

# LAFLEUR AND BAY NOMINATIONS

---

---

HEARING  
BEFORE THE  
COMMITTEE ON  
ENERGY AND NATURAL RESOURCES  
UNITED STATES SENATE  
ONE HUNDRED THIRTEENTH CONGRESS  
SECOND SESSION

TO

CONSIDER THE NOMINATIONS OF MS. CHERYL A. LAFLEUR AND MR.  
NORMAN C. BAY, TO BE MEMBERS OF THE FEDERAL ENERGY REGU-  
LATORY COMMISSION

---

MAY 20, 2014



Printed for the use of the  
Committee on Energy and Natural Resources

---

U.S. GOVERNMENT PRINTING OFFICE

88-084 PDF

WASHINGTON : 2014

---

For sale by the Superintendent of Documents, U.S. Government Printing Office  
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800  
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON ENERGY AND NATURAL RESOURCES

MARY L. LANDRIEU, Louisiana, *Chair*

RON WYDEN, Oregon	LISA MURKOWSKI, Alaska
TIM JOHNSON, South Dakota	JOHN BARRASSO, Wyoming
MARIA CANTWELL, Washington	JAMES E. RISCH, Idaho
BERNARD SANDERS, Vermont	MIKE LEE, Utah
DEBBIE STABENOW, Michigan	DEAN HELLER, Nevada
MARK UDALL, Colorado	JEFF FLAKE, Arizona
AL FRANKEN, Minnesota	TIM SCOTT, South Carolina
JOE MANCHIN, III, West Virginia	LAMAR ALEXANDER, Tennessee
BRIAN SCHATZ, Hawaii	ROB PORTMAN, Ohio
MARTIN HEINRICH, New Mexico	JOHN HOEVEN, North Dakota
TAMMY BALDWIN, Wisconsin	

ELIZABETH LEOTY CRADDOCK, *Staff Director*

SAM E. FOWLER, *Chief Counsel*

KAREN K. BILLUPS, *Republican Staff Director*

PATRICK J. MCCORMICK III, *Republican Chief Counsel*

# CONTENTS

## STATEMENTS

	Page
Bay, Norman C., Nominee to be a Member of the Federal Energy Regulatory Commission .....	15
Domenici, Hon. Pete, Former U.S. Senator From New Mexico .....	6
Heinrich, Hon. Martin, U.S. Senator From New Mexico .....	8
LaFleur, Cheryl A., Nominee to be a Member of the Federal Energy Regulatory Commission .....	12
Landrieu, Hon. Mary L., U.S. Senator From Louisiana .....	1
Murkowski, Hon. Lisa, U.S. Senator From Alaska .....	4
Shaheen, Hon. Jeanne, U.S. Senator From New Hampshire .....	9
Wyden, Hon. Ron, U.S. Senator From Oregon .....	3

## APPENDIX

Responses to additional questions .....	43
---	----



## LAFLEUR AND BAY NOMINATIONS

---

TUESDAY, MAY 20, 2014

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

The committee met, pursuant to notice, at 10:19 a.m. in room SD-366, Dirksen Senate Office Building, Hon. Mary Landrieu, chair, presiding.

### OPENING STATEMENT OF HON. MARY L. LANDRIEU, U.S. SENATOR FROM LOUISIANA

The CHAIR. Good morning. Let me call the Committee on Energy and Natural Resources to order for the purpose of reviewing the nominations of 2 nominees before the committee today.

Mrs. Cheryl LaFleur for a second term which will end June 30, 2019, if she is moved through this committee and confirmed.

Mr. Norman Bay for the 4 years remaining on the term ending June 30, 2018 which was left vacant by the resignation of John Wellinghoff last November.

Before I get into my opening remarks let me please welcome back to our committee our chairman, Senator Domenici, who served as Chair of this committee for many years.

Senator, it is wonderful to see you here. We're honored with your presence. We thank you for your extraordinary leadership over the time that you served in this capacity as Chair. We're thrilled to have you here.

Let's give Senator Domenici a round of applause, please.

[Applause.]

The CHAIR. We will begin with opening statements. Then I'll turn to Senator Shaheen and to other members, of course, to my Ranking Member, but for introductions. But let me just begin with a few opening remarks.

Congress established the Federal Energy Regulatory Commission in 1977, as we know, to replace the former Federal Power Commission. FERC has a big job. It oversees the orderly development of plentiful supplies of electricity and natural gas at reasonable prices, to protect the consumer from exorbitant prices and unfair business practices when necessary and to that end, to ensure that energy markets are reliable, open, competitive and fair.

The reliability piece has been delegated to NERC, but it still has general authority over reliability.

As the Supreme Court said, the Federal Power Commission before it, FERC is the guardian of the public interest in our natural gas and electricity markets. Its function is not only to appraise the

facts but also to bring to bear upon the problem of expert judgment and determine where the public interest lies.

FERC's job is particularly important today. The structure of our natural gas and electricity markets has been radically transformed over the last several decades making it more open and more competitive, but it is indeed much more complex. The need for more infrastructure is clear both for natural gas and electricity is increasing. There are other sources of power as we know, coal, nuclear and others play a part in this as well which is a very important debate going on in this Congress.

As the reliability of the electric grid is growing concern as its vulnerable to both natural disasters and terrorists threats as well as some criminal activities as well. The need for a well functioning commission and well qualified commissioners to serve on it to perform FERC's historic roles and face these emerging challenges has never been greater.

Just this weekend, for instance, I was home in Louisiana visiting one of the great and the largest, non federally owned reservoir in the United States, Toledo Bend, which divides the State of Texas and Louisiana up in the Northern part of our State. It was a dam and reservoir created for hydro, but it is having enormously positive economic benefits for that region with much more promise. FERC's regulation over this hydro electric project is important that decisions continue to be made for that region to grow and to prosper as well as being able to generate the power that that community needs.

It also regulates natural gas pipelines. I am, again, I hate to continue—I like to continue to bring up Louisiana because we have probably more natural gas pipelines under our State and Texas than anywhere in the Nation and the Gulf Coast does more than its fair share contributing to the production of gas and the distribution of gas around the country. There's an issue before FERC right now with a potential abandonment of a Midla pipeline which I'm extremely concerned about.

It also regulates oil pipelines of which there are dozens in my State and of course, thousands around the country. In fact I think Senator Domenici, you might like this statistic that there are 2.9 million miles of pipe under the United States right now. We need more of it, not less.

Its licensing FERC, the siting and construction of liquefied natural gas export facilities that debate is going on and those permits are moving through as we speak.

So these are important responsibilities. I know the ranking member will add some of her thoughts to this. But this committee is important to continue to—I mean this Commission is important to continue to position itself in a way that can accelerate the energy boom, create more high paying jobs and protect consumers. So it's a great challenge, but FERC, I believe, is up to it.

Mrs. LaFleur's previous nomination to the Commission, let me first start with her, enjoyed strong support from this committee and the Senate. She was approved by the committee by voice vote and confirmed by the Senate unanimously. She's been Acting Chair of the Commission since last November. Before being appointed to

the Commission in 2010 she had more than 20 years of experience in the electric and natural gas industries.

I'm going to let Senator Shaheen do a more further introduction of Ms. LaFleur. I appreciate Senator, your leadership on this entire subject and for your being here today.

Let me say Mr. Bay is currently the Director of the Office of Enforcement at the Federal Energy Regulatory Commission. The Office of Enforcement is responsible for protecting consumers from undue manipulation of the energy markets by ensuring compliance with energy rules, regulations, orders and tariffs. He served in this capacity for the past 5 years.

But before joining FERC he served in numerous capacities in New Mexico. I'm going to leave the rest to Senator Domenici and to Senator Heinrich for further introduction.

So again, Senator Domenici, we welcome you. You're always welcome back to the committee for your sage advice and encouragement. Both the ranking member and I want to make that perfectly clear to you that you are more than welcome. We're both thrilled to see you.

With that, Senator Murkowski, can I turn it over to you for opening remarks?

**STATEMENT OF HON. RON WYDEN, U.S. SENATOR  
FROM OREGON**

I believe both of the nominees here today are highly qualified for the positions they have been nominated for, and I plan to support them both.

FERC's primary tasks have been overseeing the orderly development of the nation's waterpower resources and protecting electric ratepayers and natural gas consumers from unjust and unreasonable electric and gas prices.

More recently, FERC has been handed the task of protecting electric and gas markets from manipulation and ensuring the reliability of the electric grid.

Norman Bay has a strong track record in all of those areas.

As Director of FERC's Office of Enforcement since 2009, Mr. Bay has ensured that big energy companies play by the rules. This commonsense enforcement of existing regulatory measures means that consumers across the country are getting a fair deal on the energy they use every day.

Under Mr. Bay's direction, the Office of Enforcement created an innovative Division of Analytics and Surveillance, to detect possible market manipulation. Under his leadership, enforcement transparency has also improved, through the adoption of penalty guidelines, the Brady Policy, and Notices of Alleged Violations. Additionally, Mr. Bay's Office of Enforcement includes a division (Division of Energy Market Oversight) that has produced expert materials on all aspects of energy markets.

In 2013, a prominent energy trade journal named Bay as one of the top 10 most influential people in energy.

Next, Cheryl LaFleur, also has a strong track record, having served as the Acting Chair of FERC for the past year.

Since she joined the Commission in 2010, she has focused on ensuring the reliability and security of the country's power grid. She

has shown a willingness to work with industry and on behalf of consumers and has earned rave reviews from both sides of the aisle.

LaFleur brings with her nearly 3 decades of experience in the energy regulatory world, having spent 20 years as executive vice president and acting CEO of National Grid USA.

I believe both of the nominees today are highly qualified for the positions they have been nominated for. I plan to support them both, and I encourage my colleagues to do the same.

I look forward to learning more about the nominees' thoughts on key issues, especially FERC Order 1000 and how we will ensure that regions have the authority to plan for their transmission needs and distribute costs in a way that is appropriate.

**STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR  
FROM ALASKA**

Senator MURKOWSKI. Thank you, Madame Chairman.

I join you in welcoming our friend and former colleague and chairman of this great committee back to the committee. It's good to see you, Pete. Hope you're doing well.

Thank you, Madame Chairman, for the opportunity to have a hearing this morning on 2 nominees for the increasingly important positions at the Federal Energy Regulatory Commission.

You've outlined in good detail the significance and the importance of FERC. I think for many FERC is not a household word. They don't know a lot about it. They maybe know a little bit more after having it included as mentioned in the House of Cards.

[Laughter.]

Senator MURKOWSKI. I don't know what that means, but I would suggest that it's always better if our agencies stay out of the news and out of the TV shows. But that's a subject for another time.

I would like to, again, welcome you Ms. LaFleur and you, Mr. Bay, to the committee.

Ms. LaFleur, it was just last month that we had the benefit of your testimony and your expertise at our electric reliability hearing. I would like to personally commend you for your swift response to the disclosure of sensitive, national security information that according to the IG, should have been classified. You moved on that quickly.

I also appreciate your cooperation in answering the questions that I had posed to FERC regarding the unprecedented data leak.

While you and I may not always agree on policy, you have demonstrated, I think, very strong leadership in your position as the Acting Chair. You've got steady leadership combined with your 25 years of work in the energy field. I think it demonstrates the experience. You certainly have the temperament and the judgment that we need at the Commission. So I appreciate your willingness to continue to serve.

Mr. Bay, welcome to you to the committee. It was good to meet with you last week. I appreciate the time that you had given. I think your very forthright responses to the questions that I had. So I appreciated that.

You clearly have an impressive personal story and resume. But I will say that as I reflected back on our conversations I did feel



that our discussions had raised additional questions regarding your nomination. Again, not just to be a sitting Commissioner, but to serve as the next Chairman to FERC.

I have expressed some concern about your experience in the energy policy field as being recent and limited. As we discussed in my office, the issue of recusal is one that does concern me. If confirmed you would likely have to recuse yourself from the Commission's deliberations on at least a number of enforcement proceedings.

You also highlighted what you asserted has been, I think, a broad reach of the work the enforcement office has done under your leadership. You mentioned, for example, reliability matters and even merger review. So I will have some questions for you about the scope of the assurances that might be needed to quell concerns about actual or perceived unfairness stemming from your recent work as a Commission employee.

I am troubled, though, that not only do you have a steep learning curve on areas within FERC's foundational mission, but again, that you may need to be recused from time to time on matters where you do clearly have that expertise. I'm hoping to learn how the Office of Enforcement, under your leadership, has met the commitment that you made in our meeting. You described it as bending over backward to be fair. I would agree with you that that is exceptionally important.

I liked your citation of the Supreme Court's classic statement on government prosecution in *Berger vs. the United States*. In that case the court said that because he represents a sovereignty the U.S. attorney is not an ordinary party to a controversy and that "while he may strike blows, hard blows, he is not at liberty to strike foul ones." I think you will agree that Senators should assure themselves that the blow that your enforcement office has struck in matters over the years have always been fair. I think that that will be a subject of discussion here this morning.

I raised in our discussions the assertions that had presented themselves in a *Wall Street Journal* article as well as the more recent article coming out of the *Energy Law Journal* that the enforcement office may violate due process and go too far to force settlements. I think we recognize that it's one thing to be the tough cop on the beat. It's quite another to make up rules as you go along and deny those under investigation basic due process rights whether it's access to exculpatory evidence or even the ability to review prior testimony.

I've said many, many times in this committee that we should be operating under regular order. I believe that very much. So I am certainly going to wait until after this hearing, after we've had an opportunity to not only ask questions here today, but to submit questions for the record, I will be considering fairly and with an open mind here, all the answers to the questions before making a final determination as to your nomination.

But I do think it is important that I raise these issues whether it's the issue of recusal, whether it is the, what I believe, is perhaps limited relevant experience and then the issue that I also mentioned which is the fact that our lone female commissioner, who has clearly proven her leadership would be moved down from the position that she currently holds as Chairman of the Commission.

So I raise these issues. I know we will have a good and fair hearing this morning. So I appreciate, again, the opportunity to bring these issues up and have the questions answered.

The CHAIR. Thank you, Senator.

Let's begin with Senator Domenici. Thank you so much for being here, Senator, to introduce Mr. Bay and give your remarks for the record about the qualifications of this nominee.

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

Senator DOMENICI. Thank you. Thank you very much, Madame Chairman.

It's terrific to be here. I'm looking around and first I want to ask my voice has changed somewhat since I was the Chairman. I didn't have to talk very loud and everybody got the message.

[Laughter.]

Senator DOMENICI. But now it seems like I really have to work at it. If I'm not talking loud enough would somebody tell me and I'll try again.

I noticed in preparing for today that I didn't think that you all would come. There's such terrific issues going in your respective States that I would think today would be an exciting day.

Senator Alexander, they're getting rid of a few jobs at Oak Ridge and I read about that the day before yesterday.

Senator Portman, I read with very great interest what you've been saying about how we must grow in order to get out of this problem that the GDP of America must grow. We must find ways to help it grow. Your package that you put together is very interesting.

I'm using up time because this is such a fantastic nominee he doesn't need a lot of verbiage from me. If you let me say a few other things I will use less on him.

I would say I read with interest and it seemed like the old days when Wyoming has a pond up there that they want to keep some private sector person out. EPA wants to pay, them to pay for it because the interstate streams ruling is going to take place. That's nothing new.

I thought that was settled law. But that's 12 years ago or 14 as I recall when it first happened. That was the riparian doctrine. If any of it rolled out anywhere than it got covered by the law.

I hope that's not the right recollection. I hope I was wrong in thinking that because I didn't like what I read.

Over on the left side here I know that Senator Manchin must have been very thrilled to see that big story with the Secretary of Energy and the great big coal burning power plant that burns coal in the best and most serious way. I assume you read that. It's a major story.

If I was in your shoes I would be excited for a change that maybe they're getting close. We put so much money in conversion of coal to gas and saving it in the process that maybe the research is spread out a little differently now that one Robert Byrd is no longer here. But anyway I noticed that's happened. We thank him for his, all his work in this area.

Then I noticed over on our side that not only is the old Senator from New Mexico in favor of this nominee, that's me, the old Senator.

[Laughter.]

Senator DOMENICI. But the 2 new Senators are for him too. One of them is here. He's a good one because if you get in trouble you can ask him. He's an engineer.

Many times I wished I had an engineer in my pocket when we were doing this big bill in 2005. Some of you were with me. That was a real experience. That's the best piece of energy law we have passed in the past 30 years, 40 years. Remember that all the things we saw in that one bill.

But anyway now we're here for a much lesser issue and that's this young man on my right here, Norman Bay.

I guess I would start by saying that he, Senator Alexander, he typifies the American Dream. I don't see how we can escape talking about that. He is the son of Chinese immigrants who came to America and decided that they wanted to be serious about having children. So they had 8.

[Laughter.]

Senator DOMENICI. It's not like only one of them has succeeded. They all succeeded. This one that's here asking you to confirm him, he not only got a great education and then went and got a great law degree, he then taught law at the University of New Mexico, not a bad law school incidentally.

The kids, the youngsters, voted him out the best professor there. So it seems to me one could say he didn't know anything about being a professor when he took the job, but he did it right once he got it. That's, sort of, my pitch for him today.

He has been fair in almost everything he's done. He's here today because the Energy Regulatory Commission has a vacancy. He's been nominated by our President to fill it.

As I look at it, he's done everything right that would entitle him to try this, try this job on. See whether he could do as well on it as the other things he's done. I didn't finish my little loop on the American Dream, but can you imagine this young man, the son of a Chinese immigrant, a graduate of one of the Big East schools and then going and getting a law degree at Harvard and then teaching law and then working with the National Laboratories when they were in need of help. Here is before you now seeking confirmation to this position.

I don't think we really have to talk a lot about it. If there are those who choose not to support him, that's their prerogative. I would urge that they understand that isn't always that we get a candidate of this stature, with this background coming before you for this kind of job.

You kind of wonder sometimes why somebody of his astuteness and his finesse and his fairness, you kind of wonder why he would be wanting this job. But obviously he thoroughly enjoys it. The job that he is seeking demands somebody just like him. Obviously I would urge that this committee support him.

I'm not a great fan of the President of the United States and people know that, but I think this is a great appointment. So I am on his side on this. I don't see how you can miss.

It is with great concern that I hear that maybe it is being planted by some that he isn't fair, that he bends over backward in one direction. I don't find that anywhere in his background. Maybe some who have been the beneficiaries or that had lost out in some kind of process think they would have ruled differently. But that's always the case.

The question is how might he do over a long period of time in this job that you all know he seeks here because the President asked him to do it. I don't think he was out trying to get it. I think they asked him if he'd take the job.

