working both in the Senate and for the Federal Trade Commission on such matters, but extensive experience at the state-level working to protect Nevada's consumers.

He has served as Chief of the District Attorney's Consumer Fraud Division in Reno, Nevada, counsel to Nevada's Public Utilities Commission and a seven-year ap-

pointment as Nevada's Consumer Advocate. In that work, Jon saved Nevada's utility customers more than $40 million. Jon also helped to write and enact Nevada's renewable energy requirements, one of the strongest in the nation.

As a Commissioner, Jon has actively worked to put his experience to work for the nation. In conjunction with his colleague Commissioners, Commissioner Wellinghoff has worked to implement the directives of the EPAct of 2005. He has worked to provide more opportunities to integrate wind energy resources into the electric grid.

Commissioner Wellinghoff has also worked to enhance collaboration between FERC and the states on demand side issues, serving as the co-chair of the FERC/National Association of Regulatory Utility Commissioners joint collaborative on demand response.

Commissioner Wellinghoff has worked to develop new innovations at FERC. For example, along with his colleagues, Commissioner Wellinghoff created a new "Energy Innovations Sector" at FERC. This new staff department is charged with institutionalizing the consideration of enhanced energy efficiency, incorporating innovative technologies into our energy infrastructure and considering issues such as renewable resources that are now underutilized in our system.

There is, of course, much more work to be done at FERC and I am deeply pleased that Commissioner Wellinghoff is dedicated to continuing his tenure at FERC.

I want to thank the Committee again for moving forward today and thank Jon for his willingness to continue to serve. I know he will continue to serve Nevada and the nation with great distinction as a FERC Commissioner.

The CHAIRMAN. We are very pleased to welcome Mr. Wellinghoff to the committee. We appreciate his willingness to serve a second term on the Commission, and we welcome the opportunity to consider his nomination.

At this point, we usually would hear Senator Domenici's statement. We'll interrupt to hear his statement when he arrives, but let me go ahead and ask Mr. Wellinghoff to come forward, and we'll go through the normal procedure. The rules of the committee that apply to all nominees require they be sworn in, in connection with their testimony. While you're still standing, could you raise your right hand, please?

Do you solemnly swear that the testimony you're about to give to the Senate Committee on Energy and Natural Resources shall be the truth, the whole truth, and nothing but the truth?

Mr. WELLINGHOFF. I do.

The CHAIRMAN. Please be seated.

Before you begin your statement, I'll ask you the three questions that we traditionally ask of each nominee before the committee.

First, will you be available to appear before this committee and other congressional committees to represent departmental positions and respond to issues of concern to the Congress?

Mr. WELLINGHOFF. I will.

The CHAIRMAN. Second, are you aware of any personal holdings, investments, or interests that could constitute a conflict of interest, or create the appearance of such a conflict, should you be confirmed and assume the office to which you've been nominated by the President?

Mr. WELLINGHOFF. I do not. My investments and personal holdings and other interests have been reviewed by both myself and the appropriate ethics counselors from within the Federal Government. I've taken appropriate action to avoid any conflicts of interest. There are no conflicts of interests, or other appearances thereof, to my knowledge, Mr. Chairman.

The CHAIRMAN. OK, thank you. The third, and last, question that we always ask of our witnesses is, Are you involved, or do you have any assets that are held, in a blind trust?

Mr. WELLINGHOFF. No, I do not.

The CHAIRMAN. All right, thank you very much.

Before we allow you to introduce any family members present and to make a statement, if you'd like to, Mr. Wellinghoff, let me see if Senator Domenici would like to make a initial statement here.

STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO

Senator DOMENICI. Mr. Chairman, I do, and it will be brief.

We're here to consider the nomination of Jon Wellinghoff to a second term as a member of the Federal Energy Regulatory Commission. Now, Federal Energy Regulatory Commission is one of those powerful line-item agencies that just go about doing their work, day in and day out, but it's terribly important work for the people of our Nation. I believe Chairman Joe Kelliher has been doing an outstanding job, and it seems to me that the nominee before us is going to contribute to that Commission and make it even more effective and more functional.

I have a few comments that are in my statement; they'll be made a part of the record.

[The prepared statement of Senator Domenici follows:]

PREPARED STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO

We are here today to consider the nomination of Jon Wellinghoff to a second term as a Member of the Federal Energy Regulatory Commission [FERC]. I thank Chairman Bingaman for promptly scheduling this nomination. I am hopeful that we can quickly get this nominee confirmed along with another FERC nominee, Chairman Joe Kelliher, who's renomination has been waiting on the Senate Executive Calendar since we reported it last May.

Since the enactment of the 2005 Energy Policy Act, many of us on the Committee have observed numerous times that the new authorities granted the FERC require a full complement of five commissioners if that law is to be implemented as we envisioned. So far, the Commission has, for the most part, been doing an excellent job with that implementation. But there is till much to be done. I, for one, would very much like to retain continuity at the Commission as that implementation continues. While Mr. Wellinghoff's current term does not expire until June, it seems prudent to ensure that we will have no gaps in Commission positions. I welcome this opportunity to get Mr. Wellinghoff's, as well as Mr. Kelliher's, nomination considered quickly by the full Senate.

Senator DOMENICI. Needless to say, I support you, sir, and I hope we can get you confirmed quickly.

Mr. WELLINGHOFF. Thank you.

Senator DOMENICI. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Mr. Wellinghoff, why don't you go ahead. If you have any family members you want to introduce, this would be a good time to do that.

TESTIMONY OF JON WELLINGHOFF, NOMINEE TO BE A MEMBER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Mr. WELLINGHOFF. Thank you, Mr. Chairman.

Yes, I do. I have my wife here, Karen Galatz, and my son, Jules Wellinghoff. My youngest son, Jacob, could not attend; he's taking two tests today, one in Spanish that he's having a tough time with, so we let him off.

I'd also like to introduce members of my office. I have Jim Pederson here with me, David Morenoff, and Mary Beth Tighe.

With that, thank you, Chairman Bingaman, for your courtesy and consideration for expediting this hearing. I appreciate it very much.

Ranking Member Domenici, I understand you're retiring, and I want to thank you very much for the courtesy and consideration that you gave me in my first confirmation hearing. Thank you.

Senator DOMENICI. Yes, sir.

Mr. WELLINGHOFF. In summarizing my testimony, I was before you 16 months ago, and, at that time, I promised to use my 30 years of consumer protection advocacy and knowledge in the energy field to improve efficiency in the infrastructure operations of the administration by FERC, and to do so in a way that would, in fact, benefit consumers. I believe I've done this, but, of course, I haven't acted alone. I've had the pleasure, in cooperation and collaboration, working with Chairman Kelliher, with Commissioner Moeller, Commissioner Spitzer, and Commissioner Kelly—in addition, I've had the good fortune to work with the staff at FERC—it is an excellent group of individuals—and, of course, my office members. As I indicated in my prepared statement that I've submitted to you, we've reviewed, and I voted on, individually in the last 16 months, over 1684 orders. Each order, I ask the question, How will those orders affect consumers, and how can we improve efficiency to reduce costs for those consumers?

So, I've looked at efficiency in two different sectors. One is in the area of infrastructure. Regarding infrastructure, one area of particular interest to me is the natural gas pipeline system in this country. It's a very effective system that does, in fact, deliver a commodity to consumers throughout the country. But I've determined that there are areas where, in fact, efficiency could be improved in that system. In fact, I believe there may be somewhere between 10 and 15 gigawatts—that would be 10- to 15,000 one-thousand-megawatt power plants worth of efficiency that can be squeezed out of the natural gas pipeline system. So, as such, I've collaborated with the chairman and staff, and we're now asking gas pipeline producers who are in the process of building new facilities as to how they're going to improve the efficiency of those systems, how they're going to do waste heat recovery, how they're going to do things that, hopefully, can, in essence, get more energy out of the systems that they're now constructing.

Another area is the integration of renewables into the grid. To the extent that we can have diversity in supply and also increase competition among resources, it's going to benefit consumers. With respect to that, I worked on an order where we provided for cost-allocation methodology for a trunk-line system for wind energy in California that will facilitate development of wind. It will be an order that, I think, ultimately, will be a model for the country for wind.

We also included, in a tariff filing—excuse me—in a tariff revision rule, rule 890, a provision called "conditional firm service," which provides for a new service product for, primarily, wind energy that can facilitate them getting on the grid.

On the operations and administration side, we've also done work. Mr. Morenoff and I, that I introduced, did a paper for the Energy Law Journal recently, and in that paper we looked at a researcher who has developed information that indicates that there's at least an additional $35 billion in savings that could be achieved for consumers by integrating demand response into the wholesale organized energy markets.

So, with this in mind, we've done a number of things. One, again, is with respect to tariff reform, in order 890, where we have provided for ensuring that demand response can provide services to the grid in a comparable way to generation resources, and get paid just like a generator. This ultimately will provide for creating a market for demand response and ultimately ensure the consumers can benefit from the lower cost in those markets because of incorporation of demand respond into the markets.

We've also worked to incorporate demand response into the reliability rule so that demand response, in fact, can be used as supporting reliability; again, helping create a market for something that can reduce costs for consumers. I've worked with the States in a collaborative, that I co-chair with a number of other State commissioners under the auspices of the National Association of Regulatory Utility Commissioners, to look at barriers to demand response in the interface between the State and Federal sectors in integrating demand response into the grid.

So, looking to the future, I believe there's much still to do. If we look at just improving the efficiency of the grid by 5 percent, that 5 percent could have the effect of reducing the need for 50 one-thousand-megawatt power plants, a tremendous reduction. I believe this can be done by optimizing grid operations and software. I note that you, here in the Senate, passed H.R. 6, which directs FERC to do a demand-response assessment, and also develop a demand-response plan. If confirmed, I'd devote my expertise to this effort to, in fact, maximize savings benefits for consumers by increasing energy efficiency in the delivery of the energy system.

Thank you, Mr. Chairman. I'll be happy to answer any of your questions.

[The prepared statement of Mr. Wellinghoff follows:]

PREPARED STATEMENT OF JON WELLINGHOFF, NOMINEE TO BE A MEMBER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Chairman Bingaman, Senator Domenici, and distinguished members of the Committee, I am honored to be here today as a nominee to the Federal Energy Regulatory Commission (FERC). Thank you, Chairman Bingaman, for scheduling this hearing. I thank President Bush for renominating me to this position, and I thank Majority Leader Reid for his continued support and the confidence he has expressed by recommending me to the President for renomination. At my confirmation hearing before this Committee in June, 2006, I promised to use my 30-plus years of experience with consumers, utilities, and energy policy and regulation to work at FERC to improve the efficiency of our nation's energy infrastructure and operations, and the effectiveness and responsiveness of the agency to the needs of consumers through the more efficient administration of energy regulation. I believe I have worked to fulfill that promise in my last 16 months at the Commission. That work, however, has not and cannot be done alone. Chairman Kelliher, and fellow Commissioners Moeller, Spitzer, and Kelly have not only been supportive of these efforts, but they have actively collaborated and contributed significantly to the progress made in that time. The competent and capable staff of the Commission is also to be commended for their work in these areas.

In terms of sheer numbers, the work has been substantial. In the time since I took office in August 2006, I have reviewed, discussed, and voted on over 1684 orders. These orders range from uncontested settlements of minor tariff issues to massive rulemaking proceedings of thousands of pages affecting fundamental issues such as the operation of our interstate transmission system and electric system reliability. With each of these orders I have considered, I have applied a consistent philosophy and approach. For each I have asked the following two questions:

1. How will the order impact the consumer?
2. Can the order be structured to improve efficiency and consumer benefits?

Improving efficiency while maintaining reliability of the infrastructure and operations of our nation's energy system will, in most instances, lower total life-cycle costs to consumers. Improving efficiency also often has the added benefits of reducing energy use and thus reducing local and global emissions, including greenhouse gas emissions. Improvements in efficiency must be considered, however, in the context of reliability and first costs, both of which are also important to consumers. It is within this context that I relate to you a sample of my experience to date at the Commission.

ENERGY INFRASTRUCTURE

There have been significant opportunities to consider mechanisms to improve efficiency in energy infrastructure in the numerous cases presented to the Commission since my arrival. These have included the areas of electric transmission systems, natural gas pipeline and storage systems, and innovative technologies including renewable systems.

In the area of transmission, the Congress in the Energy Policy Act of 2005 (EPAct 2005) directed the Commission to provide for incentives for the construction of new electric transmission facilities. The Commission complied by issuing Order No. 679 that provided for such incentives. In section 1223 of EPAct 2005, the Congress directed the Commission to encourage advanced transmission technologies that improve system efficiency. In those cases where transmission developers have requested incentives for transmission construction under our Order No. 679, I have linked that incentive in my decision making to the developer also establishing that efficiency improvements have been incorporated into the line using some of the innovative technologies outlined by the Congress in EPAct section 1223. This linkage is important to encouraging improved transmission efficiency and use of the EPAct 2005 advanced transmission technologies.

As another transmission example, in Order No. 890 the Commission has reformed its open access transmission procedures. In that Order, efficient transmission grid expansion is encouraged by improving the transmission planning process. Order No. 890 explicitly recognizes that demand side resources are an integral part of the transmission planning process and must be considered on a comparable basis to supply side resources. Consideration of such resources benefits consumers by promoting efficiency and allowing lower cost options to be considered by transmission planners.

The natural gas pipeline system in this country delivers essential fuel for space and water heating, cooking and other domestic and commercial uses in homes and businesses. It is also vital to the delivery of fuel for electric generation, process heat, and as an industrial feedstock. The operation of that system consumes tremendous energy to compress the gas to move it through the interstate pipeline system. It is this compression process and the efficiency of the process that has been another area of focus for me while on the Commission. It has been estimated that there are between 10 and 15 gigawatts of energy that could be recovered from our natural gas pipeline system through waste heat recovery at compressor stations and pressure recovery at pressure let down points. To the extent that this energy can be recovered economically and used to service consumers, they will benefit and all will benefit from the reduced carbon emissions. With assistance of the Chairman and the Commission staff, I began last year to explore the opportunities to recover this lost energy to generate electricity. At my request and the Chairman's direction, inquiries are now sent by staff to new pipeline developers to determine the extent to which they have considered these energy recovery techniques in their project. In addition, I have initiated talks with the pipeline industry to investigate opportunities for energy recovery on pipelines. I am confident that those discussions will prove productive, and the industry will agree to voluntarily collaborate with the Commission to identify and explore such opportunities.

In the area of innovative technologies, to the extent that new energy resources such as renewable technologies can be better integrated into the electric grid and

wholesale electric markets, consumers benefit from diverse supplies providing greater competition and consumer choice. In an effort to provide for more opportunities to integrate wind energy resources into the electric grid, Order No. 890 provides for a "conditional firm" transmission service option that allows wind developers to take service that may better match the unique characteristics of wind systems. With respect to the financing of transmission necessary to provide for the delivery of renewable energy from remote locations, the Commission in a declaratory order issued to the California Independent System Operator (CAISO) allowed for sharing the costs of trunkline transmission lines necessary to deliver wind and other renewable energy from remote areas of California. This financing mechanism could apply not only to projects in California, but to any area where there are remote dispersed location-constrained resources (wind, geothermal, solar, hydrokinetic) that can be developed to provide consumers with new diverse energy choices. This order was applauded by the American Wind Energy Association (AWEA) and will serve as a model for other regions of the country.

ENERGY SYSTEM OPERATIONS AND ADMINISTRATION

With respect to energy system operations there have been multiple opportunities to improve efficiency and thus benefit consumers. Areas where I believe I have had a substantial impact include work to further incorporate demand response and other distributed resources into wholesale electric markets, enhanced collaboration between FERC and the states on demand side issues, and the institutionalization of energy innovations and efficiency into the FERC structure.

David Morenoff, an attorney in my office, and I recently published an article in the Energy Law Journal that has been supplied to the Committee. In that article we document the substantial consumer savings possible from the incorporation of demand response into organized wholesale electric markets. One recent study estimated that the net present value to electric consumers over a twenty-year horizon could be as much as $35 billion. In an effort to accelerate the incorporation of demand response into these markets and secure these benefits for consumers, I have worked on a number of initiatives at the Commission. In Order No. 890, the Commission concluded that further reforms were needed to address deficiencies in its open access transmission tariff (OATT). For example, the Commission found that sales of ancillary services by "load resources . . . should be permitted where appropriate on a comparable basis to service provided by generation resources." In support of this finding, the Commission stated that "comparable treatment of load resources is consistent with" EPAct section 1252(f), which establishes a national policy to eliminate "unnecessary barriers to demand response participation in energy, capacity and ancillary service markets . . . ." Such comparable treatment in wholesale energy markets will enable the expeditious incorporation of demand-side measures like demand response into those markets thus saving consumers substantial money.

In another example, in Order No. 693, the Commission approved a number of electric reliability standards proposed by the North American Electric Reliability Corporation (NERC) and further directed NERC to submit improvements to several of these standards. In particular, the Commission directed modifications to include an explicit provision recognizing that demand response and other demand-side resources may be used to comply with certain reliability standards. Allowing demand-side resources to be used to comply with certain reliability standards again potentially saves consumers costs and increases efficiency.

In the area of federal state collaboration, I have been designated by Chairman Kelliher to serve as the co-chair of the FERC/NARUC (National Association of Regulatory Utility Commissioners) joint collaborative on demand response. I serve with two NARUC co-chairs. The collaborative meets three times a year and investigates the relationship between wholesale and retail electric markets and the use of demand response to make those markets more efficient for consumers. We are currently undertaking a study to investigate the barriers to more robust incorporation of demand response into those markets and mechanisms to reduce those barriers.

Finally, in the area of effective administration at FERC in the incorporation of efficiency in energy infrastructure and operation, I—in collaboration with Commissioner Kelly—developed a proposal for the Chairman to create at FERC an "Energy Innovations Sector". The Chairman endorsed our proposal and created the Sector. This new staff department is responsible for institutionalizing within FERC the consideration of enhanced efficiency in energy infrastructures and operations, incorporation of innovative technologies into energy infrastructure and operations, and investigating issues related to demand-side, renewable, and other resources that are now underutilized and considered innovative. The Sector has been operational for

several months and has a chief and several staff in place, as well as part-time assigned staff from other areas within the Commission.

FUTURE ACTIVITIES

There is considerable work that lies ahead to advance efficiency in the realm of energy infrastructure and operations. As an example, if we could improve the operational efficiency of our electric grid by 5% through optimization of transmission software, we could save the equivalent of 50 large coal plants. Integration of storage into the grid with the promise of plug-in hybrid electric vehicles (PHEVs) could revolutionize the entire grid operation and provide economic support to consumers who purchase new advanced transportation technologies like PHEVs. On October 24th of this year, we demonstrated at FERC for the first time an electric vehicle providing regulation services to the grid in real time via a signal over the internet with a response time of less than a second. This demonstration provided the type of frequency response necessary to keep the grid stable and reliable and did so in a manner and time interval far superior to that of a generating resource that currently provides such grid services. FERC has taken initial steps, as I indicated above, to allow such ancillary services to be provided by demand-side resources like a PHEV. But much still needs to be done to ensure that the tariffs and infrastructure are in place so that consumers who own these vehicles can receive payments for the provision of these services when PHEVs become commercially available.

In the area of demand response the Senate just passed legislation that directs FERC to conduct a National Assessment of Demand Response and develop a National Action Plan on Demand Response. Given the work I have already done in this area while at the Commission I believe I can provide a substantial contribution to this effort going forward.

CONCLUSION

I appreciate this opportunity to relate to you my experiences and efforts at FERC. It has been truly an honor and a privilege to have served as a Commissioner. I have had the good fortune to work with the Chairman, fellow Commissioners and staff who have all been open and interested in my ideas and proposals to improve the efficiency of our energy system for the benefit of consumers. I look forward to continuing that work. I would be happy to answer any questions that you might have.

The CHAIRMAN. Thank you very much. Let me ask a few questions to start with here.

One of the main issues that I know you folks have been grappling with is this whole issue of deregulation of the electricity markets. There's an article in the Energy Daily today; I'll just read the first sentence of it and ask your comment. It says, municipal utilities, State consumer advocates, and industrial energy users, Monday, called on FERC to launch an investigation into, quote, "unjust and unreasonable prices in deregulated wholesale electricity markets, complaining that the agency has failed to adequately protect consumers due to a blind ideological attachment to competition."

Can you give us any thoughts you've got on that kind of a charge?

Mr. WELLINGHOFF. I'm familiar with the charge of that group. I've met with many of those groups, including the APPA, American Public Power Association, ELCON, and a number of the consumer advocates, including the NASUCA, which is the consumer advocate organization. I believe they do have some legitimate concerns with respect to wholesale markets, but two things I'd point out.

No. 1, they need to look at the facts. The facts with respect to wholesale markets in this country is—from 2005 to 2006, rates have gone down in every single organized wholesale market where's an RTO and ISO.

No. 2, to the extent that they wish to provide for improvements to those markets, we need specific suggestions. When I looked at that petition that was filed yesterday, there were about 30 different

individual organizations on that petition. Of those organizations, there was only one that has offered to FERC a concrete suggestion of how to improve the organized wholesale markets. That was the Forest Paper and Products Association. In fact, they had a very interesting suggestion that they submitted in an ANOPR that FERC has issued regarding the wholesale markets; and so, we're investigating this right now. I think we do need to investigate it. What we do need is concrete solutions from groups, rather than petitions.

The CHAIRMAN. Sort of another aspect of that is the question of whether or not the incentives that we have in place for RTOs are aligned with the interests of consumers to result or produce the lowest possible rates consistent with reliable service. Do you believe that those incentives are properly aligned?

Mr. WELLINGHOFF. I certainly think we can make improvements. To the extent that we have incentives for individuals to stay in RTOs, I think that's appropriate, because I think we have seen data that shows that RTOs, in fact, are saving consumers money; not simply from the area of markets that are being created and those markets providing for more competition, but another area that a lot of people forget about with respect to RTOs is economic dispatch. Those RTOs are dispatching generators over a large footprint; and, by doing so, they, in fact, can choose the generators that will provide consumers with the lowest costs. So, I think there are a number of reasons why RTOs are ultimately providing benefits to consumers. I'd say we do have to, certainly, align the incentives with those benefits to make sure that we're not paying too much to get the end result of the benefits that consumers are seeing. I would agree.