So rather than go into further detail, I would just say to all of you that I know you've been through some difficult times. I know you wish from time to time that you could get on with things. You worry, like I do and I'm not even a member here, how we can get things going.

One way is to approve this kind of young man for this kind of job. That's one way to move the ball down just a little bit, not a lot. But I thank you very much.

I want to close by saying that the committee I once served on, this one, has a very interesting make up. The 2 women that head this committee have pledged to try to do things in a bipartisan manner. Obviously if there's anything wrong with this nominee it's that he is bipartisan, maybe some people would not like him to be bipartisan. I don't know. But clearly he is and he comes here with that mold part of his life.

We're always asking for that. Now we've got it. So we find some reason not to want it. I don't quite understand that.

But I leave you today with the hope that this fine committee will get some more real big work done. You know the areas. I can see them as we talk here.

I can see you all working so hard to try to get things done. I thank you for giving me an opportunity to sit at this side of the table and talk with you for a few minutes. Thank you very much. It's really a pleasure.

The CHAIR. Mr. Chairman, thank you so much for that beautiful introduction, sage advice. You continue to be an inspiration to all of us.

Senator Heinrich, did you want to say anything now about your nominee or wait for later in the committee?

Senator HEINRICH. At your pleasure, Madame Chair.

The CHAIR. Why don't you go ahead now and just add a few words then?

**STATEMENT OF HON. MARTIN HEINRICH, U.S. SENATOR  
FROM NEW MEXICO**

Senator HEINRICH. OK. Great.

Madame Chair and Senator Murkowski, I am incredibly pleased to say a few words regarding Mr. Norman C. Bay. I want to start by saying what an honor it is to be here with Senator Domenici in support of his nomination.

We have a long and storied history in energy policy in the State of New Mexico. It's a deep honor for me to sit here with all the great work that Chairman Domenici has done on this committee over the years.

I join Senator Domenici in strongly supporting this nomination. Since 2009 Mr. Bay has been the Director of the Office of Enforcement at FERC where he gained extensive experience into regulation of energy markets. The Office of Enforcement is responsible for market oversight and surveillance and for implementing the anti-manipulation authority of this Committee's Energy Policy Act of 2005, an incredible piece of energy legislation that certainly left its stamp on this country in many positive ways. This authority provided FERC new tools to combat the type of market manipulation that produced the devastating power crisis in the West a number of years ago.

Under Mr. Bay's leadership FERC has increased transparency in its work, opening in a number of enforcement actions that have helped protect the integrity of energy markets and provided about \$300 million in relief to consumers. I should add that Mr. Bay is a proud New Mexican and I understand an avid fly fisherman, something near and dear to my heart. He is a graduate of Dartmouth College and Harvard Law School and has had a long and distinguished career in public service.

Before FERC he taught at UNM. He also served as an Assistant U.S. Attorney. In 2000 was nominated by the President to be the U.S. Attorney to the District of New Mexico with strong bipartisan support from New Mexico's 2 Senators, Senator Domenici and Senator Bingaman. Mr. Bay was confirmed by the full Senate by unanimous consent.

I had the pleasure of meeting in my office with Mr. Bay and believe he will be fair, balanced, pragmatic and consensus oriented. He will decide cases on the merits, based on the facts, the law and the record, as they should be decided. Mr. Bay is an outstanding career public servant with extensive experience in the field of energy markets. I am very confident he will judiciously implement the laws focused on FERC's statutory responsibilities of energy infrastructure, competitive markets and reliability.

Once again, it's an honor to introduce Mr. Bay today. I strongly support his nomination to the FERC.

The CHAIR. Thank you very much.

Let me also submit a letter from the Governor, Suzanna Martinez, who wanted to be here today on behalf of this nominee, but submitted a letter strongly recommending him to our committee.

The CHAIR. Also from the additional, another Chair of the Committee, Senator Bingaman, who sent a strong letter of recommendation for you, Mr. Bay.

The CHAIR. Let me now turn to Senator Shaheen for her opening remarks.

Senator, thank you for your leadership on all of these issues and for presenting Ms. LaFleur to our committee this morning.

**STATEMENT OF HON. JEANNE SHAHEEN, U.S. SENATOR  
FROM NEW HAMPSHIRE**

Senator SHAHEEN. Thank you very much, Chair Landrieu, Ranking Member Murkowski, all of the members of the committee. It's so nice to be back before the Energy Committee. I have to say I miss it. So hopefully at some point I will be able to come back.

But I'm very honored this morning to be asked to introduce the current acting FERC Chair, Cheryl LaFleur. I had the pleasure of introducing Cheryl to this committee in 2010 during her first nomination hearing to serve as FERC Commissioner. I strongly supported her nomination then as I do now. I would point out, as several people have mentioned, that she has been serving as Acting Chair of the Commission and I think, has done an excellent job in that capacity as well.

Most important, Cheryl has routinely demonstrated an unparalleled understanding of how to best address the challenges facing our energy regulatory environment in a way that will provide affordable, reliable energy to Americans. I was talking to someone about an unrelated issue a couple of weeks ago, who volunteered that he had come before the FERC on a number of occasions and how impressed he was with then Acting Chair LaFleur's unflappability, with her ability to make people appearing before the FERC feel like they had been heard and that there was someone there who was looking for common ground to help people figure out how to get things done on the FERC in a way that benefited all parties. So I was really pleased to hear him volunteer those very positive comments.

I have to say personally I had the good fortune of working with Cheryl when I was in the New Hampshire State Senate, back in the 1990s and then as Governor. So I've had a chance to see firsthand just how many abilities she has, her qualifications that make her so, such an excellent Commissioner at the FERC.

Early in her career Cheryl led energy efficiency programs in New Hampshire. You all know how much I believe in energy efficiency and in the Northeast. Those programs focused on residential efficiency and actually won her national recognition for those efforts.

Later as President of Granite State Electric which was headquartered in New Hampshire and then as Executive Vice President and CEO of one of New England's largest utilities, National Grid, Cheryl was responsible for providing electricity to 3.4 million customers in the Northeast. I have to say, I think she brings an understanding of the challenges that we face in the East and the Northeast in a way that's very important to have that kind of expertise on the FERC.

During her tenure at FERC Cheryl has focused much of her time on improving reliability and grid security, promoting regional transmission planning and supporting a clean and diverse energy supply for the country. Her past experience working directly for electricity and natural gas customers has given her an important recognition of the hardship caused by inadequate or overly expensive energy supplies that affect working families, businesses and communities.

I have no doubt that FERC will continue to benefit from the experience and knowledge that Cheryl brings to the Commission. She has an impressive track record that clearly demonstrates her commitment to providing reliable and affordable energy. She is exceptionally qualified to continue serving as a Commissioner.

I'm delighted, again as I said, to introduce her. I strongly recommend her to this committee.

So thank you very much, Chair Landrieu and Ranking Member Murkowski, all the members of the committee. I certainly hope that you will swiftly and expeditiously vote out her nomination.

Thank you.

The CHAIR. Thank you, Senator Shaheen. It's wonderful to have you back.

We all thank you and Senator Portman for your leadership on our energy efficiency legislation. We hope to find a way to move that forward. Thank you for your leadership.

If the 2 nominees would please now stand and raise your right hand?

The rules of our committee which apply to all nominees require that they be sworn in in connection with their testimony.

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

[Witnesses respond, I do.]

The CHAIR. OK.

Please be seated.

Before you begin your statement, I'd like to ask 3 questions that are asked of each nominee before they come before this committee.

First, will you be available to appear before this committee and other Congressional Committees to represent the department positions and respond to issues of concern to Congress?

[Witnesses respond, I will.]

The CHAIR. Are you aware of any personal holdings, investments or interests that would 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 of the United States?

Ms. LAFLEUR. My investments, personal holdings and other interests have been reviewed both by myself and by appropriate ethics counselors within the Federal Government. I've taken appropriate action to avoid any conflicts of interest. There are no conflicts of interest or appearances thereof to my knowledge.

The CHAIR. Mr. Bay.

Mr. BAY. My investments—

The CHAIR. Can you turn your microphone on? You just have to—there you go.

Mr. BAY. Yes.

My investments, personal holdings and other interests have been reviewed both by myself and appropriate ethics counselors within the Federal Government and pursuant to the agreement that I signed, the letter I signed, I will take appropriate action to avoid any conflicts of interest and based on that representation in the letter, if confirmed there would be no conflicts of interest or appearances thereof to my knowledge.

The CHAIR. Thank you, Mr. Bay.

Finally, are you involved or do you have any assets held in a blind trust?

Ms. LAFLEUR. No.

Mr. BAY. I do not either.

The CHAIR. OK.

I will now call on each of the nominees for their statement. You've prepared statements for the record. Ms. LaFleur, let's begin with you.

**TESTIMONY OF CHERYL A. LAFLEUR, NOMINEE TO BE A MEMBER OF THE FEDERAL ENERGY REGULATORY COMMISSION**

Ms. LAFLEUR. thank you very much, Chair Landrieu, Ranking Member Murkowski and members of the committee. I'm honored to appear before you this morning as a nominee for a second term at the Federal Energy Regulatory Commission.

I'd like to thank Senator Shaheen for her generous introduction and for everything that she's done for the people of New England. I'm grateful for her continuing support.

I would like to thank President Obama for nominating me and this committee for holding this hearing at which I'm pleased to appear with my colleague, Norman Bay.

As the Chair has noted FERC's work encompasses a variety of responsibilities. In my 4 years on the Commission I've voted on approximately 3,500 orders as a commissioner and led the decision of more than 500 as acting chairman. In each order I've sought to use my independent judgment based on the facts of the record and the law that binds us.

I've worked to understand the perspectives of all parties and those of my colleagues to make decisions that are fair, clear and timely. I've been aided by the wonderful team in my office, all of whom are here this morning, and across the Commission.

I also appreciate the continuing support of my family. I'm very happy that my husband, Bill Kuncik, and our daughter, Allison, are sitting behind me today. Our son, Dan, is teaching high school back home just like Senator Shaheen did a long time ago. We didn't want him to leave the kids with a sub just to be here.

But I want to briefly use my time to touch on 3 areas that have been priorities for me at the Commission.

As I frequently note, our nation is seeing substantial changes in energy supply due to the increased availability and use of domestic natural gas, the growth in renewables and demand-side resources and new environmental rules. These drivers of change are really largely outside FERC's jurisdiction, but they're driving much of our work on both infrastructure and markets. Our nation is investing in electric transmission, gas pipelines and LNG facilities, and FERC's regulation has a critical impact on those investments.

In addition, supply changes require adaptations in competitive electric markets to assure that they attract needed investment and coordinate effectively with gas markets. I've sought to be a leader in those areas.

Throughout my time at FERC reliability, including grid security, has been a top priority. Ensuring reliability requires that we pay attention to day-to-day activities like trimming trees as well as emerging issues like cyber security. As I further explain in my written testimony I think we're making progress on both fronts.

In recent months FERC has approved new and more comprehensive cyber security standards and has ordered NERC to develop standards to respond to geomagnetic disturbances and physical security risks.



Finally, another area of priority for me, both as a Commissioner and as Chairman, has been building relationships between FERC and other agencies that regulate the same industries that we do. Because of the overlapping jurisdiction across the government, I believe that those relationships are essential to effective regulation. One of my first actions as Acting Chairman was to resume FERC's negotiations with the Commodities Futures Trading Commission on 2 agreements required by Dodd-Frank which we successfully executed January 2nd. As a result the CFTC is now providing FERC with critical market data that's enhanced our market surveillance.

I've also worked to build a strong relationship with the EPA. I founded and co-chaired the joint FERC/NARUC forum on reliability in the environment to discuss preparation for and compliance with new environmental regulations and assure reliability is sustained.

If confirmed I'll continue to work closely with Federal and State agencies.

I've been blessed with a wonderful career. I began in a law firm, held executive positions serving electric and gas customers and led non-profit organizations. Compared to some I came late to public service, but I found it both challenging and extremely rewarding.

It's been an honor to serve on the Commission and work on the critical issues I've mentioned and many others. I'm deeply honored that President Obama has nominated me to continue this work. Thank you for your consideration of my nomination. I look forward to your questions.

[The prepared statement of Ms. LaFleur follows:]

PREPARED STATEMENT OF CHERYL A. LAFLEUR, NOMINEE TO BE A MEMBER OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

Chair Landrieu, Ranking Member Murkowski, and members of the Committee. I am honored to appear before you as a nominee for a second term at the Federal Energy Regulatory Commission. I would like to thank Senator Shaheen for her very generous introduction, and for all that she has done for the people of New England. Senator Shaheen introduced me at my confirmation hearing four years ago, and I am grateful for her continuing support. I would like to thank President Obama for nominating me and this Committee for scheduling this hearing, at which I am pleased to appear with my colleague Norman Bay.

As you know, the Commission's work spans different industries and encompasses a variety of responsibilities. In my four years on the Commission, I have voted on approximately 3500 orders as a Commissioner, and led the decision of more than 500 as Acting Chairman. In each order, I have sought to use my independent judgment based on the facts of the record and the law that binds us. I have worked to understand the perspectives of all involved parties, as well as the views of my colleagues, to help the Commission render decisions that are fair, clear, and timely. I have certainly been aided in this by the wonderful team in my office-all of whom are here-and throughout the Commission. I also deeply appreciate the continuing support of my family, and I am pleased to have my husband Bill Kuncik and our daughter Allison with me today. Our son Dan is teaching high school physics back home-he is not here because I didn't want him to leave his students with a substitute for the day.

Four years ago at my hearing before this Committee, I pledged to try to understand the unique needs and opportunities of different geographic regions across the country. In my efforts to fulfill that commitment, I have met with a wide variety of parties from across the country and have traveled to many of those regions. For example, I have visited each of the Regional Transmission Organizations and the Bonneville Power Administration and have toured a variety of energy infrastructure, from the Grand Coulee Dam to the Kemper carbon sequestration facility under construction in Mississippi. If confirmed, I look forward to applying what I have learned and continuing to learn about the complex energy markets and infrastructure we oversee.

I would like to briefly mention three areas that have been priorities for me and that I believe will continue to shape much of the work of the Commission in the coming years.

#### *Changes in Power Supply*

As I frequently note, the nation is making substantial changes in its power supply due to the increased availability of domestic natural gas and its use for power generation, the growth of renewable and demand-side resources, and new environmental requirements. Although these drivers of change are largely outside the Commission's jurisdiction, we must be aware of and adapt to them to carry out our statutory responsibilities. These developments are driving a great deal of the Commission's work on both infrastructure and markets. Our nation is making substantial investments in electric transmission, gas pipelines, and LNG facilities, and the Commission, through its authority over transmission ratemaking and natural gas permitting and ratemaking, has a critical impact on those investments. In addition, power supply changes require adaptations in competitive electric markets, to assure they attract needed investment and coordinate effectively with natural gas markets. I have sought to be a leader on these efforts.

#### *Grid Reliability and Security*

Throughout my time at the Commission, reliability, including grid security, has been a top priority for me. Because of my past experience working directly for customers, I know firsthand how hard even a short outage can be on families, businesses, and communities.

Ensuring reliability requires that the Commission pay attention to the day-to-day, nuts and bolts activities necessary to keep the lights on, like tree trimming, as well as emerging issues, like cybersecurity. I believe that the Commission is making progress on both fronts, through its oversight of the North American Electric Reliability Corporation (NERC). For example, last year, the Commission approved Version 5 of the Critical Infrastructure Protection Standards, which for the first time require that all electric system cyber assets receive some level of protection, commensurate with their impact on the grid. In addition, the Commission directed NERC to develop standards to protect the grid from geomagnetic disturbance (GMD) events caused by solar storms. Finally, the Commission recently directed NERC to develop physical security standards for the grid, to ensure that critical facilities are identified and protected.

#### *Cooperative Relationships with Federal and State Agencies*

Finally, as both a Commissioner and Acting Chairman, I have worked to strengthen relationships between the Commission and other agencies—both state and federal—that regulate some of the same industries we do. I believe that the Commission must be independent, but never siloed. Given the complex, overlapping authorities that govern the nation's energy industry, cooperative relationships are essential.

One of my first actions as Acting Chairman was to resume the Commission's negotiations with the Commodities Futures Trading Commission (CFTC) on the two Memoranda of Understanding (MOUs) required by the Dodd-Frank Act, which were successfully executed in January. Under the new information-sharing MOU, the CFTC is now providing FERC with critical market data on an ongoing basis, and this information has already enhanced FERC's market surveillance abilities. I believe this type of collaboration can help protect customers by strengthening both agencies' oversight of energy markets.

I also believe it is important that the Commission continue its relationship with the Environmental Protection Agency to ensure that reliability is sustained as the electric sector complies with new environmental regulations. To that end, I founded and cochaired the joint FERC-National Association of Regulatory Utility Commissioners (NARUC) Forum on Reliability and the Environment. The Forum brought together federal and state energy regulators to discuss the electric utility industry's preparation for, and efforts to comply with the Mercury and Air Toxics Standards, upcoming carbon regulations, and other rules. I have also served as the Commission liaison to the Department of Energy's Electricity Advisory Committee.

Of course, because of the often intertwined nature of state and federal energy regulation, one of the most important relationships for federal regulators is with their state counterparts. If confined, I will continue to prioritize maintaining strong relations with NARUC and the state public utility commissions that NARUC represents.

#### *Closing*

I have been blessed with a wonderful career: I began in a law firm, held executive positions in companies serving electricity and gas customers, and led nonprofit orga-

nizations. I came late to public service, but have found it both challenging and extremely rewarding. It has been an honor to serve on the Commission and work on the critical issues I have mentioned and many others. I am deeply honored that President Obama has nominated me to this work. Thank you for your consideration of my nomination, and I look forward to answering your questions.

The CHAIR. Thank you very much.  
Mr. Bay.

**TESTIMONY OF NORMAN C. BAY, NOMINEE TO BE A MEMBER  
OF THE FEDERAL ENERGY REGULATORY COMMISSION**

Mr. BAY. Chair Landrieu, Ranking Member Murkowski and distinguished members of the Senate Energy and Natural Resources Committee, I'm honored to be here today as a nominee for the Federal Energy Regulatory Commission. I would like to thank President Obama for nominating me to this position. I also thank Chair Landrieu and Ranking Member Murkowski for holding this hearing.

I also owe a special thanks to Senator Domenici, who is a long time Senator from New Mexico, is still called St. Pete by his constituents and is still absolutely down to earth as a former baseball player ought to be.