The CHAIRMAN. All right.

Senator Craig.

Senator CRAIG. Mr. Chairman, thank you very much.

Jon, again, it's good to have you before us.

I appreciate—well, let me put it this way, I have watched you closely, and, while I may disagree with some of your thoughts, I appreciate your sincerity, I appreciate your commitment to the consumer, and one of the things that I feel I've gained here is a reality that we do not empower our consumers as much as we should. I think some of what you're doing, and your advocacy, is helping that a great deal, and I believe in that. I think it's tremendously important.

When you ask a consumer to conserve, you ought to provide them with the knowledge and the tools to do that. Price and conservation can go hand in hand when, in fact, that consumer knows how to do it and how to shift his or her lifestyles, or adjust accordingly. Clearly there ought to be all the incentives out there to do so. I think you are an advocate of that, and I appreciate that.

Let me ask this question. It is in relation to some of your thoughts and public statements over the past while.

Commissioner, can you please give us your thoughts on a national renewable portfolio standard, an RPS? What role, if any, should FERC play in the oversight an RPS, should a Congress pass one?

Mr. WELLINGHOFF. Thank you, Senator Craig.

I actually was very involved in the first RPS in the State of Nevada. I actually wrote that legislation—or, actually, amendments to that legislation, that expanded considerably—and was involved in about six or seven other States that were developing RPSs, including Arizona and Colorado and California. At one time, I didn't believe it would be appropriate to have a national RPS, in the sense that I was concerned that there might be some Federal preemption, and some States actually had levels of targets that were above what the Federal levels were being proposed. But, ultimately, I believe that we do need it—a Federal RPS—simply for the requirement that we have to be able to trade credits across State boundaries, and we have to be able to do that if we're going to achieve the kind of greenhouse gas reductions that we really need in this country and in the world. I think a Federal RPS would facilitate that.

I think, with respect to your question as to who should administer it, I do believe that FERC should be the administrating agency. We are a regulatory agency, we have experience with the utilities, we have experience with this type of administration, and you can see what we've done in the reliability area. I think we've carried out the provisions of the 2005 EPAct, under the direction of Congress, very well. I think we could do the same thing with respect to an RPS.

Senator CRAIG. As you know, Jon, one of the difficulties we have, here on the Hill, of fashioning a national RPS, is to try to not pick winners and losers, but, obviously, to have something that might fit all. Senator Domenici and I, in the last energy debate, in relation to our colleague, the chairman, here, got into an interesting discussion as it relates to RPS and what is new and what fits, versus what's old and may not fit as well. We were very sincere when we offered what we called a CPS, or a clean portfolio standard, believing that that is a much more modern way at looking at markets and driving markets, and a much more uniform way, by including new nuclear, new hydro, if any, new clean technologies, clean coal, all of those things that would drive a market toward a cleanliness, if you will, at the same time being much more acceptable, nationwide, as a standard. Do you have any thoughts on that concept?

Mr. WELLINGHOFF. I do have concerns about including clean coal and nuclear into a Federal RPS, primarily because those two technologies are fundamentally different than the other renewables that we've talked about, and they're different in two areas. No. 1, they're different because they're usually very large-scale systems, 1,000 megawatts or more, unlike renewables that are usually very small-scale, relatively small-scale. No. 2, they're not location-dependent, as renewables are very location-dependent; you can, in essence, site these plants anywhere. So, I really see them as very separate, and I'm not—I personally would not include them in an RPS.

Senator CRAIG. OK. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman.

Mr. Wellinghoff, I've always seen you as a decent fellow and somebody trying to be responsive, but, I've got to tell you, in the area that affects Oregon and Washington, with liquified natural gas and related, you know, pipeline issues, that's just not going to be enough for me right now. It is absolutely bedlam out there. There are all kinds of projects, at least five interrelated projects, proposing the production of far more gas than our region can possibly use. Our citizens are running around to scores of meetings now, trying to deal with scoping and comment meetings and information. They say they can't get good information. In the case of one project on the Oregon coast, Bradwood Landing, two of the Federal agencies, FERC and the Corps of Engineers, have different descriptions out with respect to the same project. That's just unacceptable, you know, to me. I think that the agency has got to get away from this sort of blinders-on approach that just basically says, "Well, we'll permit all these things. We'll go ahead with all of 'em. You know, we're not really interested in the environmental impact, we're not really interested what makes the most sense for energy production. All you people can just put your lives on hold out there on the Oregon coast and Washington." That's not acceptable to me.

So, what I want to see is a change in the agency's policy in this area so that the agency looks at these projects comprehensively, looks at the projects in aggregate, and makes some key judgments as to which project best serves the market.

So, my question to you is, having stipulated, already, I think you're a fine fellow, What are you going to do to shake this up and come up with a workable policy, now, when we've got bedlam, certainly in Oregon and Washington, with all these projects that our citizens can't even begin to track down the information on, given that the agencies are putting out two different accounts, in many respects?

Mr. WELLINGHOFF. Senator Wyden, I do understand that there is a huge impact from all these projects that are seemingly simultaneously descending on Oregon. It is an issue that I'm concerned about, extremely concerned about. You've submitted 12 questions to me, prior to this hearing, and I've tried to answer those as best I could. I think the best answer that I provided in those questions, hopefully, is that I'm committed to take our director of energy projects, Mark Robinson, and myself out to Oregon in January to talk to State officials, to look, on a generic basis, how we can deal with these issues in a way that we can make the process more transparent for the citizens in Oregon, and we can ease the process in a way that will hopefully allow for input, but do it in a way that does not overburden the——

Senator WYDEN. I appreciate that, but will you be the point person at FERC to change the policy here and get a policy that says, when you've got projects intended to serve the same market, the agency is going to look at them comprehensively to determine what best serves the market? That's the policy change I want to see, and I want to see—given the fact that you're the one up today, I want to see somebody say, "I'll be the point person to get a new policy to look at what's best for the area."

Mr. WELLINGHOFF. I certainly would look at that policy, Senator, but I will tell you that I'm very hesitant to propose to my fellow commissioners a policy where FERC is picking people and markets. Let me——

Senator WYDEN. I don't——

Mr. WELLINGHOFF [continuing]. Let me give you an example because Oregon's not the only place that's impacted. Let's talk about my State of Nevada. In my State of Nevada, we've got three coal plants—three huge coal plants being proposed that, from a baseload standpoint, could never be absorbed by the State of Nevada. One in Ely, that's being proposed by Nevada Power; another one outside of Ely that's being proposed by L.S. Energy; a third one that's being proposed in southern Nevada by Sythe, at Toquop. The BLM is doing the EIS on all those, they're not looking at them in a comprehensive manner in any way, fashion, or at all, they're, in fact, doing them individually and serially, I think, as FERC is doing the projects in Oregon.

I really wouldn't want the BLM picking for Nevada which coal plant should go forward. I don't think that would be an appropriate thing to do. I have some concerns about FERC picking whether we should be doing Bradwood or the Oregon project or the Jordan Coal Project as the appropriate project for Oregon. I think the markets will ultimately pick, and, I think, if we do them serially, but consider, however, the multiple impacts—and I certainly will do that—there's no reason why we shouldn't consider the multiple impacts of projects, knowing that they are being proposed. That has to be considered, and that—how that impact will impact the citizens of Oregon, we should do that. I will——

Senator WYDEN. My time——

Mr. WELLINGHOFF [continuing]. Commit to that.

Senator WYDEN. My time is up, but that's what I'm looking for, not picking winners and losers, but looking at this comprehensively. That isn't being done. Seems to me you've made at least aN open door to a fresh approach there, and I think that's constructive. But looking at them, collectively, comprehensively, determine all the impacts—which isn't being done today—that's what I'm looking for, and I appreciate it.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman.

Commissioner, appreciate your good work. I want to ask a couple of questions this morning about natural gas; specifically, Alaska's natural gas and how we can get that to the American market. As you know, we have been working up in the State. Governor had a new proposal, applications have been submitted. There have been a handful that have come in, as well as a proposal that's outside of the regular process that the Governor is now considering.

I guess the question to you this morning is, From the FERC's perspective, how do you view this process working, and is it on track to the level that we would like, in order to be able to provide this country the volume of gas that we have available in Alaska? We've just got to figure out how we get from there to here. So, just a few comments on that, if you would.

Mr. WELLINGHOFF. Yes. Thank you, Senator.

I believe that the resource of the natural gas in Alaska is essential to this country's economic viability. I believe that FERC, as I understand it, stands ready, at the point that projects ultimately are selected by the State, to move forward in a rapid fashion with respect to the EIS overview and other aspects of project planning, to ultimately license and site those projects.

So, my understanding is that our Office of Energy Projects is prepared, and stands ready, to move forward expeditiously.

Senator MURKOWSKI. We appreciate that commitment and hope that we'll be working with you quickly in this manner.

Let me ask you a little bit about LNG terminal approvals. How many do we have in place? What's the status of them? Just from a bigger-picture perspective, what do you view as, then, the future for imported LNG in this country? Is this an area where, in your perspective, we continue to rely more and more on these imports, and that's the direction that we go, in terms of a policy, as it relates to natural gas consumption in this country?

Mr. WELLINGHOFF. I think LNG terminals are an essential part of the supply for natural gas. You can see, from the questions from Senator Wyden, we have a number of them proposed in Oregon, and there are a number of them proposed on the East Coast, as well, and in the Southeast, where the terminals have predominated, in the Southeast, and a couple in the Northeast. But I think we're going to see more terminals be necessary closer to load centers on the West Coast and on the East Coast, as well, and I would say that it's one of the part of the mix of supply of natural gas, that we're going to keep natural gas competitive in this country.

Senator MURKOWSKI. In terms of when those LNG receiving terminals will be online—I know that you've got applications in the works, but give me a 5-year picture of what it looks like, in terms of new LNG receiving terminals, in your opinion. Or maybe there's nothing in 5 years. Is it 10 years?

Mr. WELLINGHOFF. I'll tell you, I—if I could, I'd like to get back to you——

Senator MURKOWSKI. OK

Mr. WELLINGHOFF [continuing]. In writing on that.

Mr. WELLINGHOFF. I think I could probably give you a much more detailed and answer, and give you an answer——

Senator MURKOWSKI. What I'm trying to understand is just what we have in the pipeline and what's realistic within a given timeframe.

Mr. WELLINGHOFF. We have quite a few in the pipeline. I couldn't give you an exact number, but I think we have at least 10 to 12 in the pipeline right now. I think it's realistic to see at least five of those over the next 5 years. But, again, I would like to reserve the right to get back to you and give you some detail——

Senator MURKOWSKI. We'd appreciate that.

Mr. WELLINGHOFF [continuing]. For our project——

Senator MURKOWSKI. From the Alaskan perspective, of course, there's a concern that the longer our project, up north, is delayed, you've got to have commitments to make things happen around the Lower 48 to meet that demand. Once a commitment has been made and you've got your LNG receiving terminals in place and your con-

tracts with your countries overseas to provide that gas, all of a sudden the domestic natural gas is not a part of the picture. We don't want to be pushed out of that picture.

So, I'd like to understand, kind of, how the timeline moves for, and if you can provide that, we'd appreciate it.

Mr. WELLINGHOFF. I'll do that.

[The information follows:]

STATUS OF LNG PROJECTS

The U.S. has five operating liquefied natural gas (LNG) import terminals that are able to regasify up to 5.8 billion cubic feet (Bcf) per day. These terminals are located in Everett, MA; Cove Point, MD; Elba Island, GA; Lake Charles, LA; and offshore Louisiana.

The Commission has approved 14 new LNG terminals and expansion of five LNG terminals. Of this total, four terminals and two expansions are under construction as show in the table below.

Project Name	Order Date	Proposed In-Service Date	Volumes (Bcf per day)
Freeport LNG (TX)	06/18/04	Mar-08	1.5
Sabine Pass LNG (LA)	12/15/04	Apr-08	2.6
Sabine Pass Phase II (LA)	06/15/06	Apr-09	1.4
Golden Pass LNG (TX)	06/30/05	Apr-09	2.0
Cameron LNG (LA)	09/11/03	Sept-Nov 2008	1.8
Cove Point Expansion (MD)	06/15/06	Nov-08	0.8

Based on the above schedule of projects, the U.S. can expect to have an additional 10.1 Bcf per day of LNG regasification capacity by early 2009. In addition, a deepwater port LNG terminal—the Northeast Gateway, offshore Boston, MA—is scheduled to go into service this month with the ability to regasify up to 0.8 Bcf per day.

Eight new projects and three expansions totaling 21 Bcf per day of new regasification capacity have been approved by the Commission, but currently are not under construction. These projects are shown in the following table.

Project Name	Order Date	Proposed In-Service Date	Volumes (Bcf per day)
Corpus Christi LNG (TX)	04/13/05	2009	2.6
Vista del Sol LNG (TX)	06/20/05	2009	1.1
Weavers Cove LNG (MA)	08/15/05	2010	0.8
Ingleside Energy (TX)	07/21/05	2010	1.0
Port Arthur LNG (TX)	06/15/06	2010	3.0
Crown Landing LNG (NJ)	06/15/06	2008	1.2
Creole Trail LNG (LA)	06/15/06	2009	3.3
Casotte Landing (MS)	02/16/07	2010	1.3
Clean Energy LNG (MS)	02/16/07	2009	1.5

Project Name	Order Date	Proposed In-Service Date	Volumes (Bcf per day)
Calhoun LNG (TX)	09/20/07	2009	1.0
Freeport Expansion (TX)	09/26/06	2009	2.5
Cameron Expansion (LA)	01/18/07	2010	0.8
Elba Island Expansion (GA)	09/20/07	2010	0.9

Eight proposals to construct liquefied natural gas terminals are pending at the Commission. Seven of those proposals have filed formal applications for siting; one proposal—Oregon LNG—is in the Commission's mandatory pre-filing process that precedes the filing of a formal application. The regasification capacity associated with these projects totals 9.2 Bcf per day.

Project Name	Location	Volumes (Bcf per day)
Broadwater LNG (NY)	Long Island Sound, NY	1.0
Long Beach LNG (CA)	Long Beach, CA	0.7
Northern Star LNG (OR)	Bradwood, OR	1.0
Quoddy Bay (ME)	Pleasant Point, ME	2.0
Downeast LNG (ME)	Robbinston, ME	0.5
Sparrows Point (MD)	Baltimore, MD	1.5
Jordan Cove (OR)	Coos Bay, OR	1.0
Oregon LNG (OR)	Astoria, OR	1.5

The combination of the existing capacity, the capacity of the offshore terminal that will begin service shortly, and the capacity of the projects that are under construction has the potential for 16.7 Bcf per day of regasification capacity. This amount, plus the potential capacity from those projects that have not yet commenced construction and those projects that are under analysis at the Commission add up to an additional 30 Bcf per day of capacity. We believe that the market will decide that not all of this capacity is needed due to financing requirements and the availability of LNG supplies, among other things.

However, if the market perceives that natural gas from Alaska will not be forthcoming in a timely manner, those LNG projects that may have seemed marginal may look more attractive, especially those projects with an in-service date in the next several years. Alaska offers a reliable continental source of natural gas for the Lower 48 States that will help the U.S. economy to grow and thrive, and also contribute to the economic well being of the State of Alaska.

The average post-approval siting time is variable. Approval of an application for the siting of a LNG terminal by the Commission does not allow the applicant to commence construction the following day. All approvals have conditions attached to mitigate the environmental impact of a project, as well as conditions regarding safety and security of the facility. Certain conditions must be satisfied prior to the commencement of construction. If those conditions are met, then the Director of the Commission's Office of Energy Projects will issue a letter allowing construction to commence. Further, project sponsors may not opt to commence construction even when they receive approval, due primarily to non-environmental reasons (e.g., financing decisions, execution of contracts, procurement of materials and labor). Therefore, it is difficult to predict the post-approval siting time between Commission approval and the actual commencement of construction.

As a general rule, when construction does commence, it can take approximately three years for an LNG terminal to go into service. The critical path is the construc-

tion of the storage tanks for the LNG. All of the other facilities at a LNG terminal can be constructed within this timeframe.

Senator MURKOWSKI. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Menendez.

Senator MENENDEZ. Thank you, Mr. Chairman.

Commissioner, we want to acknowledge your exemplary service on the Commission, particularly your interest in energy efficiency and distributed generation, as well as plug-in hybrids. I think that those are all things to be commended. I only wish more of your colleagues would take some of your leads on these things.

I do have, however, a specific set of questions that I want to raise with you about New Jersey. Some of them have broader policy context than New Jersey, but—and it's about these extension cords that take place.

We have a situation where we have the so-called extension cords being built to transport electricity from New Jersey to New York. There's one called the Neptune cable, that has saved Long Island customers millions of dollars, but has cost New Jersey customers much more. To accommodate this export, the Neptune cable paid only about 5 million of the 30 million necessary to accommodate the problem, and has cost New Jersey customers hundreds of millions of dollars in capacity payments.

Not surprisingly, more cables are planned. In one of these proposals, the Cross Hudson Corporation proposes taking what we call the Bergen II Power Plant, one of New Jersey's most efficient natural-gas plants, and unplugging it from the PJM grid. All of its electricity would go under the river to Manhattan. In effect, Bergen II would be transported to New York to serve New York, but current regulations and laws do not require New York or the corporations involved in the deal to compensate New Jersey for the loss of capacity or this loss of electricity.

So, my question is, Does the FERC—or is the FERC looking at this whole issue? I mean, New Jersey is specific, but I'm sure it's not unique. If everybody can go sell for higher prices and drain capacity from one State, is the FERC looking—particularly contemplating any changes to rules governing capacity export charges to reflect changed circumstances, such as happened—some of these that I've described to you? Particularly, do you know if the FERC has any action—taking any action to address the impact that these extension-cord projects are having on New Jersey's already high electricity prices? How are we going to get customers compensated for the loss of capacity—electricity and capacity from these projects? This is an ever growing issue in my State. I assume that other States that will find itself in this set of circumstances will begin to raise these issues, and I'd certainly like to get your thinking on this.

Mr. WELLINGHOFF. Certainly, Senator, to the extent that New Jersey can create capacity, it should be compensated. I absolutely believe that. I know that New Jersey has been one of the leaders in, for example, photovoltaics and also later and distributed generation. To the extent that those resources are creating capacity in lines, I think there needs to be ways that we, in fact, can com-

pensate people in New Jersey who are creating that capacity. I think that's something—and something I'm certainly absolutely looking into. To the extent that any area is creating capacity on lines through the demand side or through distributed generation or other means, I think they, ultimately, need to be compensated for it, as a generator would be compensated for creating capacity.

Senator MENENDEZ. Let me ask you this. I appreciate hearing that; the problem is that that's not happening, largely speaking; certainly not happening in the context of any just compensation. Do you think there are any laws or regulations necessary to ensure that the entire power plants are not diverted to another wholesale electricity market without compensation? Do you think you all have the wherewithal to take care of such challenges today, or do you need to have authorities you don't have today in order to do this?

Mr. WELLINGHOFF. Again, I would provide you an answer in writing on this, specifically, because I don't want to misspeak.

Mr. WELLINGHOFF. However, I don't believe that, from the standpoint of a generator, that FERC has the ability to dictate how that generator sells its capacity, as far as where it sells it. If it can, in fact, market it—skip where it's at, to the next line jurisdiction—I believe that a generator has, ultimately, that right. To restrict it to a certain area, I don't believe is in our authority, but I definitely would get back to you on that.

Senator MENENDEZ. We'd like to see how some type of just compensation takes place, because, if not, we're going to have a major problem. Ratepayers are just going to go off the wall.

Last, you know, we need a market monitor——

Mr. WELLINGHOFF. Could I add to that, my last answer, just one thing, if I could? Excuse me, but—to the extent that these plants in New Jersey have been paid for by New Jersey ratepayers, I would think the appropriate jurisdiction to determine payments of that capacity would be the State Public Utility Commission, rather than FERC.

Senator MENENDEZ. Last—well, we will continue to follow up with you—lastly, on—you know, we had a whole issue with PJM and the market monitor saying he was being interfered with. It's, you know, imperative that we have a strong, independent market monitor that consumers can have confidence in that they're not being cheated by manipulation and/or monopolies, and we hope that you, as a commissioner, along with your fellow commissioners, are going to ensure that we do everything that's necessary to strengthen the hands of these market monitors to be truly independent. I have a real concern about this issue. When you look at all this other issues that we've just talked about, in terms of electricity costs, we hear from ratepayers all of the time. So——

Thank you, Mr. Chairman.

Mr. WELLINGHOFF. I would commit to you on that—on the market monitor—absolutely, Senator.

The CHAIRMAN. Senator Tester.

Senator TESTER. Thank you, Mr. Chairman.

I want to thank Jon Wellinghoff. Thank you for being here today. Thank you for being willing to serve. This is the first time I've had an opportunity to meet you, and I am very impressed with your

knowledge of the area. I'm doubly impressed with the fact that you're one of the few of us that know how to spell your first name correctly.

[Laughter.]

Senator TESTER. So, thank you.

As you know, Montana deregulated their utilities in 1997. Maybe you don't know that, but they did. Our old regulated company sold off their assets, all of 'em. To be honest—it's a bit of an understatement—but deregulation has not been smooth in Montana. Prices have gone from some of the lowest in the region to some of the highest. They have more than doubled in the last 5 years, and are anticipated to continue to rise.

Do you believe that competition in the electricity market is working the way it ought to?

Mr. WELLINGHOFF. I believe it is working; it's not working as well as I'd like to see it working, but I think it can work. I think that consumers can benefit and be provided with more choices and more opportunities. The part about it that I like most is, I think it has the opportunity to bring in the demand side that we don't have now fully integrated into the markets. The demand side, I mean, really consumers participate in the market by reducing their demand at times that they—that's appropriate for them, but, ultimately, that—where they can ultimately make money. Things like plug-in hybrid electric vehicles that we're going to see coming to the markets will really benefit from a competitive market. I think we'll see real benefit. So, I think the benefits are really there. We're moving much slower than a lot of people, I think, would like to see. I know there are areas of the country, like Montana and others, that have been impacted, that have been impacted severely, and that concerns me—does concern me.