I'm honored to appear before this committee with Acting Chairman LaFleur.

I also wish to thank my wife, Yuri Chayama, who is here today in the committee hearing room.

I'm proud to call myself a New Mexican. New Mexico is an amazing place to be. It's a place of great natural beauty. It is also blessed to have an abundance of natural resources including the sun, wind, oil and gas.

But despite its natural beauty and its natural resources, unfortunately New Mexico is one of the poorer States in the United States. As a result developing all of our resources matters, it matters to the local economy, the State economy and in turn the national economy and the energy security of the United States. New Mexico is also home to 2 national labs, Los Alamos and Sandia, that do the kind of cutting edge research that leads to technological innovation and breakthroughs that enhance our energy security. In my view New Mexico is a real life example of an all of the above approach to energy.

Not only am I from New Mexico, but as Senator Domenici noted I'm a child of immigrants. My parents left China to come to the United States after World War II in search of a better life, higher education and freedom. In the United States my parents proceeded to have a large family. I have 3 brothers and 4 sisters.

My parents worked hard to support us and to put us through school. My father worked for the Air Force. My mother was a researcher at a Department of Energy facility. From my parents I learned the value of hard work, education and public service, of giving back something to this country that had been so good to us. I've spent my life in public service with a bipartisan commitment to good government.

I clerked for a Republican Federal judge, worked at the State Department during a Reagan Administration and began working at the Justice Department in the first Bush Administration.

In 2000 I was nominated by President Clinton to be the United States Attorney in New Mexico and was confirmed by unanimous consent to the Senate.

After DOJ I went to the University of New Mexico School of Law, taught there for 7 years and received tenure.

In 2009 I became the Director of the Office of Enforcement at FERC. It has been a great honor to work at FERC. The Office of Enforcement not only investigates potential wrong doing, including market manipulation, but is also responsible for doing market oversight, analytics and surveillance for the Commission.

As Director I have been immersed in the wholesale, physical gas and electric markets as well as the financial or derivatives energy markets that settle off of physical prices. While I've been the Director, the Commission has issued 49 settlement orders with 48 being reached by unanimous vote. Every market manipulation settlement has been issued by unanimous vote. These settlements have helped protect consumers, ensure the integrity of the markets and provide a level playing field for all market participants.

If confirmed let me tell you what my priorities would be in light of the challenges ahead.

First, to be fair, balanced and pragmatic in addressing issues, to decide cases on their merits based on the facts and the law and to be consensus oriented.

Second, infrastructure.

FERC plays a critical role in permitting and incenting the development of infrastructure. Right now as Chair Landrieu noted, there is an important need for more infrastructure both in terms of gas facilities and electric transmission.

Third, competitive markets.

To continue to look for ways to improve the efficiency of the markets and to deliver greater value to consumers.

Fourth, reliability.

This is another critical responsibility for FERC. Not only does this encompass physical security and cyber security but it includes gas-electric coordination issues as well.

Thank you for giving me this opportunity to testify before you today. I welcome any questions you have.

[The prepared statement of Mr. Bay follows:]

PREPARED STATEMENT OF NORMAN C. BAY, NOMINEE TO BE A MEMBER OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

Chair Landrieu, Ranking Member Murkowski, and distinguished members of the Senate Energy and Natural Resources Committee, I am honored to be here today as a nominee for the Federal Energy Regulatory Commission (FERC). I would like to thank President Obama for nominating me to this position, and I also thank Chair Landrieu and Ranking Member Murkowski for holding this hearing.

I am proud to call myself a New Mexican. New Mexico is an amazing place; it is a place of great natural beauty. It is also blessed to have an abundance of natural resources, including the sun, wind, oil, and gas. But despite its natural beauty and its natural L sources, unfortunately, New Mexico is one of the poorer states in the United States.

As a result, developing all of our resources matters. It matters to the local economy, the state economy, and, in turn, to the national economy, and the energy security of the United States. New Mexico is also home to two National Labs—Los Alamos and Sandia—that do the kind of cutting edge research that leads to technological innovation and breakthroughs that enhance our energy security. In my view, New Mexico is a real life example of an “all-of-the-above” approach to energy.

Not only am I from New Mexico, but I am the child of immigrants. My parents left China to come to the United States after World War II in search of a better life, higher education, and freedom. In the United States, my parents proceeded to have a large family. I have three brothers and four sisters. My parents worked hard to support us and to put us through school. My father worked for the U.S. Air Force; my mother was a researcher at a Department of Energy facility.

From my parents, I learned the value of hard work, education, and public service -of giving something back to this country that had been so good to us. I've spent my life in public service, with a bipartisan commitment to good government. I clerked for a Republican federal judge, worked at the State Department during the Reagan Administration, and began working at the Justice Department in the first Bush Administration under Attorney General Richard Thornburgh. In 2000, I was nominated by President Clinton to be the U.S. Attorney in New Mexico and was confirmed by unanimous consent of the Senate. After DOJ, I went to the University of New Mexico School of Law, taught there for seven years, and received tenure.

In 2009, I became the Director of the Office of Enforcement at FERC. It has been a great honor to work at FERC. The Office of Enforcement not only investigates potential wrongdoing, including market manipulation, but is also responsible for doing market oversight, analytics, and surveillance for the Commission. As Director, I have been immersed in the wholesale physical gas and electric markets, as well as the financial or derivatives energy markets that settle off of physical prices. While I have been Director, the Commission has issued 49 settlement orders, with 48 being reached by unanimous vote. Every market manipulation settlement has been issued by unanimous vote. These settlements have helped protect consumers, ensure the integrity of the markets, and provide a level playing field for all market participants.

If confirmed, let me tell you what my priorities would be in light of the challenges ahead:

First, to be fair, balanced, and pragmatic in addressing issues. To decide cases on the merits based on the facts and the law. to be consensus oriented because the most stable policies command the broadest support and because regulatory certainty is critical to market participants when they make huge capital investment decisions.

Second, infrastructure. FERC plays a critical role in permitting and incenting the development of infrastructure. Right now, there is an important need for more infrastructure, both in terms of gas facilities and electric transmission.

Third, competitive markets. To continue to look for ways to improve the efficiency of the markets and to deliver greater value to consumers. As part of that FERC must continue to be a vigilant cop on the beat to protect consumers and to ensure the integrity of the markets.

Fourth, reliability. This is another critical responsibility for FERC. Not only does this encompass physical security and cybersecurity, but it encompasses gas-electric coordination issues as well.

Thank you for giving me this opportunity to testify before you today. forward to answering any questions you may have.

The CHAIR. Thank you very much for your excellent opening statements.

Let me begin, Mr. Bay, with you, if I could. The Department of Energy Organizational Act requires members of FERC and I'm going to quote the statute. This is the only requirement in the law for your positions. "To be individuals who by demonstrated ability, background, training or experience are specifically qualified to assess fairly the needs and concerns of all interest affected by Federal energy policy."

I want to—I know I submitted this earlier to the record but in this question include a specific comment from the Governor of New Mexico, Suzanna Martinez, who says on your behalf, "working closely with Norman I want to say that he worked closely with State law enforcement officials regardless of their political affiliation, to partner with them in addressing border crime and to provide assistance wherever possible. He listened to State officials and had a pragmatic, collaborative approach to problem solving. My office worked closely with him when he was U.S. Attorney on a vari-

ety of law enforcement issues. What mattered to Norman was good government and public safety and he enforced the law in an even handed manner.”

How has your experience as Director of the Office of Enforcement for the past 5 years and as United States Attorney and U.S. Assistant Attorney during the last 9 years, do you believe how do those experiences qualify you to assess fairly the needs and concerns of all interested parties affected by FERC? There are some many conflicts brought to your—before your Commission. What do you think your experience in the past has taught you about how you may perform in this new position?

Mr. BAY. The key is, whether you are a U.S. Attorney or whether you are the Director of the Office of Enforcement, the key is that you have to have a commitment to doing the right thing. Everything begins with that.

Whether you are a U.S. Attorney or whether you are the Director of an Office of Enforcement and do civil work, you have to have a commitment to fairness because fairness has to be a cornerstone of your office. It goes to the very legitimacy of the work that you do. So when you decide cases, when you examine cases, you have to be fair, you have to be thoughtful, you have to be balanced and you have to be impartial. You have to decide cases based on the merits.

That’s what I would take from my positions as both U.S. Attorney and Director of the Office of Enforcement. If confirmed, I would bring that to the Commission.

The CHAIR. There have been—thank you.

There have been some recent criticisms by some lawyers that sent testimony to this committee saying that some of your decisions have been lopsided and unfair. Among other things the Commission has been criticized for levying excessive fines on market participants for manipulating energy markets.

Please explain how FERC arrives at the amount of its civil penalties? Is the amount left to you as the head of Enforcement? Is it to your discretion or are you bound by Commission guidelines?

What factors enter into the calculation of the penalties and who ultimately determines the fine amount of the penalty, the Office of Enforcement or the Commission?

Could you clarify for the record because there are some concerns in this regard?

Mr. BAY. Chair Landrieu, you raise a very important point.

When the Office of Enforcement engages in significant action it does so at the direction and with the authorization of the Commission. So, for example, if we want to enter into settlement negotiations we have to prepare a memo that the Commission reviews and that the Commission has to approve in order for us to enter into those formal settlement negotiations. Even if we’re able to reach a proposed settlement at the staff level, the Commission has to review the proposed settlement and it has to determine whether or not it is in the public interest to accept the settlement.

As I mentioned, while I’ve been the Director of the Office of Enforcement we have concluded 49 settlements. Fourty-eight of the 49 have been by bipartisan vote of the Commission. So Democrats and Republicans alike, coming together to prove a settlement and to find, as they must, that the settlement was in the public interest.

With respect to market manipulation cases, all of those settlements have been approved unanimously by the Commission.

The CHAIR. Thank you.

Let me ask my next question to Mrs. LaFleur.

There's been some concern that some of the regional electricity markets are not functioning as openly and as transparently, particularly the New England market. We had a hearing recently. Senator Manchin was helping us to try to figure out what was happening there, Senator—in the Midwest also with Senator Franken and Senator Baldwin.

There seems to be insufficient incentives to spur investment in the generation where the demand is needed most. One aspect of the situation in New England is that generators appear to be largely unwilling to contract for firm transmission services, etcetera.

In response the gas industry seemed to be unwilling to invest in new pipeline capacity unless they have the contracts.

You've been on the Commission. How is FERC going to try to work through some of these important issues between, you know, generators of gas and power and contracts to make sure that those investments get done?

Ms. LAFLEUR. Thank you, Senator. Those are some of the most important issues we're looking at.

At the time when the competitive markets were created about 15 years ago, in New England and really everywhere else in the country were very, very long on generation. So mostly the markets have reallocated resources among existing generators that came into the market.

Right now we're in a different place. We're in an investment cycle. Really taking a very hard look, particularly at the forward capacity markets, to make sure that they function to attract the investment that they need.

We actually have an open inquiry that I started at the Commission looking at the capacity markets and if we need to make changes.

The specific issue that you raise is—arises from the fact that electricity and gas attract capital differently. Electricity, the farthest ahead the markets look is 3 to 5 years generally, and the gas pipelines require a 10 to 15 year commitment for firm supply. Therefore, they are not meshing. Right now we're looking at the ways to price more fuel security into the electric markets so it will pull the pipeline investment we need.

The CHAIR. Thank you very much.

Let me turn this over to Senator Murkowski.

Senator MURKOWSKI. Thank you, Madame Chairman.

Let me follow on the question from the Chairman here about the assertions that have been made, not only through the Wall Street Journal article with the interview of Kevin and Rich Gates, who assert that they have been denied, what they believe, is basic fairness over a period of years by the Office of Enforcement.

The suggestion is that there is a form of bullying or perhaps worse. I mentioned it in my opening the Energy Law Journal article that came out last week which, I understand, has been in the process of being written for some period of time. So I'm assuming was not timed, Mr. Bay, to coincide with this hearing.

But the statements contained in that article which the Chairman references are pretty tough, suggesting that while most members of the regulated community and practitioners within the Energy Bar are reluctant to say so publicly there is a widespread view that the FERC enforcement process has become lopsided and unfair. I think it's just critically important that the FERC be viewed as this unbiased entity that really is even handed. Again, Mr. Bay, your comments to me about the importance, really, of going the extra mile to make sure that that fairness in fact is in place.

So I have a couple questions and I'll start off with you, Mr. Bay. But Ms. LaFleur, I want you in this conversation as well.

As it relates particularly to the information in the Wall Street Journal article, you've indicated to me, Mr. Bay, that you couldn't respond directly to my questions pertaining to that case because of Commission rules that you couldn't divulge certain information. I'm assuming that that is still the case or is there more that you can convey to the committee that would allay these concerns about the particular Gates allegations?

Mr. BAY. Only the Commission can disclose whether or not an investigation exists and thus changing the investigation from its non-public status to a public status.

What I can say and what is a matter of public record is that the PJM market monitor referred the up—to congestion matter to the Commission and the Commission issued an order, unanimously, directing the Office of Enforcement to open up the investigation. But I can't say anything more than that because everything else would be non-public.

Senator MURKOWSKI. So is it your understanding then that it will be opened up to investigation?

Mr. BAY. That will be a decision for the Commission to make.

Senator MURKOWSKI. OK.

Then just following on this. The law review article asserts that when individuals are under FERC investigation, FERC enforcement does not have to provide access to deposition transcripts or provide the information to individuals, even exculpatory evidence, that has been shared with the Commission. Is this also correct?

I guess the broader question would be do you believe that individuals should have access to their deposition transcripts and the information that's been shared with the Commissioners?

Mr. BAY. Senator Murkowski, you raise an important issue. They are really 2 issues.

One goes to exculpatory evidence.

Another one goes to access to deposition transcripts.

On access to deposition transcripts, in a great majority of cases the transcripts are released to the person who has been deposed. The regulations that FERC has, however, provide that the transcript access can be denied if there is a concern over the integrity of the investigation. In those instances, however, while the access to the transcript might be delayed, eventually it is released.

It's not a question of whether or not the transcript will be released. It's a question of when.

The other thing is that—

Senator MURKOWSKI. But, if I may just interrupt there?

Mr. BAY. Yes, please.



Senator MURKOWSKI. If individual isn't able to gain access to that in a timely manner in order to prepare his or her rebuttal, doesn't this limit their ability to effectively advocate their side of the issue?

Mr. BAY. What happens under the process we have is that the lawyer for the witness is able to attend the deposition. The lawyer can bring a paralegal. The paralegal can take copious notes. The transcripts are released before the show cause stage of the proceedings.

I would also say that one thing that's very unique about FERC's process is that staff prepares a preliminary findings letter for the subjects of investigations that includes a factual summary, as well as the allegations regarding potential violations.

So there's a lot there that does happen even if in individual cases there's a concern over the integrity of the investigation. So there's some delay in sharing the transcripts.

Senator MURKOWSKI. Ms. LaFleur, I'll ask this of you as well.

If you have allegations or assertions that the FERC's enforcement process raises serious fundamental due process and substantive concerns, I would suggest that this is a problem for us whether it's within the Office of Enforcement or whether it's the Commission as a whole. I don't think that this reflects well on the Commission, but even more so on the Office of Enforcement either.

How do we respond to allegations of serious fundamental due process and substantive concerns?

Ms. LAFLEUR. Senator, I think anytime anyone who practices before the Commission expresses views we have to listen to them among all the views that we hear. You know, I respect Bill Scherman and his, you know, the thoughts he expresses in the article. I think I'm quoted in the article at a House Committee saying we should always be open to ways to improve any aspects of our work.

At the same time, I think there is an alternative point of view to that expressed in the article. Enforcement is a very important part of our work because it underlies reliability and market fairness, 2 tenets of our work. It's normal that the people who were subjects of investigations might have a different view that those conducting them. You know, I stand by all my votes on both enforcement orders to show cause and settlements because I think they were fairly conducted.

But if there are ways we can learn to do it better in the future I think we should.

Senator MURKOWSKI. This is something that I would like us to have an opportunity to get into further. It's one thing if you have a disgruntled CEO or corporation because they don't like the penalty that has been assessed. But it would appear to me that we're talking about more than a few disgruntled individuals, that there's a concern, perhaps, about process.

Mr. Bay, you know, unfortunately it reflects on you since you have been at the Office of Enforcement now since 2009. So this is something I would like to delve into a little bit more.

Let me ask Mr. Bay on the issue of recusal because this was something that I have expressed concern about. If, as the Chair, you would have to recuse yourself from certain matters that you

had been involved with at the Office of Enforcement, it limits our Commission in terms of the ability to advance. You did say that, if confirmed you would work with the Ethics Counsel at FERC to determine how to proceed. I appreciate that.

But what standards effectively would be in place in order to determine if you should be disqualified from a Commission hearing? What standards would you impose on yourself? Also, do you believe that your decision to decline to recuse yourself would be appealable and whether or not it even should be?

Mr. BAY. In terms of the legal standard I would want to talk to the designated Ethics Officer to figure out what the precise legal standard is. But the gist of it has to be that there can't be an actual conflict of interest. I think even going beyond that there is a concern over an apparent conflict of interest.

So I would want to work closely with the Ethics Officer to figure out what I had to recuse myself from. In terms of whether or not a recusal decision is appealable or not, I don't know the answer to that question. But I certainly would be happy to discuss the issue with the General Counsel at FERC and get back to you on that particular point.

Senator MURKOWSKI. Do you still think that the number of proceedings from which you would have to recuse yourself is 43 or thereabouts? Is that correct?

Mr. BAY. I think it would be 43 if you take the most sweeping approach which is to say that any matter that has been opened as an investigation whether it is formal or informal requires my recusal. If you're talking about investigations that are formal or where there has been a show cause order where the Commission has issued charges, the equivalent of charges, the number is much, much smaller.

So this is one of the issues that I would want to explore with the designated Ethics Officer.

Senator MURKOWSKI. Madame Chairman, the clock is a little off, but I think I've gone over.

Thanks.

The CHAIR. Thank you.

I'm going to recognize Senator—well, Senator Manchin, Senator Heinrich next.

But let me just say, in these hearings questions are always raised I think to hone in on the nature of the questions about the nominees. I want to just underscore one thing that I heard because if I heard it wrong it needs to be corrected now before we go forward.

The ability of FERC to open an investigation is done by the Head of Enforcement or is it done by the Commission itself? Ms. LaFleur? The decision to open an investigation?

Ms. LAFLEUR. Generally, it can happen either way. The Head of Enforcement can commence an investigation. There are times when in the course of the Commission's work, the Commission might issue an order, ordering that an investigation be commenced. That's not the majority of times.