Senator TESTER. What can FERC do to encourage competition in rural areas like Montana?

Mr. WELLINGHOFF. One thing we can do is, I think, better integrate in renewable systems. I think, the more renewable systems—and I know you've got a lot of wind in Montana—the more renewable systems that we can integrate into the grid, you're going to see that helping competition tremendously. So, we've worked on that in a number of orders that I mentioned, that I have detailed in my statement that I submitted to the commission—to the committee. I think that's one significant area where, in fact, we can improve competition by getting a more diverse supply.

Senator TESTER. I don't want to get into the rate case, but, as you well know, there was a case brought to FERC about a lack of competition in the marketplace. One of the problems we have goes to what Senator Menendez was talking about, in that, we can't get juice out, we produce more than what we utilize now, in the State of Montana. So, the question falls, in relation to the lines. There's a lot or proposals for additional lines going out of Montana, there's a lot of proposals for renewable, and, for the most part, I think that renewables have some real advantages. I want to see this kind of stuff happen, as long as it's done smartly. But, what can we do to protect our consumers, and not end up with high rates? Our rates are high enough, I don't want to end up with California rates. What can we do, what can you do, to protect the consumers in a

State where we pay transportation, going both ways, in most every area, and would like not to have to do that in electricity?

Mr. WELLINGHOFF. I think the biggest ways to protect consumers is to enable consumers to, again, participate in the markets. If you can enable consumers to, ultimately, use what they can on the demand side to ensure that their costs are managed, which consumers can do—in fact, there was a great experiment by Pacific Northwest Labs up in Washington—did an experiment, ultimately, with consumer appliances and how those consumer appliances could be utilized to, in fact, provide grid services. Consumers got paid for that, ultimately. So, to the extent that FERC and the States can work together to enable consumers to participate in these markets, with demand-side distributed generation, energy efficiency, demand response, those are ways that consumers can help protect themselves. We can enable them, and they then can protect themselves.

Senator TESTER. So, you anticipate it happening, from a usage standpoint, a conservation standpoint, and, when they use the electricity, more than just cents per kilowatt.

Mr. WELLINGHOFF. I think that's going to be the best way for consumers to control bills—total bills.

Senator TESTER. OK.

Can you tell me what FERC is doing now to encourage renewables in the marketplace? Let me preface this a little bit. When we had the first energy-bill debate, and we talked about a renewable portfolio standard. Many of the people who were opposed to a renewable portfolio standard just talked about wind as being the only renewable out there, but I see it as being much more than that, whether it's geothermal or biomass-powered, or whatever. What has FERC done to—and what can they do—to help promote renewables, so that it's not just seen as one entity supplying it?

Mr. WELLINGHOFF. We're doing a number of things. One, we just had a workshop on interconnection to the grid. In the organized markets, in the ISOs and RTOs alone—there's over 300 gigawatts of new development that is actually applied for an application to interconnect to the grid. Of that 300 gigawatts, 45 percent is wind, and they're having great difficulty getting the studies done to make these interconnects and to ultimately develop the projects. So, we had a workshop at FERC to try to figure out how to break that logjam, so ultimately, we can get more of these projects connected. That was one thing we did.

Commissioner Moeller and I had a workshop in Oregon that dealt with a new evolving renewable area, and that's hydrokinetics, which is wave power and also ocean current and in-river systems, that seemed to be very promising. FERC, in fact, has come up with a pilot-license project—pilot-license process, where, in fact, we can license small projects to demonstrate them, to determine if they can be interconnected, if they're environmentally benign, and if, in fact, they are in the public interest. That process seems to be working well. We're moving forward with that process, as well.

We've done a number of things, in changing our open-access tariff provisions that allow for such things as conditional firm, where wind can actually hook onto the grid and not have to have the ability to have capacity in that grid every hour of the year, but just

for the hours that they may need it over time on a conditional-firm basis. So, we're doing a number of things that I think are moving forward with fully integrating renewables into the grid and ensuring that we have more diverse supply in this country.

Senator TESTER. Finally, if I might, Mr. Chairman, I just want to thank you and thank the Commission for the relicensing of Mystic Lake. It's something in Montana that has been a bit contentious and, I think, just this last Monday, you did that.

Mr. WELLINGHOFF. Yes, we did.

Senator TESTER. I want to thank you for that.

The last thing is that being a farmer, a small-businessman, and a consumer of electricity in a State that's on the northern latitudes, energy cost is becoming a big thing, not just electricity, but transportation fuels, too. I'm sure we're not alone with that problem. I don't know how often you get out—you talked about going to Oregon soon. If you get the opportunity, maybe stop off on your way out there; it's not really on the way, but it's kinda. It would be great to have you come out and visit Montana. Maybe you've already done this; if you have, I apologize—but it would be great to have you come out and visit with some of the public-service commissioners onsite to let them show you what's going on. Because for a State like Montana that's had such a great company as Montana Power for so many years, to have them sell off all their assets and have this whole thing up in the air for electricity rates is really sad to see. To be honest with you, and it's really inhibited our economic development in the State—in rural areas, in particular—even though the co-ops have done a fine job in protecting their customers, everybody knows that's not going to last forever.

Mr. WELLINGHOFF. I'll do that, Senator.

Senator TESTER. Thank you.

Mr. WELLINGHOFF. Thank you.

The CHAIRMAN. Thank you very much.

We'll allow members to file any additional questions with the committee, up until 5 o'clock this afternoon, if they have additional questions for the nominee.

The CHAIRMAN. Again, thank you for being here.

That will adjourn our hearing.

[Whereupon, at 11:28 a.m., the hearing was adjourned.]

APPENDIX

RESPONSES TO ADDITIONAL QUESTIONS

FEDERAL ENERGY REGULATORY COMMISSION,
Washington, DC, December 19, 2007.

Hon. JEFF BINGAMAN,
Chairman, Committee on Energy and Natural Resources, United States Senate, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN BINGAMAN: Thank you for conducting a hearing yesterday for my nomination to another term on the Federal Energy Regulatory Commission and thank you for reporting my nomination to the full Senate for consideration.

Following the hearing you forwarded additional written questions from members of the Energy and Natural Resources Committee and asked that the answers be provided by the time you were to begin a business meeting to consider my nomination. That deadline was to be 11:30 AM today.

Attached you will find my responses to all of the written questions posed by members of the Committee. In addition, I am responding in writing to Senator Murkowski's general question posed during the hearing about Liquefied Natural Gas terminal proposals currently pending before the Commission.

Sincerely,

JON WELLINGHOFF,
Commissioner.

[Attachment.]

RESPONSES TO QUESTIONS FROM SENATOR BINGAMAN

Question 1. Over the last two years, as the Commission has implemented the Energy Policy Act transmission pricing provisions I have been concerned that the Commission might be awarding incentive rates for behavior that would have been undertaken by utilities in any event, and that petitioners before the Commission might view incentive rates as an entitlement and not as an inducement to increase beneficial investment. How can the Commission make clearer to builders of transmission that the term "incentive rates" does not always and only mean increased rates of return for all transmission?

Answer. I believe that in providing an incentive return on equity (ROE) adder for transmission construction, the Commission should focus on encouraging investment decisions beyond the upgrades simply required to meet a utility's service obligations or the minimum standard for good utility practice. Incentive ROE adders should be more narrowly targeted to transmission investments that provide incremental benefits, such as those resulting from the deployment of best available technologies that increase efficiency, enhance grid operations, and result in greater grid flexibility. In this regard, I have linked each of my decisions on incentive ROE adders for new transmission construction to a demonstration by the developer that it has considered and, to the extent practicable, incorporated into its project some of the advanced transmission technologies specified by Congress in section 1223 of EPAct 2005. I have also considered incremental benefits associated with new transmission construction that is needed to accelerate the integration of renewable energy resources into our nation's energy portfolio. I believe that this approach is engendering positive responses from transmission developers to now consider and incorporate such technologies into their projects.

In several cases, including incentive proposals submitted by American Electric Power Service Corporation and Southern California Edison Company, applying these criteria led to me support the granting of incentive ROE adders. In other cases, including incentive proposals submitted by Trans-Allegheny Interstate Line Company and Baltimore Gas and Electric Company, I concluded that applicants failed to demonstrate that an incentive ROE adder was appropriate. My conclusions,

however, have not always been shared by a majority of fellow Commissioners, resulting in my dissenting in a number of cases.

Question 2. During the last few years utility rate increases in much of the Nation have brought questions as to whether markets are genuinely competitive and are producing the most efficient price signals in the electric industry. Does the Commission intend to undertake a comprehensive overview of the state of competition in electricity markets in the near future? Are market institutions functioning, in your view, to produce the lowest rates consistent with reliable service? Particularly, are such mechanisms as forward capacity markets, locational marginal cost pricing, ancillary services markets and other market mechanisms working to produce lower rates, or only adding to cost?

Answer. The Commission conducts an annual State of the Markets Report analysis that has shown consistently that the wholesale markets are competitive. The market monitors in each RTO and ISO region also produce such reports that have demonstrated that markets are competitive. In addition, the Commission conducts a market power test prior to authorizing an entity to charge market based rates.

At this time I do not believe a comprehensive overview of the state of competition in electricity markets is required. This is not to say that I believe those markets are functioning perfectly or that there is not room for improvement. I believe that as a whole, rates are just and reasonable. As I indicated at my hearing, the latest data from the RTO/ISO Council indicates that wholesale rates have substantially declined in each RTO/ISO region from 2005 to 2006.

While not a comprehensive overview, the Commission did issue an Advance Notice of Proposed Rulemaking (ANOPR) on June 22, 2007, to examine a variety of specific issues associated with competitive electric markets administered by Regional Transmission Organizations (RTO). The ANOPR followed two technical conferences that the Commission had convened to discuss some of the challenges facing wholesale energy markets and to address head-on some of the criticism being leveled at the competitive model. In the ANOPR, the Commission sought comment on the role of demand response in organized markets, how to increase opportunities for long term contracting, ways by which the Commission might strengthen market monitoring, and ways to better ensure that RTOs are responsive to their stakeholders. We have received a number of comments and suggestions for possible reforms—including a recent request to broaden the scope of the inquiry to examine additional issues. I am open to these requests to the extent that they can lead to concrete recommendations for solutions to current market problems.

But the overarching issue from my perspective is not rates but total consumer bills. It is my belief that the construct of a wholesale competitive electric market provides the most efficient structure to give the consumer the opportunity for lowest total overall bills. This is through the mechanisms of fostering participation of consumers in those markets through demand response, energy efficiency, distributed generation and other distributed resources. Creating markets and industries to support those consumer dependent resources is the promise of organized competitive wholesale electric markets. This together with diversity of supply through enhanced opportunities for new renewable resources to participate in these markets will provide consumers with the opportunity to keep total bills stable and manageable.