The CHAIR. For the record could you both submit in the last 43 cases that are—seem to come up this morning which ones the Com-

mission has instituted and which one the Head of Enforcement as the 2—

Ms. LAFLEUR. You mean the commencement of the investigation?

The CHAIR. The commencement and I have 43.

Ms. LAFLEUR. I have already—that as a question for the record.

The CHAIR. OK.

Ms. LAFLEUR. I think most were start—bubbled up and then came to the Commission.

The CHAIR. OK. Would you give us that information, please?

The CHAIR. Alright, Senator Manchin, you're next, I believe.

Senator MANCHIN. Thank you, Madame Chairman.

Thank both of you for the service you have been given—that you've given and the service that you would like to continue to give. I appreciate that.

I'll think I'll start with you, Mr. Bay. First I want to thank you for coming and visiting with me. I would like to start with you.

If you could just describe to me your understanding of the, you know, the role now as a Commissioner verses the difference of being the Enforcement and what you see as the most important aspect of this job as far as with FERC and the responsibilities that FERC has?

Mr. BAY. I think there are substantial differences between being the Director of an office at FERC and being a member of the Commission, particularly being Chairman of the Commission.

In the Office of Enforcement certainly the office does investigations and it does market oversight and market analytics and surveillance, but obviously the work of the Commission goes beyond that and it includes infrastructure and other areas. So there's much more that you have to do on the Commission, in a sense, than what you would do as an office director because you cover the entire range of the work at the Commission.

Senator MANCHIN. What steps, if you're confirmed as the Chairman of this Commission, what steps would you be prepared to take that will review the impacts of the 111D greenhouse gas emissions by EPA? How would you proceed with that?

What would you be looking for?

Mr. BAY. That's an important issue. Obviously the rule will be coming out in early June.

Senator MANCHIN. Hm hmmm.

Mr. BAY. At FERC, given our statutory responsibilities, reliability has to be job one. So as I review that draft rulemaking I would be looking, if confirmed, to try to assess what the reliability impacts are and what FERC can do working with key stakeholders like the EPA, the States and State commissions and NARUC, the RTOs, ISOs and industry to ensure that there is sufficient planning and preparation and discussion that any challenges can be met.

Senator MANCHIN. If the 111D rule comes out and shows that basically the difference, if you will, the required resources be dispatched based on the environmental attributes rather than cost how would you rule? Against or for or in favor?

Mr. BAY. So, I very much respect the work of the EPA. They have an important job to do, but FERC has an important job as well. For FERC 2 of our key statutory responsibilities are reliability and ensuring that rates remain just and reasonable.

Senator MANCHIN. You believe that's been done lately? I mean, are—we've been going down that path with seeing where—is EPA taking that into consideration, I might add? In your estimation?

Mr. BAY. I have not been following the decisional process at the EPA closely enough to know. But I do know that staff at the Commission does meet with the EPA and they do discuss reliability issues. Certainly that is an important role for FERC to play going forward.

Senator MANCHIN. Were you concerned about the Polar Vortex that we had this past winter of what it might have done, I mean, most of the PGM system is the system that I live in, were you concerned about that?

Mr. BAY. I think everyone who was either living through the Polar Vortex or involved with the work at FERC watched closely as the Polar Vortexes unfolded.

Senator MANCHIN. Ms. LaFleur, very quickly. I know in your position as Acting Chairman right now, is reliability, do you believe, that enough emphasis and that FERC Commissioners, as they stand today, understand that reliability is their main concern and goal with cost?

Ms. LAFLEUR. Yes, I think we clearly understand that. I think as new EPA rules are developed we really have 2 big jobs.

One is to comment on the rules and help be part of the process to assure reliability is sustained when the—

Senator MANCHIN. If you're at odds how do you all handle that if you're at odds with where the EPA is going and it's not practicality, it's not going to happen?

I mean it's a wonderful thing to wish something to happen but if you—the fact of what you're dealing with. Are we going to put people in jeopardy of their life or?

Ms. LAFLEUR. I think the fact that, for example, the 111d rules that you mentioned, Senator, are going to have a year for review. I've heard several times Administrator McCarthy say that year is to make sure that all the States and FERC and the RTOs are involved to make sure that reliability can be sustained.

But I think beyond just commenting, FERC, as the Administrator of the markets and the infrastructure, for example, if we need to burn more gas we need more gas pipelines. We have a role.

If for renewables we need more transmission, we have a role. We can't just comment. We have to make sure the system adapts because reliability is not optional.

Senator MANCHIN. I'm just saying, if I may?

The desirability of where the EPA might want to go verses the reliability of what you're responsible for. Would you overrule and do based on reliability and basically not adhere to the desirability if it's not practical?

Ms. LAFLEUR. I don't have control over what they ultimately rule. But I would always speak honestly if there were a reliability issue.

Senator MANCHIN. Mr. Bay.

The CHAIR. Thank you, Senator Manchin.

Senator Alexander.

Senator ALEXANDER. Thanks, Madame Chairman.

Welcome to both of you.

Reliability is job one, Mr. Bay. I hear that from Ms. LaFleur too, correct?

Mr. BAY. Yes, Senator Alexander.

Senator ALEXANDER. Rates are just and reasonable, I think you said that a minute ago and I've heard the words that your job is to keep the electricity markets open, competitive and fair. Is that correct?

Mr. BAY. That's correct.

Senator ALEXANDER. Mr. Bay, you're aware of the wind production tax credit?

Mr. BAY. Yes, I am.

Senator ALEXANDER. That it pays wind developers about 2.3 cents per kilowatt/hour for every hour produced?

Mr. BAY. I don't know the precise number, Senator Alexander, but I know—

Senator ALEXANDER. That is the number.

You're aware that that sometimes is much as some markets as the value of the electricity sold wholesale. Are you aware of that?

Mr. BAY. Yes.

Senator ALEXANDER. Let's take the example of it's 3 a.m. in Chicago and the wind is blowing which it does at night and everybody is asleep so the demand for electricity is not great. Are you aware that wind developers can literally pay utilities to take their electricity, drive the price below zero and create a condition called negative pricing?

Mr. BAY. There is negative pricing in a number of the RTO/ISOs.

Senator ALEXANDER. Isn't it true that when that happens that base load power such as coal and nuclear power becomes less economical to operate and that a pervasive system of negative pricing for wind power could contribute to the closing of base load plants?

Mr. BAY. I assume that that is possible, Senator Alexander.

Senator ALEXANDER. Would you say that if wind developers engage in negative pricing and sell and basically pay utilities to take their electricity that that amounts to market manipulation?

Mr. BAY. The market manipulation rule requires a showing of an intent to defraud and so one difficulty with calling that type of behavior market manipulation is that it is behavior that has been basically permitted by Congress in passing the Production Tax Credit.

Senator ALEXANDER. So would it also be fair to say then that if there is a law or a tariff of the Commission that establishes something as legal that that would be a complete defense to market manipulation?

Mr. BAY. In order 670 which is the order that implemented the EPACT 2005 Anti-manipulation Authority, the Commission which issued order 670 by unanimous vote under Chairman Kelliher noted that conduct that was specifically authorized by a tariff created a defense.

Senator ALEXANDER. Does create a defense?

Is it a complete defense?

Mr. BAY. If it—I can't recall the exact language and I would have to look at the language of Order 670. But it's recognized in the Order that if conduct is specifically authorized by the tariff that that's a defense.

Senator ALEXANDER. So a wind developer can relax if they're engaging in paying utilities to take their wind power because even though it might not be good policy, it's specifically permitted by law?

Mr. BAY. I think it depends upon the market tariffs and that RTO/ISO, Senator Alexander.

Senator ALEXANDER. Do you think it is good policy for—if job reliability is No. 1, to create a condition where wind producers can actually pay utilities to take their electricity sometimes in some markets?

Mr. BAY. I don't think I'm in a position to evaluate the merits of the Production Tax Credit for wind.

Senator ALEXANDER. I would think if reliability is job one and keeping markets open and competitive and fair and rates just and reasonable that that would be forefront of your job.

The Center for Strategic and International Studies says that there may be 25 of our nuclear plants close between now and 2020. Now the principle cause of that is probably the low cost of natural gas. Another cause might be over regulation. But one cause is, they say, negative pricing. It would seem to me that that would be important.

Would it be consistent with the Obama Administration's concern about climate change to allow to continue a system of negative pricing that contributed, even in a small way, to the closing of nuclear power plants that produce 60 percent of our carbon free electricity?

Mr. BAY. I can't comment more broadly on the Obama Administration's climate plan. I can tell you that I do recognize that nuclear currently constitutes about 20 percent of the generation in the United States and it has—

Senator ALEXANDER. Sixty percent of the clean electricity.

Mr. BAY. It has advantages because it is, you know, there are no carbon emissions and it has little price volatility and it's reliable.

Senator ALEXANDER. Thank you, Mr. Bay.

My time is up, Madame Chair.

The CHAIR. Thank you.

This is the order, Senator Heinrich, then Senator Barrasso, then Senator Cantwell, Senator Portman, Baldwin, Lee and Senator Wyden.

Proceed, Senator Heinrich.

Senator HEINRICH. Thank you, Madame Chair.

I wanted to just be clear about a couple of things that have come up over the course of the hearing. In particular with reference to the Wall Street Journal article I wanted to make it clear that that was an op ed, not so much an article as an opinion piece authored by Mr. Schereman.

Also remark a little bit on the legal journal article because I would suggest that there certainly could be a bit of a sour grapes factor at play considering that Mr. Schereman has clearly represented the losing side in a number of cases.

But I think the bigger issue with regard to exculpatory evidence and deposition transcripts is a very good question. However, I don't believe it's one that we should blame on the staff, Mr. Bay or anyone else at enforcement for following the legal and regulatory envi-

ronment that they clearly work under. In fact, I think if there is a valid due process concern it's probably the job of this committee to get to the bottom of that and rectify it, if it exists.

I want to start my questions for both of you by asking you a little bit about your opinions on how best to modernize the grid. I guess I'd start out with a question that's more specific to my home State and then move on to some that are clearly a broader viewpoint for the purpose of the Nation as a whole.

New Mexico is fairly fortunate to have an abundant supply of a number of energy sources, in particular, natural gas, solar and wind. However, without the infrastructure to deliver that energy to markets these resources may never be fully developed. In the West, in particular, we have long distances and very complex land ownership, split between private, State, Federal, throw in Department of Defense as a whole additional layer of Federal.

I'd like to know from each of you, your thoughts on how the Commission can help promote investment in new interstate transmission capacity.

Mr. Bay, we'll start with you and then go to Ms. LaFleur.

Mr. BAY. I think there are a few generic factors that I would look to, if confirmed.

One would be to make sure that we provide as much regulatory certainty as possible to transmission developers, particularly with respect to rates, terms and conditions of service.

Second, FERC does have the ability to offer incentives for transmission development. So that's something. That's a tool in the tool kit, that upon the proper showing by the developer, that incentive might be available.

I think a third thing that FERC can do is to ensure that its review of the proposals is always thorough, professional and prompt.

Finally I would say that there is always the possibility of looking for additional efficiencies, looking for additional ways to streamline the process. That may involve changes within FERC.

Although my own personal view is that staff at FERC is outstanding, particularly in those offices. But it may be that there are ways of working with other key stakeholders where the process can be facilitated. In that regard I read that the White House has issued an executive order requiring Federal agencies to streamline the permitting process. I think that's a step in the right direction.

Senator HEINRICH. Thank you.

Ms. LaFleur.

Ms. LAFLEUR. Thank you, Senator.

I think there's a number of things that FERC can do to help modernize the grid through its oversight of interstate transmission.

One of the major issues we've been working on is Order 1000 which requires regional planning and cost allocation to try to make sure the region plans together with so much money going into transmission. New Mexico is in the WestConnect region with a wealth of renewables to plan for. The order requires that public policy requirements like renewable standards be considered.

Second as Mr. Bay alluded to, we do regulate transmission rates. That's both base ROE and incentives that Mr. Domenici and his colleagues gave us in 2005, the right to give out incentives. That includes incentives for advanced transmission technologies.

Finally, a lot of what I would call the geeky market rules really impact how easy it is to build and connect renewables and transmission in places like New Mexico, requiring more frequent transmission scheduling in shorter increments, streamlined rules for storage and ancillary services in the West. Some of these energy “geek” rules, I call, you know, really affect how feasible it is to bring in the new technologies.

Senator HEINRICH. Do you think those regional orders are working well?

Ms. LAFLEUR. I think it has great potential. I think in—so far what we’ve seen is that in the parts of the country that already had regional markets and regional planning have taken the next step and are doing competitive transmission solicitation already under Order 1000. In the parts of the country, like New Mexico, that had bilateral markets are a little earlier in their process. But the potential is very great.

Senator HEINRICH. Thank you.

The CHAIR. Thank you.

Senator Barrasso.

Senator BARRASSO. Thank you very much, Madame Chairman.

Mr. Bay, I note your comments to the Chairman about your commitment to do the right thing and a commitment to fairness. I’d like to ask you about an article published in the Energy Law Journal last week. It addresses the office you currently lead, the Office of Enforcement.

The author is a former general counsel at FERC and it relates to the fundamental principle of due process. I assume you believe in due process for someone accused of wrong doing because you said you have this commitment to do the right thing and committed to fairness.

According to this article there was a widespread view that the FERC enforcement process,” you know, under you, had become, “lopsided and unfair.” They go on to say that one needs only to observe the fact that enforcement staff denies in case after case the existence of exculpatory or exonerating materials only to produce a subset of these materials too late in the process to be of use in raising defenses.

They go on saying one of the fundamental principles of due process is that the government is not permitted to hide information from the accused that may aide in his or her defense.

The author states that the enforcement staff routinely, not occasionally, routinely fails to produce these documents. This seems to imply a level of bullying and tactics that seem to be unethical, biased and prejudiced.

I find this very troubling. I believe this raises serious questions about your fitness to be on the Commission. I also believe that these tactics have contributed to driving investors out of the electricity markets and that means a less reliable electric grid and higher costs for consumers.

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



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

Let me give you a little background about the Brady Doctrine. I was actually, when I came to the Office of Enforcement, it was at my recommendation that the Commission adopt the Brady policy, that is this policy that requires the disclosure of material, exculpatory evidence, to the defense where the defense doesn't have it and can't reasonably obtain it. It was my recommendation that the Commission adopt this policy, this written policy. The Commission unanimously agreed to do so.

So it is something that I care about. In fact I helped, as I said, bring it about.

But I'm not aware of the kind of, I would describe it as rampant, in a way that this article is written. If that were the case I would have the same concerns as you.

Senator BARRASSO. Let me ask one other principle question I think many of us are asking is why have you been nominated to the Commission? Not just why have you been nominated as a Commissioner, but why you've been nominated to be Chairman?

The nomination papers reveal no experience with the energy sector prior to 2009.

Prior to then you did not work in the energy industry nor did you work as a regulator of the industry.

Moreover, the Commission already has a Chair, Chairwoman LaFleur. She has been serving as a Commissioner for nearly 4 years, as Chairwoman for 6 months. While I don't often agree with her policy positions one can't deny that she's qualified to serve.

Prior to her confirmation she had spent over 20 years at 2 utilities, New England Electric System. She's also been President and Acting CEO of National Grid.

So given the wide gap in experience between you and Chairwoman LaFleur, why should we demote Chairwoman LaFleur to make room for you? What specific qualifications do you have to be Chairman of FERC?

Mr. BAY. I have great respect for Acting Chairman LaFleur. I have always worked well with her. If I'm confirmed and we're both confirmed, I would be able to work well with her. I look forward to working with her if I'm confirmed.

You would have to ask the White House that particular question, Senator Barrasso. But I would like to think that the White House might have considered a number of factors.

First, that I've done work and good work to protect consumers and the integrity of the marketplace and to ensure that there is a level playing field for all market participants. The bills that people pay for energy, they need to know that those bills have not been inflated, that they have not been ripped off in some fashion.

That's an issue that not only affects all the families that live on Main Street, all the middle class families that live on Main Street. It also affects large industrial end users, manufacturers and the like. So if there was one lesson from Enron and the Western Power Crisis it was that FERC had to be a cop on the beat to protect the energy markets.

Second, I do have experience with respect to the energy markets, particularly the physical markets and the financial markets. My experience, by the way, didn't just start at FERC in the sense that when I was a U.S. Attorney I worked closely with the national labs. After I left DOJ I was counsel to Sandia Labs for a number of years which Senator Domenici alluded to. There were even 2 summers when I was in college when I worked at a DOE research facility.

The third reason is that I have this bipartisan record of commitment to public service and to good government.

A fourth reason might be geographical diversity. I do come from New Mexico. It's a western State and it's a producer State. Westerners and Pacific North westerners have always cast a long shadow, not only on this committee, but at FERC as well.

Senator BARRASSO. Thank you, Madame Chairman.

The CHAIR. Thank you.

Senator Cantwell.

Senator CANTWELL. Thank you, Madame Chair.

Thank you for this important hearing. It was so good to see our colleague Senator, former colleague, Senator Domenici, here this morning. It was reminding me of all the work that this committee has done over the past many years. I was thinking as I was looking around, I'm so glad we're joined by such smart and talented new colleagues, but I'm also reminding myself as we sit here that I think there's only a handful of us that were even on the committee in 2005. I think maybe 4 or 5 of us.

So when it comes to this issue I think some of our colleagues are just catching up to speed on the importance of the anti-manipulation laws that are on the books and what FERC has done in that regard. So I hope people will spend time on that issue because we had many hearings during this process. I'm reminded of another hearing that we had, actually I think it was before the Finance Committee, where Rex Tillerson, the Exxon Mobile Chairman testified about how outside Wall Street markets were driving up energy costs and basically it resulted in a headline, Exxon CEO says Wall Street is driving up gas prices by 50 percent.

So while people don't remember those days or remember all the enforcement that now come into these energy markets. If we want to have a hearing about whether our manipulation laws are hitting the mark, don't go far enough, you know, we should have that hearing. I don't think that's about Mr. Bay as much as it's about whether Wall Street has really been policed in the efficient ways to not drive up, artificially, the cost of energy markets.

I think energy markets are the lifeblood of any economy. If we don't police them properly then we are going to police ourselves out of economic development.

So I wanted to, if I could, Ms. LaFleur, you know, we've had all this discussion here. I think you said it best when you said, you know, FERC's job is about the, you know, interstate transmission lines, correct?

Ms. LAFLEUR. Yes.

Senator CANTWELL. Applying just and reasonable rates, correct?

Ms. LAFLEUR. Yes.

Senator CANTWELL. So I think some of my colleagues think that somehow you or Mr. Bay are going to decide in some individual State what generation is going to come online. That's for the State to decide, correct, whether it's—

Ms. LAFLEUR. That's correct, as you know, under the Federal Power Act. That's left to the States.

Senator CANTWELL. So whether it's coal or nuclear power or what have you, the State decides that. You only decide whether it's a just and reasonable rate?

Ms. LAFLEUR. That's essentially correct.

The State definitely has the right to build transmission—build generation and decide what they want. Sometimes the rules of how much the generation gets paid in the market affects what gets built. But we don't site generation or require generation to be built.

Senator CANTWELL. Which I think is important that somehow the long arm of a FERC Commissioner could come down and make that decision. I don't hear anybody saying that it's happened so far one way or another, right?

Ms. LAFLEUR. That's correct.

Senator CANTWELL. Like no one is here saying this is what happened, you know, when this commissioner was on or that commissioner was on and here's how they drove this policy to favor one source over another. I haven't heard of those arguments.

To this point about, you know, the Commission and manipulation, is there anything that the enforcement division has recommended over the last several years, you know, 4 or 5 years that you have disagreed with as far as a case on manipulation?

I mean, one that's been decided by the Commission?

Ms. LAFLEUR. I have not substantively dissented in any of the orders to show cause. That's not true, in any of the settlements. I have dissented on a few orders to show cause in terms of the application of the penalty guidelines. I've also had some procedural dissents in some of the procedures that are used in the investigations.

I think that this is a relatively new area of our work. It's to be expected that we'd have debates about how the rules are to be applied. I think that's why we have 5 Commissioners. But I haven't dissented on any of the settlements or the substance of the orders to show cause, just the penalties and procedures.

Senator CANTWELL. I guess I would just say I think that some people think they don't like the fact that Mr. Obama has nominated Mr. Bay, maybe over you, to be the head of the Commission. But yet, you've agreed with every decision that he's recommended on manipulation and principles. So the issue is, on at least this point, you know, I don't see the difference.

Madame Chair, if there is some issue about exculpatory evidence and the comparison between FERC and say, what DOJ does on exculpatory evidence or what the FCC does on exculpatory evidence. Let's have that hearing, as my colleague from New Mexico was pointing out, let's look at that.

But I would say that the decision on releasing exculpatory evidence is the Commission. It's the Commissioners responsibility, not Mr. Bay's. He's the staff member. At this point, he's the staff member.

They are the Commissioners. They decide.

So if somebody wants to find fault with exculpatory evidence I would say, start with the Commission.

Thank you.

The CHAIR. Thank you, Senator Cantwell, for your leadership on that issue in particular.

Let's go to Senator Portman.

Senator PORTMAN. Thank you, Madame Chair.

Appreciate your holding this hearing and your hearing on reliability. The grid reliability hearing I thought was an excellent opportunity for us to talk about something that's a big deal in Ohio. We've got, as you know, probably 41 of our coal fired plants that are being phased out. I think that's the most of any State in the country.

Some are going to retire altogether. Some are being converted to another fuel source. To the question that my colleague, Senator Cantwell, asked about the difference between you 2 in terms of your decisions, I guess the concern that some of us have is just the question of experience. This is a very complex sector of our economy. Certainly the whole grid reliability issue has raised a lot of very difficult issues that as Acting Chair, Ms. LaFleur, you've been involved with.

I appreciated the fact that last time we talked about this there seemed to be an understanding that, you know, this is a serious issue, a danger in terms of prices to the consumer. Ultimately I think about what happened last winter. Natural gas prices jumped to as high as \$2000 a megawatt for some utilities. I mean, I really think if it had not been for the grid operators at PJM, it might have brought down the grid in our area of the country.

So this is a serious issue. It has to do, again, with this traditional coal fired plant base generation shifting to more reliance on natural gas. It also has to do heavily with Federal regulations. In Ohio we're seeing that very directly as we heard testimony from at this committee.

So I guess I would ask you a question, Mr. Bay, if I could. What do you think the FERC should do, if anything, to help the Environmental Protection Agency understand how, collectively, their rules are impacting grid liability because the reliability of the grid is really a FERC responsibility? So what would you do to ensure that EPA understands how these rules affect reliability?

Mr. BAY. FERC has to work closely with the EPA and has to provide technical assistance to the EPA to make sure that the reliability issues are recognized. Then I think what FERC also has to do is to monitor the situation and work with other key stakeholders. It's not just the EPA. It would include NERC, the RTOs/ISOs and the States which do their own resource advocacy planning.

Senator PORTMAN. In response to that question Acting Chair LaFleur said we've tried to be a source of reliability expertise to EPA. I think as those rules are developed we need to be commenters in the draft stage such as the Greenhouse Gas Rules that are coming out on June 2nd. Would you agree with that?

Mr. BAY. I would support that, if confirmed.

Senator PORTMAN. OK.

I think her response was a little stronger than yours. Without giving you the benefit of what she had said and I hate to pit you guys against one another.

But that's our concern, really, is just to ensure that as a member Ms. LaFleur continues to take this role seriously of ensuring that the regulators understand what their impact is on reliability and that as a new chair that you would be someone to provide, really not just technical assistance, but helping as a commenter as you said on draft rules as they're being developed by EPA.

A couple of other questions for you, Mr. Bay.

We also had a discussion about base load operation and there seem to be a consensus developing in our last hearing that base load generation should receive a higher value in the capacity market to ensure that we had enough of this kind of generation to support the system. I guess I would ask you if you agree that the capacity markets are not properly rewarding base load generation.

Mr. BAY. This is an issue that the Commission has teed up at the April 1st technical conference that it just had with the question being whether or not certain resources are providing value that's not being adequately recognized or compensated by the markets, in this case the capacity markets. So comments have been invited. If I'm confirmed, I certainly look forward to reviewing those comments and talking to other stakeholders about it.

Senator PORTMAN. Going back to this cumulative effect of regulations, would you commit to modeling what the cumulative effects are of EPA regulations if you became chairman?

Mr. BAY. Senator Portman, I know that this is a very important issue for you. I know that you've raised it in a number of hearings. This might take a little bit of time to explain but if you can indulge me, I'll try.

Currently there are a number of assessments that are done, although they do not focus exclusively on EPA rulemakings. NERC does a study on reserve margins. It's actually a very helpful study. It was relied upon by staff at FERC in doing their summer assessment.

The RTOs/ISOs do a study as well. Of course, States do studies.

So one question I have is what FERC could bring to the table given the other studies. It's certainly something that is doable although I think that there are some challenges.

One is that you would have to try to do the modeling before the rules have been finalized. There's a little bit of a moving target issue.

Then, of course, you have to try to project load. It depends how granular you want to be and how weedy whether you're looking at States or whether you're looking at regions or whether you're looking at regions or whether you're looking nationally.

Then, you would have to try to determine the business plans of generators. Are they planning to close? Are they planning to retrofit or are they going to be opening up a new unit?

So and then, of course, you would have to try to determine the reason why the current plant is closing. Is it because of the EPA rulemaking or is it because the plant is 40 to 50 years old, has a high heat rate, is inefficient and the like.

So there are a number of issues there. But all of that being said, if confirmed, I'm certainly willing to discuss the issue with my colleagues on the Commission and to see if we can't reach some sort of consensus.

Senator PORTMAN. My time is expired and others are here, but I would just say that I, for one, and I think the committee would benefit from this as well.

We'd like to see that modeling from a national perspective. We understand it require certain assumptions. We would hope you would be totally transparent on what those assumptions are so people could understand what the business models are, what regions you're talking about in terms of why plants are closing. You know, you should also talk to the operators because, as I testified under oath before this committee, that regulations clearly have an impact.

So I would hope that you would work with us on that modeling. I assume you're going to be confirmed. I think we would benefit greatly from that information to avoid, again, a near disaster last winter, some suggested problems this summer, perhaps and certainly next winter, if there's another cold winter. We would benefit from that expertise that FERC exclusively has.

Thank you, Madame Chair.

The CHAIR. Thank you, Senator Portman.

Senator Baldwin.

Thank you for your patience, Senator.

Senator BALDWIN. It's well worth the wait to get this opportunity, thank you, Madame Chair.

Thank you to both of our nominees for taking the time to meet with me earlier in this process.

I wanted to have the opportunity to ask a couple of questions of both of you.

One that very closely ties into a hearing that the Chair and ranking member were very—well, that I was very pleased that you arranged to look at a crisis that occurred throughout parts of the United States, but certainly affecting Wisconsin which was a very severe propane shortage last winter. The hearing had a witness, one of the staff members at FERC, Nils Nichols, who is an expert on pipelines. We were very pleased to have him on hand to discuss the role that the Commission played in responding to this crisis.

I just wanted to follow up on that testimony because I think the experts that were assembled for that panel agreed that it was FERC's emergency order to reprioritize propane on a particular batch pipeline that really helped ease the crisis. It was, sort of, a turning point in what was a long crisis for us.

But there was also some discussion about the tool that was used to accomplish this task. What might need to be revisited in case it needs to be used in the future. So this emergency authority was clearly critical to the Midwest and other—to the Midwest this year. I would say as a—ask as a FERC Commissioner how would you work to update this particular power authority tool or advise us to create greater legislative clarity to ensure that the Commission has the ability to respond in this—in a like manner in a future crisis.

Please?

Ms. LAFLEUR. Thank you, Senator.

I was very pleased that we were able to use our authority under the Interstate Commerce Act in February. It was the first time it had ever been used since the time of the railroads.

I think, in terms of what we can do better under our existing authority, I would try to be more alert next winter to the emergency earlier so we could maybe get ahead of it a little more than we did this winter. It wasn't something that we normally do so we weren't necessarily—it was brought to us by the National Propane Gas Association, some of the pipelines and we reacted. I would like to be a little more proactive in monitoring it.

In terms of what Congress could do? They could certainly expand the authority. But I, since it's only been used once in decades, I guess given how difficult it is to change legislation, I think we should focus on using what we have effectively right now.

Senator BALDWIN. OK.

Mr. Bay, do you have any comment on this?

Mr. BAY. Just a few thoughts, Senator Baldwin.

I appreciate your leadership on this issue. I know that your letters to the Commission have been very effective in making sure that the Commission focused on the needs of your constituents.

I would underscore the points that Acting Chairman LaFleur made. I think there are several things that FERC can do going forward.

One is to continue to closely monitor propane. We do have market monitoring capabilities in the Office of Enforcement. They do track propane.

Second, make sure that these good lines of communication that opened up this past winter continue to stay open and that FERC continue to have these discussions with key stakeholders like State officials, Congress, industry. The National Gas Propane Association took a very active role here. It was very helpful. With other stakeholders.

Then finally I think that the Commission could consider issuing a policy statement with respect to its emergency authority under the Interstate Commerce Act delineating the conditions under which it might invoke that emergency authority.

But I give tremendous credit to Acting Chairman LaFleur for her leadership in taking charge of that order and making sure it got issued.

Senator BALDWIN. Thank you.

Additionally I wanted to talk about natural gas pipelines. Obviously we have changing circumstances in the United States with regard to production of natural gas. I know my home State has a strong manufacturing sector and many are eager to switch or transition to natural gas. Although some have found themselves unable to access supplies, the supplies of gas that they need.

But many of the pipeline projects that will become—will come before the Commission in the future will carry fuel directly to export and not to domestic consumers. Other projects will be proposed to serve domestic consumers after the lines that they have previously or historically relied upon and paid for over the years have been diverted to provide for the export market.

So what will guide you, as FERC Commissioners, in the review processes to ensure that domestic rate payers are not footing the bill to get our fuel to foreign customers?

Ms. LAFLEUR. Senator Baldwin, our authority over LNG export is really limited to the environmental and safety review of the export facilities and the appurtenant pipelines. The actual export of the commodity is approved or disapproved by the Department of Energy.

I will say though that implied in your question was somehow changing the direction of a pipeline. In any case where someone seeks to abandon a pipeline or change its direction FERC does have a Consumer Protection Authority to make sure that the customers who were relying on that pipeline for gas are protected under the rights and the existing tariff. It's not something we take lightly to change the use of a pipeline.

So, but as to the commodity export, that's not something we look at.

Senator BALDWIN. Right.

Mr. Bay.

Mr. BAY. I don't have any additional comments, Senator Baldwin.

The CHAIR. Thank you.

Senator Lee I think will be our last questioner and then Senator Murkowski and I will wrap up with finals unless other members have it. We'll try to conclude in about 10 minutes.

Senator Lee.

Senator LEE. Thank you, Madame Chairman.

Mr. Bay, I've got a few questions for you.

First of all, my first line of questions relates to an Op Ed that was referred to briefly earlier penned by Bill Scherman in the Wall Street Journal, in yesterday's copy of the Wall Street Journal. He raised some concerns with some of FERC's enforcement activities. Let me just read a portion of it to you here.

He said, "Unlike such agencies as the Securities Exchange Commission, at FERC subjects are forced to fight with one hand tied behind their backs. FERC often doesn't provide the subject with the information it collected during the investigation even when its allegations are based on that information. FERC enforcement also often does not even provide the subjects with all the information it has shared with the Commission."

He goes on later to explain that FERC recently said its enforcement is under no obligation to provide any response to the legal and factual arguments raised by subjects.

Are these statements made by Mr. Scherman true as far as you are aware? Do you think that we need some reforms to the way FERC enforcement is proceeding?

Mr. BAY. Certainly I am always open to suggestions if the suggestions can improve what we do. But I actually do not think that those particular criticisms are correct.

Mr. Scherman makes the allegation that there is no sharing of information by FERC enforcement staff, but in point and fact there is a preliminary findings letter that subjects of investigations receive. That preliminary findings letter provides what its name suggests.



It contains the preliminary findings.

It lists the allegations.

There's just a tremendous amount of information in there.

Senator LEE. OK, so I don't dispute that there is information shared by FERC. But that's not—I don't see that as necessarily refuting what he's saying. If what he's saying is that they're not sharing the information they've got. They might be sharing some of it but withholding other aspects of it.

Do you concede that point?

Mr. BAY. The information—so not only is there the preliminary findings letter, but if the case proceeds to the show cause stage my understanding is that staff will share information with the subject of the show cause order.

The other thing I would say, so there is sharing of information. By the way, my understanding, Senator Lee, is that is consistent with practice at the SEC where once the action is filed, that's when the SEC provides the information. So I don't think that FERC practice is an outlier in this regard.

The other point I would make—

Senator LEE. But both as to the type and quantity of information shared and as to the timing of it, you think it mirrors—

Mr. BAY. I don't—

Senator LEE. That which is granted by the SEC?

Mr. BAY. I think it does. That's certainly something that I can follow up with you on in the questions that are submitted after the hearing.

Mr. BAY. I think it does, but I do not believe that FERC's practice is, again, is an outlier relative to other enforcement offices.

Senator LEE. OK. Yes, I'd like to follow up on that because Mr. Scherman, who has represented dozens of people under investigation by FERC and is also familiar with the SEC's practices, takes issue with that and seems to disagree with it.

What about this other point that FERC, itself, and he's quoting here. FERC recently said that its enforcement, "is under no obligation to provide any response to the legal and factual arguments" raised by subjects.

Mr. BAY. So, I don't think that's correct in this sense.

Senator LEE. But these are quotes.

Mr. BAY. Right.

Senator LEE. I mean, there are quotation marks around what I just uttered. Are you saying that—

The CHAIR. They're not his quotation marks. They're someone else's.

Mr. BAY. They're not my quotation marks, yes. No.

Senator LEE. OK.

Mr. BAY. So I don't know where he got the quote. But and I don't know what context that comment was made, you know, for which quotation marks were added.

This is what I can tell you though is, if there is a preliminary findings letter the subject of the investigation is given the opportunity to respond. Of course, there is a lot of discussion even before you get up to that point where there's a lot of back and forth with the subject of the investigation which they have the opportunity to convince FERC staff that the matter should be dismissed.

If the matter proceeds that's when the preliminary findings letter is created which the subject has the ability, which the subject has the ability to respond to. Then what FERC staff has to do is seek settlement authority if it believes the matter should still proceed. It has to seek settlement authority from the Commission.

So the Commission then would receive not only the FERC's staff memo, but it would also receive the response from the subject of the investigation.

Then if the matter doesn't settle then FERC staff would issue something known as a Wells notice which the subject of the investigation, again, has the opportunity to respond to.

If FERC staff still believes that a show cause order should be issued it prepares a report for the Commission attaching the prior filings by the subject of the investigation. FERC staff does not necessarily respond to the counter arguments raised by the defense to the 1b.9 note or the 1b.19 note. So that is the Wells notice.

But all of this then goes to the Commission which then has the opportunity to review it. After the show cause order is issued, if it is issued, the subject of the investigation has the ability to respond.

Honestly, FERC provides a tremendous amount of process to the subjects of investigations. They are, in my view, there's a lot of transparency into the work of the Office of Enforcement because it's been very important to the Commission over the years that that transparency be provided whether it's Brady evidence, exculpatory evidence or whether it's penalty guidelines, whether it's a notice of alleged violations, whether it's our annual report which indicates, for example, cases that we've dismissed and why.

Senator LEE. OK, Chairman, I want to follow up in writing.

The CHAIR. Yes, thank you.

Senator LEE. I see my time has expired. It sounds to me like what you're saying is that the procedures are adequate, but I'll want to follow up with you on why you believe that to be the case. We'll do that in writing.

Thank you very much.

Mr. BAY. Thank you, Senator Lee.

Senator LEE. Thank you, Madame Chairman.

The CHAIR. Thank you, Senator.

Let me just end with 3 brief comments and then Senator Murkowski, you may have some comments as well.

I think this has been a very excellent hearing in regular order to evaluate the qualifications of these 2 nominees.

The Commission, Mrs. LaFleur, Ms. LaFleur, has received from me recently and some local elected officials from Louisiana a number of letters regarding a Boston based hedge fund, ArcLight, their plans to abandon a pipeline that has served 9 parishes in Northeast and Central Louisiana would effectively end affordable natural gas services to these parishes that are sparsely populated, relatively poor. I know that you can't comment on ongoing investigations. But I'm going to ask in writing, without getting into specifics of this case.

Do you and I want to ask you, Mr. Bay, do you agree that is a violation of the Natural Gas Act public interest standard, as currently written, to abandon a pipeline and effectively strand the affected customers with no service or unreasonable terms of service?

Ms. LaFleur.