Currently market institutions, in my view, are not functioning to produce the lowest bills consistent with reliable service. But I believe that the Commission is incrementally moving toward implementing such market institutions that will produce lowest bills for consumers while maintaining reliable service. That is why market mechanisms such as forward capacity markets, locational marginal cost pricing, and ancillary services markets have been instituted to assist in producing lowest bills for customers. But to the extent that demand response and energy efficiency have only recently been incorporated into some of these market mechanisms and have not yet had the opportunity to provide full benefits to consumers, we do not yet know the extent to which consumer bills can be stabilized or reduced.

Question 3. Many have argued recently that regional transmission organizations do not have either the proper governance structure or incentive structure to be sure that transmission prices and prices in the markets they administer are sufficiently protective of consumers. How should the Commission proceed to be sure that incentives for RTOs are aligned with interests of consumers to produce the lowest possible rates consistent with reliable service?

Answer. The Commission recognizes both the type of concerns noted in your question and the importance of ensuring that RTOs' governance structures and incentives are consistent with consumers' interests. Indeed, such concerns contributed to the Commission's decision earlier this year to initiate a rulemaking proceeding on a variety of issues associated with competitive markets administered by RTOs. As noted above, following several technical conferences, the Commission issued an

ANOPR in June that specifically sought comment on ways to ensure that RTOs are adequately sensitive to the needs of their customers. For example, the Commission preliminarily found in the ANOPR that representatives of customers must have some form of effective direct access to an RTO's board of directors, and sought comment on how that goal can best be achieved. The Commission is now in the process of reviewing the many comments that it received in response to the ANOPR and considering proposals to improve RTOs' responsiveness to consumers' concerns.

More generally, it is important to recognize that RTOs are already providing important benefits to consumers. For example, as I discussed above, I believe that competitive markets administered by RTOs offer the greatest promise for efficient use of demand-side resources and renewable energy resources. The economic dispatch of these and other resources will drive down costs to the benefit of consumers.

In addition, the Commission's Order No. 890 established new requirements for regional transmission planning in RTOs and other regions. The required open and transparent planning processes will provide opportunities for resources that are technically capable, such as demand response and distributed generation, to complement the build out of needed transmission infrastructure, thus lowering total costs and consumers' total bills.

Question 4. The Advanced Notice of Proposed Rulemaking on Competition proposed what is called "scarcity pricing", which amounts to taking price caps off markets during emergencies, even for sales to and from affiliates. It seems to me that the only time price caps are important is during emergencies. Does this scarcity pricing not raise the danger that markets might spiral out of control again? What is to prevent sellers from taking advantage of emergency situations to charge unreasonable prices?

Answer. The issue of how to appropriately price electricity during times of system shortage is one that the Commission raised in the ANOPR. The Commission sought comment on the need for further forms of "scarcity pricing" and on various mechanisms to send price signals when additional resources are needed to serve consumers, such as during hot summer days when the electric system is running short. Commenters have raised some of the issues your questions raise.

I believe that the objective of a shortage pricing mechanism should be to obtain the resources needed to provide electricity services at the lowest cost to customers. It is my position, which I stated at the Commission's open meeting when we released the ANOPR for public comment, that I will not vote for the scarcity pricing proposals in the ANOPR unless and until RTOs have fully integrated demand resources into their operations and planning. Further broadening the pool of resources to include demand response resources can improve the efficient operation of the markets, improve reliability and lower prices to consumers. Indeed, I believe that distributed energy resources, such as demand response, energy efficiency and distributed generation, are the most potent protection customers have against those who might try to take advantage of an emergency. Demand resources can provide a competitive threat to generators, lessoning the reward to withholding or other efforts to raise prices, before a market gets to the point of emergency conditions.

The ANOPR asks questions about the potential of several methods to remove barriers to more widespread demand response by customers. There are many difficult issues associated with how to appropriately price electricity during emergency conditions, which are under active consideration at the Commission. We have sought, and continue to seek, workable solutions to inefficiencies that remain in RTO markets. I can assure you that I intend to fully consider all of the comments we have received to the ANOPR as I work through these difficult issues with my colleagues at the Commission.

Responses to Questions From Senator Wyden

In response to questions for the record during the Committee's 2005 hearing on LNG permitting, Mark Robinson, Director of the Office of Energy Projects, responded that,

> The Commission is supportive of competition within the energy industry and of the idea that the market drives infrastructure development. Past experience, particularly since the restructuring on the gas industry following Order No. 636, has demonstrated that market forces can serve the same end as a competitive or "Ashbacker" hearing. Where the Commission approves multiple projects to serve a similar market, only an economically viable project will actually be built, i.e., only where customer commitments ensure new service will fulfill a genuine need.

Question 1. How is this policy consistent with the obligation of the Commission to make an affirmative finding of public convenience and necessity under the Natural Gas Act?

Answer. A finding that a project is in the public convenience and necessity requires a determination regarding both economic and environmental considerations. Environmental considerations include design, safety and security issues.

I believe that the Commission's current policy to allow the market to determine which project should be built is consistent with our obligation under the Natural Gas Act. A project results from an open, competitive process with customers making service choices, and the developer and customers to be served bearing the economic risks. In practice, the Commission's current policy has worked well to bring the right infrastructure into service at the right time. Under the current policy, there has not been any significant underinvestment or overinvestment in gas infrastructure.

With regard to environmental considerations, the Commission has exercised its authority to condition the certificates we issue to prevent and mitigate as necessary the project's environmental impacts, including impacts on landowners and citizens. The FERC Environmental Impact Statement (EIS) is a comprehensive analysis of the design, safety, security and environmental issues of a project that underlie the conditions we attach to a certificate.

Taken together, our certificate process fulfills our obligation under the NGA.

Question 2. Do you agree with this policy that competitive or "Ashbacker" hearings need never be conducted where multiple projects are proposed for a given market?

Answer. No. Nonetheless, I do not believe that "Ashbacker" hearings are generally the appropriate or preferred method. I have serious doubts that consolidating projects at very different levels of development and review would result in a better selection process. Such a policy could delay needed supplies and increase costs to consumers. The rationale for an "Ashbacker" hearing is mutual exclusivity where issuing one license would preclude issuing the other. Therefore, it would be an appropriate process for virtually identical projects proposed to be sited in close proximity in the same timeframe.

Question 3. Are there circumstances where you believe that it is ever appropriate for the Commission to conduct competitive or "Ashbacker" hearings where multiple projects are being proposed to serve a single market? If so, when?

Answer. Please see my response to question #2 above and my answer to your prehearing question #3.

RESPONSES TO QUESTIONS FROM SENATOR MENENDEZ

EXTENSION CORDS TO NEW YORK

Question 1. I want to discuss the so-called "extension cords" which are being built to transport electricity from New Jersey to New York. The "Neptune" cable has saved Long Island customers millions of dollars, but has cost New Jersey customers much more. To accommodate this export, the Neptune cable paid only about $5 M of the nearly $30 M needed to accommodate the problem and has cost New Jersey customers hundreds of millions of dollars in capacity payments.

Not surprisingly, more cables are planned. In one of these, proposals the Cross Hudson Corporation proposes taking the Bergen-2 power plant, one of New Jersey's most efficient natural gas plants, and unplugging it from the PJM grid. ALL of its electricity would go under the river to Manhattan. In effect Bergen-2 would be transported to New York to serve New York, but current regulations and laws do not require New York or the corporations involved in the deal to compensate New Jersey for this loss of capacity or this loss of electricity.

Does the FERC plan to take any action to address the impact that these "extension cord" projects are having on New Jersey's already high electricity prices?

How will the FERC ensure that New Jersey customers are compensated for the loss of capacity, electricity and capacity from these projects?

In particular, does FERC contemplate any changes to rules governing "Capacity Export Surcharges" to reflect changed circumstances as happened with the Neptune Line?

In relation to the Bergen-2 project in particular, PSEG has shown a willingness to work with me and my office to ensure New Jersey ratepayers are fairly compensated. But what laws or regulations are necessary to ensure the entire power plants are not diverted to another wholesale electricity market without compensation?

Answer. I share your concerns with respect to the difficulties associated with allocating the potential costs and benefits of regional transmission projects that are built within the PJM footprint, as well as inter-regional projects such as underwater cables connecting New Jersey and New York. While our national economy works most efficiently when energy is traded freely across state boundaries, FERC has approved measures for PJM that can help offset certain negative, local effects of the types of projects you mention.

With regard to transmission solutions, the Commission had taken a series of actions to improve the transmission planning process within PJM, which should result in a more robust transmission system and provide constrained areas such as portions of New Jersey with access to additional lower cost power supplies.

In March 2007, the Commission issued an order (currently pending rehearing) that facilitates cost allocation for transmission projects identified as needed for either reliability or economic (congestion relief) reasons. The Commission's order allocates on a PJM region-wide basis the costs of new, centrally planned "backbone" transmission facilities that operate at or above 500 kV. The Commission reasoned that the benefits from those large "backbone" projects were sufficiently broad that a rate that spreads the costs region-wide was appropriate. The Commission also required the development of a detailed methodology for allocating the costs of new facilities below 500 kV so that the beneficiaries of those projects would bear the cost of the new facilities. Taken together, the modifications the Commission has required to the cost allocation method for new transmission facilities within PJM are aimed at developing transmission resources that can help supply the power needs of constrained areas like northern New Jersey at a reasonable cost.

Indeed, looking at northern New Jersey alone, there are already several backbone projects currently under evaluation within PJM that could address congestion and looming reliability concerns. I would also point to PJM's Regional Transmission Expansion Plan (RTEP), which sets forth a structure that assures opportunities for demand response and generators using all fuel types. PJM presently has interconnection requests in New Jersey for plants that are fueled by wind, hydro, biomass and methane.

I believe that the actions the Commission has taken in these various areas recognize the regional interconnected nature of the PJM transmission system and provide a platform for addressing the energy needs of all states within the PJM region. That platform allows effective regional planning and provides a level playing field for demand response, generation and transmission options for meeting the wholesale electric power needs of New Jersey's consumers. While there are difficult policy choices that lie ahead, I believe that we can work through those challenges together with our state regulatory colleagues to fashion energy solutions that work for all the states in the PJM region.

DISTRIBUTED GENERATION

Question 2. In your oral testimony, you explained that full participation in real-time electrical markets is one way to make sure these markets treat consumers fairly. This participation can take the form of demand-response programs, but it also includes small renewable sources of electricity.

In the PJM region, we have seen intermittent renewable sources, such as solar power, participating in capacity markets only when aggregated. Individual small solar projects can get paid for excess electricity, but do not receive capacity payments. What needs to be done to allow small intermittent electrical sources to participate fully in forward capacity markets? This question also applies to disaggregated demand-response programs.

Answer. Small intermittent electric sources, such as individual small solar projects, present unique problems in forward capacity markets. Because they are intermittent, individual projects may not generate electricity at the same time as system peak demand or during shortages of available generation. Grid operators will be reluctant to provide capacity payments under these circumstances. Nevertheless, a variety of solutions could be employed to firm output from these intermittent sources. First, on-site storage (which could be based on battery technology, flywheels, small hydroelectric facilities with storage capability or plug-in hybrid electric vehicles) could be added or linked to the project. Producing and storing electricity during solar or wind availability would allow the project to inject electricity into the grid at the time of high system demand or when directed by the grid operators. A recent November 2007 study by the California Independent System Operator on the integration of renewable resources indicates that this linkage is feasible.