Ms. LAFLEUR. I'll look forward to those questions. I know we've had correspondence on this before.

As I indicated earlier when we have an application to abandon, our responsibility is to make sure that customers are protected.

The CHAIR. You understand that to be the current law?

Ms. LAFLEUR. Yes.

The CHAIR. The current law that they cannot be left with no service, but they also cannot be left with unreasonable terms of, you know, different service?

Ms. LAFLEUR. Of course, I can't comment. I wish I could, but I can't comment on the Midla pipeline.

The CHAIR. I know, but generally.

Ms. LAFLEUR. But I certainly believe that when we get an application to abandon, we have to make sure the customers are protected in their service and rates.

The CHAIR. OK.

Let me ask this general question. I know I said in terms of safety of pipe, not safety of pipelines but in the upkeep of pipelines that is important so that service can continue over time because rates are paid. Who makes sure that the companies that own pipelines are investing back in the safety and security and just general maintenance of pipelines so that they actually last as long as they are supposed to?

Ms. LAFLEUR. PHMSA, the Pipeline—it's part of the Department of Transportation, I believe. H stands for Hazardous. But the Pipeline Authority, PHMSA, Cynthia Quarterman's authority—

The CHAIR. Do you know how many people they have working for them?

Ms. LAFLEUR. I believe several hundred. I've been over to meet with them, but I don't know exactly. But we do the rate regulation that supports safety.

The CHAIR. Hm hmmm.

Ms. LAFLEUR. But I could take that as question for the record.

The CHAIR. OK.

The CHAIR. Thank you.

Then on the Toledo Bend issue and thank you for the courtesy here, Senator. I just did a field hearing in Louisiana, I mentioned it in my opening statement. Toledo Bend Reserve is the largest, non-federally owned reservoir in the country.

The local authority which is a relatively poor and rural parish, Sabine River Authority, has already spent over \$10 million on a licensing process that's taking 7 years and is not completed yet.

FERC can partially offset these costs by granting a longer 50 year term, as I requested, as opposed to 30. I just want to follow up and continue to call that to your attention. I know that, you know, \$10 million is not a lot of money by Washington standards, but by Sabine Parish, I can promise you \$10 million is an awful lot of money.

So I want to continue and then finally, following up on Senator Baldwin. She and I are in a little bit opposite ends but both understand that we want to have natural gas for our country. But I also believe that a proper, reasonable level of exports can provide more vibrant markets, more aggressive exploration and production. But

we also don't want to undermine our domestic markets for creating jobs right here in America.

So I'm going to submit some additional details on the liquefied natural gas export process. I thank both of you for responding in writing.

The CHAIR. Senator, any final comments from you? Thank you for your courtesy.

Senator MURKOWSKI. Just very briefly, Madame Chairman. Again thank you to both of you.

This is probably going to be more of a statement than a question, but I think we've had some good discussion here today about some of the processes that are inherent within the FERC and within the Office of Enforcement. I think many of us would suggest that this needs to be looked at. When there are, continuous, allegations or criticism that due process is lacking, that there is, there are substantive issues at play when we're talking about the inability to obtain exculpatory evidence, and the inability to really be able to engage at a timely part of the process.

I think this causes concerns. It is suggested in an article that came out, again, a day before yesterday here, but it suggested that if the Commission is willing and I'm reading this from the Wall Street Journal article, that the FERC, "can adopt limits on its enforcement power and appoint administrative judges to oversee the investigation process." Then it details what other fixes might be included in providing investigation subjects with collected information including exculpatory information, granting subjects some limited discovery rights, defining market manipulation, laying out clear rules, defenses and safe harbors are also essential.

I think—I know, Madame Chairman, that the purpose of today's hearing is to determine whether or not Ms. LaFleur should be nominated and Mr. Bay, nominated as Chair, but I think there have been some interesting issues that have been raised. I don't know how much of it would actually have to be driven through legislative changes versus what can be done administratively from within the Commission.

But again, I will repeat and I think most everyone here on the Dais has said, this is an extraordinarily important Commission and becomes more important every day as we talk about the issues that so many have raised today as it relates to reliability, as it relates to capacity, to pricing for the consumers. This is big and important stuff. If it is viewed that the Commission is not operating in a manner that delivers a level of credibility this is a problem for us.

So, I'd like to explore this a little more in detail. But I do think, again, it goes to, again, the significance of the character and the quality of those who we are tasking to serve on this Commission.

Ms. LaFleur, I have stated repeatedly I have great confidence in you. I think that you have clearly risen to the challenges you've taken on, the acting role. I've made no secret of the fact that I would like to see you continue in that capacity.

Mr. Bay, you have presented yourself well in terms of response to the questions. But when it comes to the specifics on the policy my observation is that there are still areas where you have yet to gain that level of experience just on that policy side.

I want to make sure that the FERC is not rolled over by the EPA. I think sometimes that's what happens. Yet, you've got to work with the EPA, but you need to stand shoulder to shoulder with them as an agency.

So, again, I appreciate the willingness of both of you to serve. I know we'll have further opportunity to provide questions for the record which we hope that you would answer in a timely manner. But again, thank you for the opportunity this afternoon.

The CHAIR. Thank you.

Senator CANTWELL. Madame Chairman?

The CHAIR. Yes?

Senator CANTWELL. If I just could because I too appreciate this hearing. I hope that, you know, we'll step back and take a larger look because, you know, we're drilling down into detail here on one particular element of the Commission. Believe me, I know it's important and it's, I guess I would be where the Ranking Member was in her statement about FERC and not being like a household name.

But unfortunately in the Northwest we learned it was a household name in the Enron crisis. We depended on it. We had to depend on it. Otherwise we would have been the deep pockets in much manipulation.

So I just want to make sure we all step back for a second and realize the home run that has been hit by FERC when it comes to enforcing anti-manipulation language that we gave to them in 2005. They are the shining light in a regulatory scheme of making sure that energy prices are just and reasonable.

Now, we wish we would have had that happen before. That they would have just been enforced as just and reasonable, but there was a lot of attempts by a lot of previous people to make sure they weren't enforced. That's why we have the new law.

But as far as agencies and the policing of the market, they have been a leader. So if we need to get something fine tuned and right, we shouldn't hesitate to look at that and to observe that. But I would definitely make sure we're holding the Commission at large as part of that effort.

Madame Chair, I just believe so much that, you know, I believe in investment. I took over your job as a small business chair. I can guarantee you, I believe in access to capital.

But I also believe that our energy markets cannot be the tool of a lot of people who just want to invest for the purposes of their own manipulation of the market. We have to have policemen on the beat. So I just, while we drill down here also remind people that the policemen have been on the beat and have done a lot of great work.

Thank you.

The CHAIR. Thank you, Senator Cantwell.

The record will remain open until 5 o'clock tomorrow afternoon for members to submit questions to these 2 nominees.

The CHAIR. Then we will proceed under regular order.

Meeting adjourned.

[Whereupon, at 12:26 p.m., the hearing was adjourned.]



## APPENDIX

### RESPONSES TO ADDITIONAL QUESTIONS

---

#### RESPONSES OF CHERYL A. LAFLEUR TO QUESTIONS FROM SENATOR LANDRIEU

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

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

#### *TOLEDO BEND*

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

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

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

*Question 1.* The problems Toledo Bend has faced over the past several years are not unique. What is FERC doing to simplify the relicensing process and how it is making sure that the costs associated with relicensing aren't diminishing the economic benefits of hydroelectric projects like Toledo Bend?

Answer. The Federal Power Act requires the Commission to ensure that hydropower licenses are best adapted to a comprehensive plan for developing affected waterways, which the Supreme Court has held requires an examination of all public interest considerations. In order to provide sufficient information for the Commission to understand the environmental impacts of relicensing a project, license applicants must provide the Commission information regarding affected resources. The costs of gathering this information will vary, depending on the complexity of the issues and the extent to which there is already existing information available.

Proceedings may become more lengthy and expensive if state and federal resource agencies with mandatory conditioning authority seek substantial new information, or if there are significant disputes among stakeholders. Within these constraints, the Commission makes every effort to ensure that hydropower relicensing proceedings are as efficient and cost-effective as possible, requiring only those studies that are justified and shown to be reasonably cost-effective, and encouraging stakeholders to reach agreement on the scope of the process and the issues in the proceeding. In addition, pursuant to the Hydropower Regulatory Efficiency Act of 2013, the Commission is investigating the feasibility of a two-year licensing process for projects at non-powered dams and for closed-loop pumped storage projects. To date, the Commission has held a public workshop, received public comment, and issued criteria and solicited applications for projects to test a two-year process.

#### *LIQUID NATURAL GAS*

FERC remains at the center of our efforts to efficiently approve licenses for Liquefied Natural Gas (LNG) export facilities in Louisiana and across the country. Responsibly exporting LNG will create thousands of high-paying jobs and help provide

energy security for our allies. We should be exploring how to expedite the approval of LNG export facilities.

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

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

*Question 2.* What can FERC do to expedite the approval of LNG export facilities in the United States?

Answer. In general, FERC acts on both pipeline and LNG project applications expeditiously. About 92 percent of applications are acted on within a year of the filing of a complete application. To date, and in light of this record, I have not identified specific changes that I believe are needed at this time. However, I believe that the Commission should continue to dedicate sufficient resources to maintain an expeditious review process, and I am always open to looking for ways to improve the Commission's processes.

#### *MIDLA PIPELINE*

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

ArcLight should have known the pipeline was in serious need of repair to maintain safe operations when it purchased Midla in April 2013. I agree with Louisiana customers that ArcLight should be held responsible for the poor condition of the pipeline, which it recently purchased and now owns, and is also responsible to finance the necessary maintenance, repair and possible replacement without saddling customers with an unaffordable bill. ArcLight must take responsibility for the safety and operation of the Midla pipeline and offer constructive solutions to solve the safety and operational problems of the pipeline in a way that allows 9,000 Louisiana customers to continue to get natural gas at an affordable price.

*Question 3.* Without getting into specifics of the ArcLight abandonment proceedings, do you agree that it is a violation of the Natural Gas Act public interest standard to abandon a pipeline and effectively strand the affected customers with no service, or unreasonable terms of service?

Answer. Under Section 7(b) of the Natural Gas Act, an interstate pipeline company may only abandon jurisdictional facilities or services if the abandonment is permitted by the "present or future public convenience or necessity." Central to the Commission's consideration of any request for abandonment authorization are the principles that (1) a pipeline which has obtained a certificate of public convenience and necessity to serve a particular market has an obligation to continue to serve, and (2) the burden of proof is on the applicant to show that the public convenience or necessity permits abandonment, that is, that the public interest will in no way be disserved by abandonment.

#### RESPONSES OF CHERYL A. LAFLEUR TO QUESTIONS FROM SENATOR JOHNSON

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

Answer. The Commission has undertaken and continues to undertake a number of policy steps to encourage appropriate development of transmission facilities. For example, I supported Order No. 1000 because I believe it promotes robust regional transmission planning processes to identify more efficient or cost-effective transmission facilities to meet regional needs, as well as greater certainty regarding how the costs of new transmission facilities will be allocated, both of which are key to increasing the likelihood that needed transmission will move forward to construction. Further, in response to policy direction from Congress in the Energy Policy Act of 2005, the Commission provides incentive rate treatments to encourage transmission development in appropriate circumstances. In 2012, I supported a policy statement that refocused those incentives to encourage utilities to use ratemaking tools that mitigate risk, and that provides guidance as to the kinds of transmission projects that the Commission believes would merit a higher return on equity.



With respect to allocating costs of new transmission, I believe the Commission's policies must be flexible to account for differing regional needs. In my time on the Commission, I have supported orders approving different approaches across the country that all respect the central principle that costs must be allocated in a manner at least roughly commensurate with benefits.

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

Answer. Virtually all energy issues and decisions require consideration of—and sometimes tradeoffs among—reliability, cost, and the environment. Rural electric cooperatives and municipal utilities are often leaders in efforts to bring down the cost of clean energy to their customers, including through deployment of new technologies. If confirmed, I am committed to continuing to work to help all segments of industry fairly balance all three considerations.

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

Answer. I believe FERC has strong authority to combat financial manipulation in the energy markets. I have noted that it would be helpful for Congress to provide clarification of the respective jurisdictions of the Commission and the Commodities Futures Trading Commission (CFTC) in the wake of last year's Court of Appeals for the District of Columbia case, *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013) related to exclusive jurisdiction over futures contracts. However, if confirmed, I would continue to focus on ensuring the Commission effectively uses the authority to combat market manipulation that Congress provided in the Energy Policy Act of 2005.

I also believe that FERC has sufficient tools and information to combat fraud. Over the past several years, the Commission has promulgated a number of rulemakings—such as Order No. 760, requiring RTO and ISOs to provide FERC with certain market transaction data, and Order No. 771, providing FERC with access to information (e-tags) used for scheduling electricity transmission—to increase the quantity and quality of information it receives about the energy markets. In addition, under the information sharing Memorandum of Understanding with the CFTC that I and then-CFTC Chairman Gensler executed on January 2, 2014, the Commission recently began receiving important financial energy trading data from the CFTC's Large Trader Report. This information has significantly aided the Commission's efforts to conduct market surveillance and analysis. I also worked with CFTC Acting Chairman Wetjen to create a staff-level Interagency Surveillance and Data Analytics Working Group to coordinate information sharing between the agencies and focus on data security, data sharing infrastructure, and the use of analytical tools for regulatory purposes. If confirmed, I believe the Commission should continue to look for ways within its jurisdiction to improve its market oversight abilities.

#### RESPONSES OF CHERYL A. LAFLEUR TO QUESTIONS FROM SENATOR STABENOW

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

*Question 1.* This demonstrates the need for FERC's oversight to ensure that energy markets provide customers with a fair price for the energy they depend on in their homes, farms, and businesses. What ideas will you bring to enhance FERC's efforts to detect instances of illegal market manipulation?

Answer. I agree that market oversight is a critical part of FERC's work, and that the Commission should act within its existing jurisdiction to rigorously monitor the energy markets for instances of manipulative behavior. In order to strengthen the Commission's ability to do that work, on January 2, 2014 I executed the information sharing Memorandum of Understanding (MOU) with the CFTC required by the Dodd-Frank Act. Under that MOU, the CFTC recently began providing key data from its Large Trader Report, which the Office of Enforcement uses in its market surveillance and oversight efforts. In addition, CFTC Acting Chairman Wetjen and I created a staff-level Interagency Surveillance and Data Analytics Working Group to coordinate information sharing between the agencies and focus on data security, data sharing infrastructure, and the use of analytical tools for regulatory purposes. Furthermore, over the past several years, the Commission has promulgated a number of rulemakings—such as Order No. 760, requiring RTO and ISOs to provide FERC with certain market transaction data, and Order No. 771, providing FERC

with access to information (e-tags) used for scheduling electricity transmission—to increase the quantity and quality of information it receives about the energy markets. If confirmed, I believe the Commission should continue to look for ways within its jurisdiction to improve its market oversight abilities.

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

Answer. I agree with the bedrock foundation underlying the Order No. 1000 cost allocation principles: costs of new transmission facilities must be allocated in a manner at least roughly commensurate with benefits received. As the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) has stated, “[t]o the extent that a utility benefits from the costs of new facilities, it may be said to have ‘caused’ a part of those costs to be incurred.” The “roughly commensurate” standard referenced in your question stems from the same Seventh Circuit decision. As there is no formulaic definition for “roughly commensurate,” I have previously stated that the Commission should remain flexible in assessing potential regional variations in the application of this standard. In evaluating filings submitted in compliance with Order No. 1000, we have not mandated a “one-size-fits-all” approach. Indeed, the Commission has found that various cost allocation proposals will allocate costs in a manner at least “roughly commensurate” with benefits received.

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

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

Answer. The Commission’s role with respect to exports is limited to approving the physical facilities used in exports, and ensuring, as you explain, that the facilities are designed and constructed safely and with minimal environmental impacts. Each export facility is unique as to its potential environmental impacts and also, to some extent, in its design. Therefore, every project must be evaluated on its own merits and it is difficult to draw many general conclusions from the projects that we have reviewed to date. I believe it is important that the review of every proposed project be thorough, and that the Commission dedicates sufficient resources to that task.

#### RESPONSE OF CHERYL A. LAFLEUR TO QUESTION FROM SENATOR HEINRICH

*Question 1.* I understand there are cases still pending at the Commission that are inhibiting generators from gaining access to existing transmission capacity because FERC has effectively delayed a decision by issuing tolling orders. In the west, development of a number of clean-energy projects depends on open access to the grid. Will you commit to acting on these types of cases as quickly as possible without issuing tolling orders that extend statutory deadlines?

Answer. Under the Federal Power Act, parties must seek rehearing of a Commission order within 30 days after the issuance of an order, and rehearing requests are denied by operation of law if the Commission does not act within 30 days after a party seeks rehearing. The Commission issues tolling orders of rehearing requests to prevent the denial of those requests by operation of law, and to ensure that the arguments raised by parties on rehearing receive fair and full consideration by the Commission. I certainly agree that the Commission should act on all matters before it in a timely manner, and, if confirmed, I commit to continue my efforts to help

ensure that the Commission acts in a fair, clear, and timely manner on issues that come before it.

RESPONSES OF CHERYL A. LAFLEUR TO QUESTIONS FROM SENATOR MANCHIN

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

Answer. The Commission's role under section 215, generally, is to certify and oversee the Electric Reliability Organization (ERO), to approve or remand mandatory reliability standards proposed by the ERO, and oversee enforcement of the approved standards. The Commission also may direct the ERO to file a new or modified reliability standard, as it did recently in directing the ERO to file new standards on physical security and geomagnetic disturbances. It is important to note that the Commission cannot write these standards itself. Fundamentally, the Commission's role under section 215 is to ensure, within the scope of jurisdiction granted by Congress, that these standards help maintain the reliability and security of the bulk-power system.

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

Answer. The Commission has a responsibility to help ensure that grid reliability is maintained as EPA rules are implemented. The Commission's formal role in reviewing EPA rules occurs during the Office of Management and Budget (OMB) interagency review process. Commission staff reviewed parts of the draft Greenhouse Gas rule as a part of that OMB process and provided input to the EPA from a reliability perspective. I am reviewing the June 2 proposal and note that it gives significant flexibility to states and permits regional approaches to compliance. I look forward to discussing the proposed rule with the EPA, utilities, the National Association of Regulatory Utility Commissioners (NARUC), Independent System Operators/Regional Transmission Organizations (ISOs/RTOs), the North American Electric Reliability Corporation (NERC), and industry.

In addition to commenting on EPA's proposal, FERC has a role in ensuring that the energy infrastructure and markets adapt to new environmental requirements through its authority over transmission ratemaking and natural gas permitting and ratemaking. For example, if additional gas generating capacity is needed and more gas pipelines need to be built, FERC has a role in certificating those pipelines. FERC also has a role in ensuring that the regulations under its jurisdiction are sufficient to attract needed investment in electric transmission and gas pipelines.

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

Answer. Yes. I believe it is important that the Commission continue its relationship with the EPA, utilities, NERC, and other stakeholders to ensure that reliability is sustained as the electric sector complies with new environmental regulations.

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

Answer. Generally, the dispatch of resources by the markets reflects their costs (or bids) but also reflects any applicable requirements imposed under other laws, including federal or state environmental requirements. For example, if a valid and approved State implementation plan under the federal Clean Air Act were to require an "environmental dispatch," that requirement would have to be met by the affected utilities and ISOs/RTOs. Under such a scenario, the Commission's statutory responsibilities would remain unchanged: to ensure just and reasonable rates, a reliable power grid, and fair and efficient markets. I note that markets in the East and in California have already begun to incorporate the price of compliance with greenhouse gas emissions reduction goals in response to the creation of the Regional Greenhouse Gas Initiative (RGGI) and California's carbon cap-and-trade program.

*Question 5.* Should FERC adopt policies that support one fuel type over another?

Answer. No. FERC policies should focus on ensuring that the rules that govern organized and bilateral wholesale electric markets promote the delivery of reliable power in a manner that is nondiscriminatory and resource-neutral, resulting in efficient price signals that market participants can rely on to make investment decisions. Although the drivers of power supply changes are largely outside of the Commission's jurisdiction, we must be aware of, and adapt to, these developments in order to carry out our statutory responsibilities to ensure just and reasonable rates, a reliable power grid, and fair and efficient markets.

*Question 6.* Are there currently any FERC policies, in your view, that promote one fuel type or energy source over another?

Answer. No. Please see my answer to question 5.

*Question 7.* EPA projected that its Mercury and Air Toxics Standards would not endanger grid reliability because the regulation would result in less than 5 GW of power plant retirements. Yet, EIA now projects that the regulation will close for 50 GW of power plants. More EPA regulations are to come—particularly for GHG emissions from existing plants. How will you address the inaccuracy to date on EPA projections on regulatory impacts on reliability?

Answer. FERC's formal role in reviewing EPA rules occurs during the OMB inter-agency review process. I believe that FERC should be involved in commenting on draft rules, monitoring industry's progress in responding to rules that potentially impact electric reliability, and helping assure that energy infrastructure and markets support environmental compliance.

Commission staff reviewed parts of the draft Greenhouse Gas rule as a part of the OMB process and provided input to the EPA. EPA issued its proposal on June 2. I am reviewing the June 2 proposal and note that it gives significant flexibility to states and permits regional approaches to compliance. I look forward to discussing the proposed rule with the EPA, utilities, NARUC, ISOs/RTOs, NERC, and industry.

*Question 8.* We hear that base load energy is essential to the grid but struggles in organized markets. Can you describe benefits to the grid that base load power is uniquely positioned to provide?

Answer. Serving customers reliably at the lowest possible cost requires the use of multiple types of resources with different characteristics. Base load generation is characterized by the ability to continuously meet energy demand at a relatively constant rate and base load generators have traditionally been a source of dependability, fuel security, and resource diversity. In addition to base load generation, system operators also rely on other resources that can change output levels quickly or otherwise provide flexibility to the system. The importance of any one characteristic depends on system conditions at a given time. For instance, during the extreme weather events experienced last winter, resources that had a secure fuel supply enhanced system operations and reliability. During significant fluctuations in load or variable energy resource output, flexibility and responsiveness are of primary importance.

I am aware that certain types of baseload resources are finding it difficult to recover their costs in the organized markets. The docket the Commission opened last fall on eastern RTO/ISO capacity markets is a potential forum for consideration of this issue.

*Question 9.* Do you believe that base load energy resources are essential to the reliable operation of the grid?

Answer. I believe that base load generation, which can provide continuous power to the grid, is one resource that provides system operators with the tools they need to reliably satisfy load at least cost.

*Question 10.* Why shouldn't FERC treat any net metering sale as a wholesale sale?

Answer. Although no net-metering cases have come before me during my time at the Commission, I have been following with interest the debates surrounding net metering that are occurring at the state level. While it would be inappropriate for me to prejudge issues related to net metering that could be presented to the Commission in the future, I look forward to participating, if confirmed, in any Commission consideration of this important issue.

*Question 11.* If a utility's grid operating costs are being shifted from net metering customers to other customers, is that just and reasonable?

Answer. Issues related to net metering, including the potential for cost shifting among customers, have received increased attention in recent months. I know such cases require careful balancing of the costs to interconnection customers with the costs borne by all other customers on the system. Although discussions have occurred primarily at the state level, it would be inappropriate for me to prejudge issues related to net metering that could be presented to the Commission in the future. However, I look forward to participating, if confirmed, in any Commission consideration of this important issue.

*Question 12.* Under what circumstances do you believe FERC should take action to prevent cost shifting from net metering customers to other customers?

Answer. As noted above, issues related to net metering, including the potential for cost shifting among customers, have received increased attention in recent months. I know such cases require careful balancing of the costs to interconnection customers with the costs borne by all other customers on the system. Although dis-

cussions have occurred primarily at the state level, it would be inappropriate for me to prejudge issues related to net metering that could be presented to the Commission in the future. However, I look forward to participating, if confirmed, in any Commission consideration of this important issue.

*Question 13.* FERC has determined that demand response should be given the locational marginal price. Do you believe this is the right policy or should it be overturned?

Answer. I voted in favor of Order No. 745, which, among other things, established rules for pricing demand response services in the organized energy markets. On Friday, May 23, 2014, the U.S. Court of Appeals for the D.C. Circuit issued a decision vacating Order No. 745 and addressing both the Commission's jurisdiction over demand response and Order No. 745's compensation requirements. The Commission is in the process of reviewing that decision and determining next steps. It would be inappropriate for me to prejudge any actions the Commission might take in response to the D.C. Circuit opinion.

*Question 14.* Should FERC treat a megawatt of energy produced the same as a "negawatt" of energy saved? What are the issues that differentiate a megawatt from a negawatt?

Answer. As noted above, the U.S. Court of Appeals for the D.C. Circuit recently issued a decision vacating Order No. 745 and addressing both the Commission's jurisdiction over demand response and Order No. 745's compensation requirements. The Commission is in the process of reviewing that decision and determining next steps. It would be inappropriate for me to prejudge any actions the Commission might take in response to the D.C. Circuit opinion.

*Question 15.* Will the physical security standard recently passed by NERC adequately protect the public from electric grid outage caused by terrorist attack?

Answer. NERC's petition to approve the physical security standard was filed with the Commission for review on May 23, 2014. It would be inappropriate for me to judge the merits before interested parties have an opportunity to submit comments to the Commission, so that we can consider all relevant arguments. I assure you that I will carefully consider the proposal and all filed comments to ensure that NERC's filing does adequately protect the public.

*Question 16.* Could an attack on an electric generation plant cause a cascading outage or long-term power shortage?

Answer. A carefully planned and executed attack on a single or multiple generation plants could cause cascading outages, but I have not seen information that would lead me to believe that it could cause a long-term power shortage. The extent and duration of any outage from an attack would depend upon a number of factors, such as the size and location of the plant, system loads, the configuration of the grid, the availability of replacement equipment and fuel, and the resilience of the systems under attack. Resilience begins with how the system is planned, designed, constructed, and operated, and is informed by how asset owners and grid operators respond to and learn from events. Many of these factors are addressed in detail in the FERC-approved mandatory reliability standards, such as standards requiring that the grid be able to continue to operate after a single contingency event and certain blackstart capabilities be in place, ensuring that additional generation is able to come online to replace units lost unexpectedly. Building a resilient grid requires comprehensive and ongoing assessments under a range of conditions, and, if confirmed, I will be dedicated to carrying out this work with NERC and others.

*Question 17.* Why were generation plants exempted from NERC's physical security standard?

Answer. NERC's petition to approve the physical security standard was filed with the Commission for review on May 23, 2014. In the petition, NERC states that a generation facility does not have the same critical functionality as certain transmission substations, and also that the planning process for the electric grid already plans for the possible loss of a generator. NERC adds that limiting the standard to certain transmission substations and their associated primary control centers will allow the industry to focus resources where they are most essential for maintaining reliable operations. It would be inappropriate for me to judge the merits before interested parties have an opportunity to submit comments to the Commission, so that we can consider all relevant arguments. I assure you that I will carefully consider the merits to ensure that NERC's filing does adequately protect the public.

*Question 18.* Why did NERC exempt operators of critical control centers—including the two major control centers for the western half of the United States—from physical security requirements?

Answer. NERC's petition to approve the physical security standard states that the drafting team determined that the standard should only provide additional physical security protections to those primary control centers that can physically operate crit-

ical substations. The drafting team also determined that a physical attack on a control center that only has monitoring or oversight capabilities of a critical substation would not have a direct impact on reliability in real-time. It would be inappropriate for me to judge the merits before interested parties have an opportunity to submit comments to the Commission, so that we can consider all relevant arguments. I assure you that I will carefully consider the merits to ensure that NERC's filing does adequately protect the public. I also note that control centers are required to be protected under the recently-approved NERC Version 5 cyber security reliability standard.

*Question 19.* Is it true that an electromagnetic pulse device in a suitcase or van could take out a critical grid control center or substation?

Answer. My understanding is that this is possible. The effectiveness of such an attack would depend on a number of factors, including the strength of the device, the proximity of the device to the target, the type of equipment that is being targeted, and the type of shelter housing that equipment.

*Question 20.* How much would it cost to build an electromagnetic pulse device capable of taking out a grid control center or substation?

Answer. It is my understanding that these devices generally cost tens of thousands of dollars to build. However, the effectiveness of such a device would depend upon the factors described above in response to Question 19.

*Question 21.* Why doesn't the new physical security standard approved by NERC contain required protection against local electromagnetic pulse devices?

Answer. NERC's petition does not directly address this issue. It would be inappropriate for me to judge the merits before interested parties have an opportunity to submit comments to the Commission, so that we can consider all relevant arguments. I assure you that I will carefully consider the merits to ensure that NERC's filing does protect the public adequately. However, it is worth noting that the Commission has directed NERC to propose reliability standards to address the threat posed by a geomagnetic disturbance event. Because of the similarities between GMD and EMP events and impacts, the forthcoming GMD standards could also help address the threat of EMP attacks.

*Question 22.* Do you agree that with the basic principle that the "cost causer" should pay for transmission upgrades—that is, that when transmission upgrades are needed, the entities that made them necessary should pay?

Answer. I agree that the "cost causation" principle, as it has been established by the courts and applied by the Commission, is a central tenet of fair cost allocation.

It is important to note that needed transmission upgrades may be identified in a number of ways. For example, transmission upgrades may be needed to reliably interconnect individual new generation resources or to create capacity to satisfy individual requests for transmission service. In these situations, long-standing Commission policy allows a transmission provider to charge the customer a rate equal to the higher of either: (1) the incremental cost of the required upgrades or (2) the embedded costs of the transmission provider's system. This policy ensures that individual interconnecting generators and transmission service customers pay the full cost of the upgrades they require (or "cause"), and that existing customers do not subsidize any costs caused by these new customers.

More recently, in Order Nos. 890 and 1000, the Commission adopted cost allocation requirements for transmission facilities that are identified in a regional transmission planning process as needed to meet reliability requirements, provide economic benefits, or address transmission needs driven by public policy requirements enacted by federal, state or local governmental authorities. Notably, these types of transmission facilities are not driven by a specific service request. To address these types of transmission facilities, I supported adopting the cost allocation principles in Order No. 1000 to guide the allocation of the costs of regionally-planned projects, while giving each region the flexibility to design its own cost allocation approach to meet its own needs, consistent with these principles.

I agree with the bedrock foundation underlying the Order No. 1000 cost allocation principles: costs must be allocated in a manner at least roughly commensurate with benefits received. Allocating transmission costs commensurate with the benefits received by grid users is not a departure from the "cost causation" principle; in explaining the "cost causation" principle, the U.S. Court of Appeals for the Seventh Circuit Court has stated that "[t]o the extent that a utility benefits from the costs of new facilities, it may be said to have 'caused' a part of those costs to be incurred."

*Question 23.* I recognize that you cannot address merits of specific compliance proceedings pending before the Commission. But I have a couple of questions I trust you can answer about the general policy behind FERC Order 1000:

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

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

Answer. I do not believe that Order No. 1000 either exceeds FERC’s statutory authority or establishes a preference for renewable-based electricity. Rather, Order No. 1000 facilitates the identification of transmission facilities that are more efficient or cost-effective solutions to regional transmission needs, including reliability and economic needs, as well as transmission needs driven by federal, state, or local public policy requirements. Order No. 1000 does not mandate any particular regional cost allocation methodology, and I agree with the bedrock foundation underlying the Order No. 1000 cost allocation principles: costs of new transmission facilities must be allocated in a manner at least roughly commensurate with benefits received. Ultimately, the Federal Power Act requires that the rates, terms and conditions of transmission service provided by public utilities be just and reasonable and not unduly discriminatory or preferential, and I believe that Order No. 1000’s cost allocation principles further that statutory requirement.

*Question 24.* Shouldn’t FERC transmission policy be neutral with respect to the source of electricity generation? Do you agree or disagree?

Answer. I agree. FERC policies should focus on ensuring that the rules that govern organized and bilateral wholesale electric markets promote the delivery of reliable power in a manner that is nondiscriminatory and resource-neutral, resulting in efficient price signals that market participants can rely on to make investment decisions.

*Question 25.* If you disagree, can you identify provisions in the Federal Power Act that authorize FERC to favor a particular source of generation over others?

Answer. See answer to Question 24; I am not aware of any provisions in the Federal Power Act that authorize FERC to implement transmission policies that favor a particular source of generation.

*Question 26.* If Congress wanted to express a preference for a particular generation source, don’t you think it would have so stated—for example, by enacting a federal renewable portfolio standard? Isn’t this Congress’ prerogative—not FERC’s?

Answer. The Commission can only act under the authority delegated to it by Congress. It is the prerogative of Congress to enact legislation, such as you mention. As noted above, FERC policies should focus on ensuring that the rules that govern organized and bilateral wholesale electric markets promote the delivery of reliable power in a manner that is nondiscriminatory and resource-neutral, resulting in efficient price signals that market participants can rely on to make investment decisions. Those markets should be capable of accommodating changes in power supply that may be driven by factors outside of the Commission’s jurisdiction, such as changes in law enacted by Congress. Although the drivers of power supply changes are largely outside of the Commission’s jurisdiction, we must be aware of, and adapt to, these developments in order to carry out our statutory responsibilities to ensure just and reasonable rates, a reliable power grid, and fair and efficient markets.

*Question 27.* Do you support this aspect of Order 1000—specifically that FERC has ordered states to plan for new transmission lines on the basis of undefined and unspecified “public policies” including environmental mandates?

Answer. I supported the reforms required in Order No. 1000, which did not order states to plan for new transmission lines based on undefined and unspecified public policies. Rather, Order No. 1000 requires local and regional transmission planning processes to consider transmission needs driven by public policy requirements established by duly enacted federal, state or local laws or regulations. The Commission stated in Order No. 1000 that recent increases in transmission development combined with projections by industry and NERC of the need for significant future additional transmission investments, as well as changes in the generation mix driven in part by public policy developments, required action to ensure that transmission planning and cost allocation requirements are adequate to support more efficient and cost-effective transmission facility decisions. The Commission will monitor transmission planning processes to ensure that they are effective in meeting regional transmission needs and supporting the provision of Commission-jurisdictional service at rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential.

*Question 28.* If so, can you direct me to the provision of the Federal Power Act that authorizes FERC to require states to conduct this type of planning?

Answer. As explained in the answer to Question 27, FERC has not ordered states to plan for new transmission lines based on undefined public policies. In Order No. 1000, the Commission relied on section 206 of the Federal Power Act, which obligates the Commission to ensure that jurisdictional electric rates are just and reasonable and not unduly discriminatory or preferential. In addition, the Commission explained that section 201(b)(1) of the Federal Power Act grants the Commission jurisdiction over the transmission of electric energy in interstate commerce, as well as jurisdiction over all facilities for the transmission of electric energy.

*Question 29.* Couldn't this policy result in the construction of new transmission lines—the need for which is premised on EPA rules that currently subject to challenge in the courts—which may be struck down? Wouldn't that be wasteful? How is this fair to consumers?

Answer. I believe that robust regional transmission planning processes that comply with the requirements of Order No. 1000 will benefit consumers by promoting more efficient and cost-effective transmission facilities. I supported the Commission's requirement that public utility transmission providers in a transmission planning region consider transmission needs driven by public policy requirements. Like you, I recognize that the public policy requirements that drive such transmission needs could change over time for a variety of reasons. Nonetheless, I believe that it is prudent to consider transmission needs driven by duly enacted public policy requirements as a transmission planning region identifies transmission solutions.

Furthermore, I believe the concern that you have identified will be mitigated by a number of aspects of regional transmission planning. First, transmission lines are frequently designed and constructed to serve multiple needs, including not only needs driven by enacted public policies, but also reliability needs and efforts to reduce congestion. Thus, comprehensive transmission planning can ensure that ratepayers receive benefits beyond those associated with public policies. Second, transmission planning regions may reevaluate their regional transmission plans each planning cycle to determine whether a transmission need still exists and whether a transmission project is still needed. If enacted public policies change over time, the transmission planning process is therefore equipped to address associated changes in transmission needs. Finally, as you know, planning and constructing new transmission infrastructure can take a significant amount of time. Given this lengthy process, I believe that transmission planning processes will be able to account for changes in enacted public policies that drive transmission needs.

#### RESPONSES OF CHERYL A. LAFLEUR TO QUESTIONS FROM SENATOR WYDEN

*Question 1.* I view FERC Order 1000—where FERC has insisted that the Bonneville Power Administration and other governmental utilities in the Northwest agree to cede their transmission cost-allocation authority to FERC—as a significant overreach. Can you assure me that if you are confirmed you will support policies that keep the locus of Northwest electricity decisions in the Northwest as opposed to shifting authority to FERC headquarters in Washington, D.C.?