Second, the intermittent electric source could be linked to demand response technologies or actions at an associated facility. If capacity is required during a period

when the intermittent resource is not operating, reductions in demand could be achieved that match the capacity of the intermittent resource. Third, additional research could be focused on measuring and verifying generation patterns from the individual resource. If the resource can be demonstrated to produce electricity under a variety of conditions with identifiable generation patterns, then grid operators may allow these intermittent sources to participate in forward capacity markets.

Disaggregated demand-response programs have a greater ability to participate fully in forward capacity markets. Both PJM and ISO New England currently allow demand resources to participate in their forward capacity markets. In order to receive capacity payments, demand response providers must submit detailed measurement and verification plans that document the ability of their demand resources to provide demand reductions during peak periods or when directed over time. Increased participation in these forward capacity markets by disaggregated demand-response programs could be achieved by additional actions. First, the installation of advanced meters at all residences and businesses could increase participation by allowing cost-effective, detailed measurement and verification to be achieved at more facilities. Second, grid operators typically impose minimum size requirements for demand resources in capacity markets because their systems cannot model or sense smaller resources. If a disaggregated demand-response program is below the minimum size threshold, it cannot participate. Additional investment in software or sensors may be required to expand the capability of the grid operator to model and monitor smaller, disaggregated demand response resources. The Commission has recently created an Energy Innovations Sector within our staff that is tasked to explore such issues with PJM and other stakeholders.

MMU

Question 3. I'd now like to discuss an issue which affects the entire PJM RTO region. Last spring, Dr. Joseph Bowring from PJM's market monitoring unit came public with disturbing allegations that his work was being interfered with and manipulated. Under FERC's oversight, PJM and its Market Monitoring Unit have been trying to resolve their dispute.

It is imperative that we have fair and competitive electricity markets. Without a strong, independent market monitor, consumers cannot be confident that they are not being cheated by monopolies or manipulators. In evaluating any proposed solution, FERC should make sure that the Market Monitor has timely access to whatever information they need to determine whether prices need to be mitigated. The Market Monitor must have the staff and infrastructure needed to do their job. And, in order to preserve its independence, the Market Monitor should report to a board outside of the PJM hierarchy, a board which represents all stakeholders. What steps will the FERC take to make sure that this dispute does not result in a weakened Market Monitor or uncompetitive markets?

Answer. I agree that strong independent market monitors are essential to fair and competitive electricity markets. I am committed to that objective, as is the Commission, as can be gleaned by actions we have taken in the last six months.

First, in June, the Commission issued an Advance Notice of Proposed Rulemaking (ANOPR) that, among other issues, sought comments on proposals to strengthen the effectiveness of market monitors by safeguarding their independence and fostering useful and transparent market analysis. As particularly relevant to your concerns, to ensure that market monitors would have adequate tools with which to do their jobs, the Commission proposed requiring each RTO or ISO to include in its tariff a provision imposing upon itself the obligation to provide its MMU with access to market data, resources, and personnel sufficient to enable the MMU to carry out its functions. Furthermore, we noted that an inherent tension exists in a structure that requires MMUs to report to RTO/ISO management yet, at the same time, perform evaluations and issue reports that may be critical of that management. We stated that it could be difficult for an MMU to discharge these oversight and reporting obligations effectively unless it had some degree of independence from RTO/ISO management. Therefore, the Commission proposed that each RTO and ISO, in addition to maintaining a market monitoring function, be required to have its MMU—whether internal, external, or a hybrid combination of the two—report either directly to the RTO's or ISO's board of directors or directly to a committee of independent board directors. The Commission is currently considering comments with respect to these issues and others that were raised in the ANOPR.

Second, with respect to the PJM market monitoring situation, as you are aware, the Commission has under active consideration two complaints that alleged interference by PJM in the ability of the MMU to monitor the market. The parties are engaged in settlement discussions being facilitated by the Commission's Chief of

Staff, whose report is due to the Commission this week. I am confident that the ultimate resolution of this matter will not result in a weakened market monitor or uncompetitive markets, as neither would be acceptable to the Commission under current policy or to me personally.

RELIABILITY PRICING MODEL

Question 4. About a year ago, FERC approved PJM's "Reliability Pricing Model." RPM was intended to encourage the construction of power plants in New Jersey and other locations where they are needed most, by increasing the revenues that power plant owners and developers would receive for selling the rights to their capacity.

Thus far, RPM has caused some plants that were slated to retire to stay online, but there is no sign of getting more power plants built in the locations where they are needed most. In the meantime New Jersey customers are paying billions more for electricity.

Some have suggested new plants have not been built because there are many market barriers for new entrants to build plants. Others have suggested that the capacity markets need to be put to auction 6 or even 8 years in advance instead of the current 3 in order to give companies the ability to show the financial community a long-term stream of revenues to attract financing.

What is FERC doing to ensure that this system is working, and that this money will result in needed generation?

Does FERC have any plans on how to change RPM if the new capacity they have projected does not come online?

Answer. I supported the Commission's order that approved RPM as a mechanism to address the long-term reliability needs of all electricity consumers within the PJM footprint, including consumers in New Jersey. The early stages of RPM implementation have produced some positive results: available capacity in 2009-2010 should increase by 9,107 MW as a result of the RPM implementation, and the most recent auction for the 2009-2010 delivery years cleared 893 MW of demand response. It is also noteworthy that RPM includes a reliability backstop mechanism. If PJM's market is short for three consecutive delivery years, PJM's Office of the Interconnection will declare a capacity shortage and make a filing with the Commission for approval to conduct a reliability backstop auction.

The Commission will continue to actively monitor implementation of RPM. If experience demonstrates that RPM is not achieving its goals, the Commission will consider modifications to the RPM rules, as necessary.

RESPONSES TO QUESTIONS FROM SENATOR CANTWELL

THE MOBILE-SIERRA DOCTRINE AND FERC DISCRETION

In a brief recently filed with the U.S. Supreme Court, FERC took the position that, under the Federal Power Act's statutory "just and reasonable" standard, it was free to approve long-term contracts arising out of the 2000-01 Western power crisis notwithstanding evidence that, in the words of Stanford University energy economist Dr. Frank Wolak, suppliers to the Western markets during this period were "able to exercise market power at unprecedented levels," resulting in "prices vastly in excess of competitive levels." FERC also claimed authority to override contracts for essentially any reason. In light of these claims, please answer the following:

Question 1. How does FERC define "just and reasonable" in the context of market-based rates and, in light of its position that the unprecedented contracts signed during the 2000-01 crisis are "just and reasonable," is there any remaining upper limit on prices FERC will approve?

Question 2. Given FERC's claim of virtually unlimited discretion to override contracts, will FERC provide any clarification explaining the circumstances under which it will intervene to abrogate or reform contracts arising from dysfunctional markets?

Question 3. How can FERC reconcile its claim to the Supreme Court that it is free to ignore evidence of market manipulation and market power abuse in determining whether to correct contracts affected by that abuse with its recent emphasis on enforcement of market standards? Does FERC's position in the Supreme Court allow market abusers to protect their ill-gotten gains by locking them up in contracts, undermining any incentive they might otherwise have to obey market rules and report abuses by other market participants?

Question 4. Given that the courts have concluded that FERC is the sole forum to bring complaints of market power abuse and manipulation, isn't FERC's refusal to intervene in contracts arising from the Western power crisis tantamount to granting market abusers complete immunity from antitrust laws?

Answer. I believe that these questions are most effectively answered together.

With regard to the U.S. Supreme Court's consideration of *Morgan Stanley Capital Group, Inc.* v. *Public Utility District No. 1 of Snohomish County, Washington, et al.,* it is first important to recognize that the Commission did not support the petitioners' petition for a writ of certiorari. In a brief filed with the Court in August 2007, the Commission stated that further review of the Ninth Circuit Court of Appeals' underlying decisions was not warranted. In support of that conclusion, the Commission stated that the Ninth Circuit's decisions "stand for the narrow proposition that, if there is a credible claim that severe market dysfunction has affected the formation of a market-based contract, the Commission must take that fact into account in determining whether the public-interest standard of *Mobile-Sierra* applies to its review of that contact." These statements align with the Commission's and my belief that the Ninth Circuit's decisions could be implemented consistent with our statutory responsibilities.

Unfortunately, despite the Commission's brief to the contrary, the Court granted the petition for certiorari. After the Court made that decision, the Commission was obligated under the Court's decision in *SEC* v. *Chenery Corp.,* 332 U.S. 194 (1947), to defend its underlying orders on the grounds set forth in those orders. Consistent with that obligation, the Commission filed a brief on the merits with the Court in November. The Solicitor General (at the U.S. Department of Justice) represents the U.S. government before the Court and has the final say as to the content of the government's briefs. I do not necessarily agree with all of the arguments that appeared in the Commission's November brief.

Because the case now before the Court may still come back to the Commission on remand, it is not appropriate for me to discuss the merits of the specific case. However, on a more general issue raised by your questions, I have clearly stated my views about how the Commission should approach application of the *Mobile-Sierra* "public interest" doctrine, such as in the attached concurrence to the Commission's October 2006 *Entergy Services, Inc.* order. Applying the standards described in my *Entergy* statement, I have concluded in dozens of subsequent cases that the Commission should not agree with requests to apply the "public interest" standard to future changes to settlements sought by nonparties to those settlements or the Commission acting on its motion. My conclusions often have not been shared by a majority of my fellow Commissioners, resulting in my dissenting in numerous cases.

THE CONVERSION TO MARKET FUNDAMENTALISM

When you were first nominated, you expressed healthy skepticism about FERC's market-based reform efforts, pronouncing yourself "agnostic" about whether markets deliver benefits to consumers greater than traditional regulation. In light of the unmitigated disaster that resulted from California's deregulation effort, this skepticism seems justified. Moreover, recent analysis reveals a large and growing gap between prices paid by consumers in states without RTOs and "organized" markets and states operating in such markets, which were created at FERC's behest. At the same time, the Amaranth episode reveals that markets continue to be vulnerable to market power abuse and manipulation of market prices. Despite any clear evidence of bottom-line benefits for electric consumers, you recently reversed course, declaring yourself a "convert" to the religion of market-based reforms.

Question 1. Given what is, at best, a mixed record of results for consumer benefits, how can you justify abandoning your skepticism about market-based reforms?

Question 2. During the 2000-01 Western energy crisis, it is now clear that the FERC commissioners then sitting allowed their enthusiasm for market-based reform to trump growing evidence of market dysfunction and abuse until the crisis reached historic proportions. Without a skeptic of markets on the Commission, isn't there a danger that hope will once again triumph over experience at FERC, and that the regulatory failure of 2000-01 will repeat itself?

Answer. As I discussed yesterday in response to questions from Senator Bingaman, I have come to believe that open, fair competitive markets offer a better structure for development and implementation of innovative new technologies such as renewables, distributed generation and demand response. For example, the use of economic dispatch in wholesale electric markets provides the opportunity for these resources to compete on level playing field with more traditional resources. And where these innovative resources such a demand response are lower cost traditional resources, use of them in our electric system will lower total costs to consumers and provide consumers with real choices.

Therefore, contrary to abandoning my skepticism about market-based reform, I have embraced the opportunities for innovation that competitive markets open and intend to work to improve the efficiency or these markets in order to lower the total

costs to consumers. As I stated yesterday, I think there are opportunities to improve the current competitive market structures. In my 16 months at the Commission, I have work aggressively to ensure the demand resources and renewable technologies receive comparable treatment in all aspects of electric transmission and market operations and planning. I am actively engaged with my colleagues in a rulemaking to examine a variety of specific issues associated with competitive electric markets administered by Regional Transmission Organizations (RTOs). Among the issues we are considering are ways to increase access and participation in these markets by demand resources. We are also considering ways to improve the responsiveness and accountability of RTOs to their stakeholders. I assure you that I continue to aggressively pursue implementation of the specific reforms necessary to make a market structure work best for consumers.

ATTACHMENT

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Services Inc. Docket No. ER05-1065-002

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(ISSUED OCTOBER 18, 2006)

WELLINGHOFF, Commissioner, concurring:

The parties to the ICT Agreement have asked the Commission to apply the "public interest" standard of review if and when it considers requests from any of those parties to change the Agreement in the future.[52] The parties have also asked the Commission to apply the "public interest" standard when such changes are sought by either a non-party to the Agreement through a complaint or the Commission acting *sua sponte*.

In its original order approving the ICT Agreement,[53] which issued prior to my becoming a Commissioner, the Commission did not comment on or explain why it was appropriate to apply the "public interest" standard in the circumstances sought by the parties, rather than retaining the "just and reasonable" standard of review for prospective contested changes to the Agreement. I believe that the particular facts of this case warrant the Commission agreeing to apply the "public interest" standard when it considers such changes to the Agreement. In light of the importance of this issue, I want to take this opportunity to explain how I reached that conclusion.

The Federal Power Act and the Natural Gas Act require that rates, terms, and conditions of service must be "just and reasonable" and not unduly discriminatory or preferential.[54] There is little dispute that the Commission's initial review of an agreement is conducted under the "just and reasonable" standard.[55] Similarly, there is little dispute that the parties to an agreement should be able to expressly prescribe the standard of review for future disputes over the agreement as between or among the parties to that agreement. Thus, the parties to an agreement may request that the Commission use the "public interest" standard, which is generally viewed as higher or stricter than the "just and reasonable" standard,[56] in reviewing proposed changes to their agreement that are contested between or among the parties at some future time after the agreement is initially approved by the Commission.

Other circumstances, however, present more difficult policy decisions for the Commission. These include what standard of review should apply when the parties to an agreement fail to expressly state the standard of review that should apply when the Commission considers future contested changes to the agreement. Difficult ques-

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[52] The "public interest" standard of review and the related *Mobile-Sierra* doctrine stem from the U.S. Supreme Court's rulings in *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.,* 350 U.S. 332 (1956), and *FPC* v. *Sierra Pacific Power Co.,* 350 U.S. 348 (1956).

[53] Entergy Services Inc., 115 FERC ¶ 61,095 (April 24, 2006 ICT Order), errata notice May 4, 2006, order on reh 'g, 116 FERC ¶ 61,275 (2006) (ICT Rehearing Order).

[54] 16 U.S.C. § 824d; 15 U.S.C. §717c.

[55] See, e.g., *Maine Pub. Utils. Comm'n* v. *FERC,* 454 F.3d 278, 283-86 (D.C. Cir. 2006).

[56] See, e.g., *Standard of Review for Modifications to Jurisdictional Agreements,* Notice of Proposed Rulemaking, 113 FERC ¶ 61,317 at P 4 (2005) (citing *Papago Tribal Utility Authority* v. *FERC,* 723 F.2d 950, 954 (D.C. Cir. 1983)).

tions of policy also arise when the parties to an agreement ask the Commission to apply the "public interest" standard when it considers changes sought by either a non-party to an agreement or the Commission acting *sua sponte.*

Case law on the applicability of the "public interest" standard is not entirely clear and is, in fact, inconsistent.[57] Indeed, the courts have noted that "[w]hether and when *Mobile-Sierra* applies in varying contexts is going to remain in confusion" until the Commission establishes a clear policy.[58] The courts have further suggested that the Commission need not tolerate the "public interest" standard at all and could require prospectively that all contracts be subject to the "just and reasonable" standard.[59]

Given this uncertainty in case law, I believe that the Commission should set a clear policy on these issues. That policy should strive to strike a balance between recognizing contracting parties' needs for certainty with respect to their agreements and protecting the interests of energy consumers. An agreement, by its terms, may affect not only the rights and interests of the parties thereto, but also the rights and interests of others, as well as the operation of markets that shape rates, terms and conditions of service within the Commission's jurisdiction. Therefore, the Commission's determination as to whether and when it will agree to apply the "public interest" standard to future changes to an agreement sought by non-parties or the Commission acting *sua sponte* should not be limited to a consideration of the rights and interests of the contracting parties alone.

To strike the proper balance, I would first require parties to include specific language in an agreement if they intend to ask the Commission to apply the "public interest" standard with regard to future changes sought by any or all of a party, non-party, or the Commission acting *sua sponte.* Thus, unless specific language appeared in an agreement, the Commission would apply the "just and reasonable" standard to future changes. This approach reflects my belief that as a general matter, retaining the right to future review under the "just and reasonable" standard enables the Commission to more effectively fulfill its statutory mandate under the FPA and the NGA.

The "just and reasonable" standard is not new; it is well-known and well-defined. The electric and gas industries have operated and thrived under this standard for seven decades, during which it has served the Commission well as a tool to protect the interests of consumers. The Commission should not surrender this important tool absent a compelling factual and policy basis for doing so.

I reject the argument, made by some advocates of broad use of the "public interest" standard, that the "just and reasonable" standard is antithetical to the principle of sanctity of contract and fails to promote certainty and stability in energy markets. Past precedent demonstrates that the Commission recognizes the importance of sanctity of contract and that the Commission uses the "just and reasonable" standard judiciously in considering contract modification. In Order No. 888, for example, the Commission made precisely these points and indicated that an entity "has a heavy burden in demonstrating that the contract ought to be modified" even under the "just and reasonable" standard.[60]

Second, where the parties to an agreement ask the Commission to apply the "public interest" standard to future changes to sought by non-parties or the Commission acting *sua sponte,* I would require the parties to demonstrate by substantial evidence that a factual and policy basis supports their request. In particular, I believe that the Commission should only grant such requests in narrowly proscribed circumstances where substantial evidence affirmatively demonstrates that the contract or agreement has broad-based benefits to both parties and non-parties. In making this assessment, I would take into consideration, among other issues: (1) whether the contract or agreement was negotiated through a stakeholder process reflecting a wide range of interests, (2) whether state commissions had meaningful opportunity to participate in the stakeholder process, (3) the extent of and justification for opposition to the request for the Commission to apply the "public interest" standard; and (4) whether granting the request is necessary to the resolution of the proceeding. Requiring a showing of broad-based benefits, supported by substantial evidence, is an appropriate condition precedent to the Commission granting such a request because the term "public interest" implies interests beyond and distinct from those of the contracting parties.

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[57] See, e.g., *Boston Edison Co.* v. *FERC,* 233 F.3d 60, 67 (1st Cir. 2000) (stating that even cases within the D.C. Circuit "do not form a completely consistent pattern").

[58] Id. at 68.

[59] Id.

[60] Order No. 888 at 31,665.

Third, it is important to recognize that the *Mobile-Sierra* doctrine assumes that agreements are entered into voluntarily. The courts have stated that "the purpose of the *Mobile-Sierra* doctrine is to preserve the benefits of the parties' bargain as reflected in the contract, assuming that there was no reason to question what transpired at the contract formation stage."[61] Therefore, the standard of review that applies to prospective contested changes to an agreement—whether it be the "just and reasonable" standard or the "public interest" standard—does not affect the ability of a party, or the Commission acting *sua sponte,* to seek to make that agreement void (e.g., on the basis of fraud, mistake, misrepresentation, duress, or undue influence).

Applying these standards to the facts of this case, I believe that it is appropriate for the Commission to agree to apply the "public interest" standard when it considers future changes to the ICT Agreement sought by parties, non-parties, and the Commission acting *sua sponte.* Concerns about transmission access on the Entergy system have been extensive and persistent. The ICT proposal, as modified by the Commission, promises to alleviate such concerns and significantly improve access to transmission service.

Since 2002, the Commission, state regulators, and market participants have worked with Entergy to improve access to transmission service on Entergy's system.[62] The first attempt toward that end was the Generator Operating Limits (GOL) proposal. However, significant errors in Entergy's use of the GOL methodology did not permit the Commission or market participants to determine whether available transmission capacity was being restricted or withheld from independent power producers and other generators that use transmission service. The next attempt was the Available Flowgate Capability (AFC) proposal. Again, implementation errors led to numerous claims by customers of loss of access to transmission, lack of transparency, and data reliability problems.

The ICT proposal marks the third, and a significantly different, attempt to improve access to transmission service on Entergy's system. The ICT appears to have sufficient authority to independently and fairly grant or deny transmission service, perform necessary feasibility and system impact studies, administer Entergy's OASIS, and ensure that the terms of Entergy's OATT are administered in a nondiscriminatory manner. In particular, having an independent entity oversee and evaluate Entergy's AFC process and verify Entergy's data, and requiring Entergy to report any disagreements it has with the ICT over proposed modifications to the AFC process, will provide transparency to Entergy's transmission program. The ICT is also required to develop and chair a stakeholder process that will provide safeguards for continued nondiscriminatory access to transmission service, as well as a forum for further improvements.

In addition, several of Entergy's retail regulators were parties to the Commission's proceeding on the ICT Agreement, and the Commission took their comments, as well as the comments of other parties, into account when making its determinations. Consideration of those comments was entirely appropriate and helped the Commission in reaching its conclusion that Entergy's ICT proposal, as modified, is just and reasonable and consistent with or superior to the Commission's *pro forma* OATT.

Taking all of these factors into account, I believe that it is appropriate for the Commission to grant the request of the parties to the ICT Agreement, and to apply the "public interest" standard when it considers future changes to the ICT Agreement sought by parties, non-parties, and the Commission acting *sua sponte.*

For these reasons, I respectfully concur with the Commission's order.

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[61] *Atlantic City Electric Co.* v. *FERC,* 295 F.3d 1, 14 (D.C. Cir. 2002) (citing *Town of Norwood* v. *FERC,* 587 F.2d 1306, 1312 (D.C. Cir. 1978)). See also *PacifiCorp* v. *Reliant Energy Services, Inc.,* 105 FERC ¶ 61,184 at P 55 (2003) ("All three cases [cited by PacifiCorp] recognize that *Mobile-Sierra* preserves the parties' bargain as reflected in the contract, when there is no need to question what transpired at the contract formation stage. Our decision here is consistent with those cases, as there has been no showing of fraud, duress, or the exercise of market power at the contract formation stage.").

[62] See April 24, 2006 ICT Order at P 4-21; ICT Rehearing Order at P 2-7.