Answer. If confirmed, I will give due consideration to the concerns you raise. With respect to Order No. 1000, I do not believe that the Commission sought to centralize authority over regional transmission planning at FERC; rather, the requirements of Order No. 1000 are intended to facilitate transmission planning and decision-making at the regional level, using criteria and processes developed by public utility transmission providers, enrolled non-public utility transmission providers, and interested stakeholders. Importantly, the Commission in Order No. 1000 did not require non-public utility transmission providers to participate in regional transmission planning processes and corresponding cost allocation methods. Instead, the Commission encouraged such participation and noted that the success of the reforms called for in the rule would be enhanced if all transmission owners, including non-public utility transmission providers, participate. If confirmed, I will continue to carefully consider the concerns raised by non-public utility transmission providers as the Commission addresses further filings related to Order No. 1000 implementation.

*Question 2.* The nation's electricity sector is in a period of transition, with significant shifts in the past decade due to the greater usage of renewables, lowered costs of natural gas, and many older units scheduled to come offline. One important effect of these changes has been decrease in carbon emissions from the power sector, a trend that needs to continue for our nation to move to a truly low-carbon economy. As the power sector continues to evolve in this manner, what challenges do you see coming up in the future as a result of this transition, and what role do you envision for the FERC in helping to manage the challenges that will come along with that transition?



Answer. As I frequently note, the nation is making substantial changes in its energy supply due to the increased availability of domestic natural gas and its use for power generation, the growth of renewable and demand-side resources, and new environmental requirements. Although these drivers of change are largely outside the Commission's jurisdiction, we must be aware of and adapt to them to carry out our statutory responsibilities. These developments are driving a great deal of the Commission's work on both infrastructure and markets. Our nation is making substantial investments in electric transmission and gas pipelines, and the Commission, through its authority over transmission ratemaking and natural gas permitting and ratemaking, has a critical impact on those investments. In addition, power supply changes require adaptations in competitive electric markets, to assure they attract needed investment and coordinate effectively with natural gas markets.

RESPONSES OF CHERYL A. LAFLEUR TO QUESTIONS FROM SENATOR FRANKEN

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

Answer. I believe that the revisions adopted last year to the Commission's pro forma small generator interconnection procedures will help facilitate the interconnection of community wind projects. Compliance filings to implement the Commission's order are due in August 2014. If confirmed, I look forward to continuing to monitor the impact of the rule going forward, as well as looking for other opportunities to remove barriers to interconnection while ensuring that all generators receive just and reasonable prices for their power.

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

Answer. I believe that a number of recent Commission initiatives, including Order No. 1000, will facilitate the construction of new efficient and cost-effective transmission infrastructure for new resources of various types in the coming years as those initiatives are implemented. In addition, the Commission has been, and should continue to be, responsive to requests for flexibility in rates, terms and conditions from developers of transmission projects under non-traditional business models, including merchant transmission, that can foster needed development.

*Question 3.* In Minnesota and across the Midwest and other areas of the country this past winter, we experienced a very serious propane shortage. I was pleased that FERC used its authority to prioritize shipments of propane on the Enterprise pipeline running from Mont Belvieu, Texas to distributors further north. This action helped get propane to those who needed it. However, the Cochin pipeline, which has been transporting a very substantial amount of propane from Canada to the Midwest, is being repurposed to send other petroleum products in the opposite direction. Should FERC be given additional authorities to conduct a public interest determination before permitting the reversal of pipelines such as Cochin?

Answer. As your question recognizes, under the Interstate Commerce Act, the Commission does not have the statutory authority to prevent an oil pipeline or product pipeline from abandoning service in one direction and then starting service in the opposite direction. The Commission's emergency powers under ICA section 1(15) provide discretion to the Commission to address situations on an ad hoc basis as they may arise. As I said at the hearing, I believe that the Commission should first ensure that it uses its existing authority effectively, and that the Commission should continue to be alert and proactive in monitoring the propane markets. If I am confirmed and Congress chooses to grant the Commission additional authority over such pipelines, I will work to ensure that the Commission faithfully executes that additional authority.

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

Answer. I support efforts to improve transparency into pipeline operations, though I believe that these efforts should be consistent with the regulatory authority vested by Congress in the Commission. Under the Interstate Commerce Act, common carriers are prohibited from disclosing certain information, including the nature, kind, quantity, destination, or routing of any property delivered over the pipeline, that

may be used to the detriment of shippers or improperly disclose business transactions to a competitor. Thus, the Commission does not currently receive from oil or product pipelines product shipment information, including when and where, for example, propane is shipped. However, if confirmed, I commit to continue the Commission's efforts to be alert and proactive in monitoring the propane markets.

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

Answer. Under the Federal Power Act, the Commission does not have jurisdiction over the siting of generation, including height restrictions governed by state or local zoning laws. As mentioned above, if confirmed, I will continue to look for opportunities to remove barriers to interconnection of new resources while ensuring that all generators receive just and reasonable prices for their power.

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

Answer. I agree that the adequacy of transformer supply is important to the resiliency of the electric grid. In addressing supply chain and appropriate inventory levels, it is important to have a clear understanding of which assets are the most critical in terms of how their loss would impact operation of the bulk power system. The version of cybersecurity reliability standards recently approved by FERC (CIP version 5) expressly requires utilities to determine the criticality of cyber assets and tailor protections accordingly. The FERC directive that NERC develop a physical security standard also requires identification of the most critical facilities. In addition, FERC's final rule on geomagnetic disturbance standards also required identification of the assets most important to protect and explicitly identified inventory management as a possible mitigation strategy to be used under the standards.

NERC's petition to approve a physical security standard was filed with the Commission for review on May 23, 2014. It would be inappropriate for me to judge the merits before interested parties have an opportunity to submit comments to the Commission, so that we can consider all relevant arguments. I assure you that I will carefully consider the proposal and all filed comments to ensure that NERC's filing does adequately protect the public.

I also note that the Edison Electric Institute (EEI) has undertaken the voluntary Spare Transformer Program (STEP) and that NERC maintains the Spare Equipment Database (SED) Program. These programs are designed to help utilities identify and share spare transformers in emergencies. Finally, the Department of Homeland Security, the Department of Energy, and others are working to develop the Recovery Transformer (RecX), a prototype extra-high voltage (EHV) transformer that would significantly reduce the recovery time associated with EHV transformers. This initiative may play an important role in improving our ability to recover if a number of transformers are damaged concurrently for any reason.

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

Answer. As mentioned above, NERC's petition to approve a physical security standard was filed with the Commission for review on May 23, 2014. Because the reliability standard is pending before the Commission, I cannot comment on it at this time. I note that many other existing reliability standards are intended to mitigate the type of system impacts that may be caused by an extreme weather event.

#### RESPONSES OF CHERYL A. LAFLEUR TO QUESTIONS FROM SENATOR HELLER

##### *Question on Order No. 1000*

Mr. Bay and Ms. LaFleur,

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

effect has been a significant challenge that has consumed FERC's time and policy attention for over a year and counting.

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

Answer. I believe that FERC's cost allocation policies should be flexible to meet regional needs in both established regional transmission organizations and in bilateral market regions. That is why I supported the regional transmission planning and cost allocation approach of Order No. 1000, which adopted minimum requirements for regional transmission planning and cost allocation, but gave regions flexibility to develop specific proposals that will meet regional needs and reflect regional differences. In evaluating filings submitted in compliance with Order No. 1000, we have not mandated a "one-size-fits-all" approach. Indeed, we have approved a variety of cost allocation proposals that satisfy the minimum requirements established in Order No. 1000.

Because the issue of binding cost allocation is pending before the Commission, I cannot comment on it at this time.

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

Answer. I recognize the significant contributions of non-public utility transmission providers to regional transmission planning, and in Order No. 1000, the Commission encouraged their participation, noting that the success of the reforms called for in the rule would be enhanced if all transmission owners, including non-public utility transmission providers, participate. In particular, the Commission stated that regions may propose as part of their Order No. 1000 compliance filings any tariff provisions they believe are necessary to recognize the unique status of non-public utilities that seek to participate in the regional planning process. A number of proposals addressing the enrollment and participation of non-public utility transmission providers are currently pending before the Commission on rehearing and compliance, and, accordingly, I cannot comment on them at this time.

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

Answer. I expect that existing vertically-integrated electric utilities will have a significant role in future transmission development at the local, regional, and inter-regional levels. As the Commission noted in Order No. 1000, existing utilities bring certain strengths they can rely on when proposing to construct transmission projects, such as unique knowledge of their own transmission systems, familiarity with the communities they serve, economies of scale, experience in building and maintaining transmission facilities, and access to funds needed to maintain reliability.

Meanwhile, following implementation of the non-incumbent transmission developer reforms in Order No. 1000, I expect new entrants to pursue opportunities to identify, propose, and develop transmission facilities, primarily, though not exclusively, at the regional level. It is important to note that Order No. 1000's non-incumbent developer reforms did not seek to define specific roles for existing utilities and new entrants; rather, Order No. 1000 simply sought to remove a barrier to entry that the Commission concluded has the potential to undermine the identification and evaluation of more efficient or cost effective transmission projects and result in unjust and unreasonable rates or undue discrimination by public utility transmission providers.

Accordingly, I expect to see new entrants focus primarily on new transmission facilities that are governed by the requirements of Order No. 1000.

#### *Renewable Development*

Geothermal energy is base load renewable power that plays an extremely important role in Nevada but gets too little attention nationally. It provides 24/7 power without emissions and, in the case of binary geothermal, with negligible water consumption. Geothermal is a valuable energy resource and yet it is lagging behind other renewables sources in development.

*Question 1.* What is your view of geothermal energy and the challenges it faces?

Answer. Geothermal energy is a sustainable source of base load energy, with growing potential due to the development of new technologies to utilize it. Similar to other types of technologies that may be located a distance from load centers, geothermal energy will need to obtain cost-effective access to transmission lines to move that power from its source to the loads. As noted below, FERC works to ensure open access to transmission facilities and promote transmission planning and generator interconnection policies that are fair to all resources.

*Question 2.* What can FERC do to help our markets value exactly what geothermal provides-reliable clean energy?

Answer. One of the Commission's core responsibilities is to ensure that wholesale rates are just and reasonable. As such, the Commission has long supported the development of competitive wholesale power markets that support investment and are fair to all types of technologies and sources of power, including geothermal. I believe that the Commission should continue to assess our competitive power markets in the upcoming years to, among other things, ensure they properly value the contributions of all types of resources.

*[Preamble to Question 3]*

In October 2012, the Secretary of the Interior signed the Record of Decision finalizing a program to facilitate development of solar energy on public lands in six southwestern states. The Western Solar Plan provides a blueprint for utility-scale solar energy permitting in Arizona, California, Colorado, Nevada, New Mexico and Utah by establishing solar energy zones, incentives for development within those zones, and a process through which to consider additional zones and solar projects. The Western Solar Plan established an initial set of 17 Solar Energy Zones, totaling about 285,000 acres of public lands, that serve as priority areas for commercial-scale solar development, with the potential for additional zones through ongoing and future regional planning processes. Two additional Solar Energy Zones were designated in 2013 in Arizona and California. Additionally, a programmatic environmental impact statement relating to the authorization of geothermal leasing in Nevada was completed in October 2008.

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

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

Answer. The Commission currently has no direct ability to authorize transmission lines on public lands in the West, other than in the limited case of primary transmission lines that connect hydropower projects to the interstate electric transmission grid. While the Energy Policy Act of 2005 granted limited "backstop" authority to the Commission, subsequent court decisions have effectively prevented the Commission from exercising that authority. Nonetheless, the Commission has participated, and will continue to participate, in interagency efforts that seek to improve and streamline federal permitting processes for construction of new transmission infrastructure on public lands, such as the Rapid Response Team for Transmission.

Although FERC does not have a direct role in permitting transmission facilities, it is the Commission's responsibility to ensure open access to transmission facilities and develop transmission planning and generator interconnection policies that are fair to all resources. For example, the Commission recently issued a Notice of Proposed Rulemaking concerning open access for Interconnection Facilities, proposing new rules to remove barriers to competitive generation development.

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

Answer. Access to transmission is a critical issue for location-constrained resources. As noted above, the Commission has worked with relevant federal agencies to improve and streamline federal permitting processes for transmission on public lands. If confirmed, I will continue to support these important interagency efforts.

#### RESPONSES OF CHERYL A. LAFLEUR TO QUESTIONS FROM SENATOR HELLER

##### *Waste Heat recovery*

In their 2009-2014 Strategic Plan, FERC established a "Long Term Performance goal" that by FY2013, 100 percent of jurisdictional natural gas companies will be "examined for feasibility of installing waste-heat recovery systems." The plan called for FERC to conduct bi-monthly reviews of electronic bulletin boards (EBB) "to gauge the availability of information on waste-heat recovery potential," beginning in FY2010 and continuing through FY2014 and for Pipeline companies to volun-

tarily post information about waste heat feasibility on their Electronic Bulletin Boards (EBBs).

FERC made these recommendations formal in July 2012 rulemaking, Order No. 587-V. O It is my understanding that the rulemakings have had limited impact to encourage companies to actually move toward implementing waste heat.

*Question 1.* How has FERC worked toward this goal since that time? Has the natural gas supply chain made measurable progress in implementing waste heat technologies on pipelines and other operations?

Answer. Consistent with the performance goal you cite, the Commission has examined 100 percent of interstate pipelines' EBBs to verify that each pipeline has examined its system to identify resources conducive to the installation of waste-heat recovery facilities and made such information publicly available. The Commission does not track installation of waste-heat recovery facilities, but I understand that the industry has moved to seek opportunities to install such facilities.

*Question 2.* FERC requires pipeline companies to demonstrate consideration of waste heat recovery technologies when they work with FERC to site a new facility. Does FERC have any mechanisms for prioritizing siting applications for pipelines and other natural gas operations that include co-benefits like waste heat?

Answer. The Commission acts on all natural gas project applications as soon as the record is complete in each case, and processes multiple applications simultaneously. Because Commission practice does not establish a queue for pipeline applications, there is no process by which certain projects can be prioritized over others.

RESPONSES OF NORMAN C. BAY AND CHERYL A. LAFLEUR TO QUESTIONS FROM  
SENATOR HELLER

*Wholesale Electric Market Reform*

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

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

Answer. I believe that regional coordination and efficient dispatch services are very important to ensure that variable energy resources are cost-effectively integrated into the grid. In recent years, the Commission has issued significant orders that address these issues, including Order No. 1000 to improve regional coordination and transmission planning, and Order No. 764 to remove barriers to the integration of variable energy resources. If confirmed, I will continue to work to ensure that the rules governing organized and bilateral wholesale electric markets, including rules governing regional coordination and resource dispatch, further non-discriminatory access to those markets for all resources.

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

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

Answer. I have been closely following the discussions surrounding the potential for developing an energy imbalance market in the West over the past several years. Commission staff has served as a resource to those exploring the idea of a Western energy imbalance market and to those with questions about how such a market might affect them. However, because a number of cases concerning the formation of a Western energy imbalance market are currently pending before Commission, I cannot comment specifically on the merits of such a market.

*Question 3.* It has been contended that capacity markets should remain voluntary and that states and regions should make the decision whether or not to implement such a market, and if so, be allowed to design them to reflect the unique features of the relevant market. What's your view here?

Answer. Membership in a regional transmission organization (RTO) or independent system operator (ISO) is voluntary, and I believe it should continue to be voluntary. Regulatory structures in different regions of the country appropriately reflect the unique features of the relevant region. Within an RTO or ISO structure,

I believe that states would have an important role in any consideration of implementing a capacity market.

RESPONSES OF NORMAN C. BAY AND CHERYL A. LAFLEUR TO QUESTIONS FROM  
SENATOR MURKOWSKI

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

*Question 1a.* What actions has FERC taken to advise the EPA of the dangerous impacts their rules are having on grid reliability? Is FERC playing a formal role in evaluating the EPA proposed rules? Does a MOU exist between the EPA and FERC to govern your discussions?

Answer. The Commission has a responsibility to help ensure that grid reliability is maintained as EPA rules are implemented. The Commission's formal role in reviewing EPA rules occurs during the OMB interagency review process. Commission staff reviewed parts of the draft Greenhouse Gas rule as a part of that OMB process and provided input to the EPA from a reliability perspective. I am reviewing the June 2 proposal and note that it gives significant flexibility to states and permits regional approaches to compliance. I look forward to discussing the proposed rule with the EPA, utilities, NARUC, ISOs/RTOs, NERC, and industry.

In addition to commenting on EPA's proposal, FERC also has a role in ensuring that the energy infrastructure and markets adapt to new environmental requirements through its authority over transmission ratemaking and natural gas permitting and ratemaking. For example, if additional gas generating capacity is needed and more gas pipelines need to be built, FERC has a role in certifying those pipelines. FERC also has a role in ensuring that the regulatory rules under its jurisdiction are sufficient to attract needed investment in electric transmission and gas pipelines.

FERC, EPA and DOE staff have jointly developed a document that describes how the three agencies are monitoring, within their respective jurisdictions, the progress in responding to certain EPA regulations affecting the electric power sector.

*Question 1b.* Did FERC conduct, or are you in the process of conducting, a grid impact analysis on the greenhouse gas regulations that are proposed by the EPA?

Answer. The greenhouse gas regulations were proposed on Monday, June 2, 2014. FERC has not conducted a grid impact analysis of those regulations.

*Question 1c.* What do you believe are the three largest threats to baseload generation?

Answer. I believe that baseload generation plays a critical role in our resource mix. However, I am aware that certain of these resources have recently found it difficult to ensure cost recovery in the wholesale power markets. For example, the relatively low cost of natural gas has helped drive down energy prices and revenues. In addition, state and federal policies that impose new environmental requirements and seek to procure specific resource types have challenged baseload resources. Finally, the emergence of new competitive technologies has also challenged baseload resources.

FERC policies should focus on ensuring that the rules that govern organized and bilateral wholesale electric markets promote the delivery of reliable power in a manner that is nondiscriminatory and resource-neutral, resulting in efficient price signals that market participants can rely on to make investment decisions. Although the drivers of power supply changes are largely outside of the Commission's jurisdiction, we must be aware of, and adapt to, these developments in order to carry out our statutory responsibilities to ensure just and reasonable rates, a reliable power grid, and fair and efficient markets.

*Question 1d.* In general, widespread and persistent outages to the Bulk Power System are rare. However, as assets begin to retire, there is a quiet consensus that the risk of a "localized" reliability effect is growing. If true, would you find this impact acceptable if caused by federal policy?

Answer. Reliability is a top priority for me and must be sustained in the face of any change in federal policy. That is why I think it is important to work with NERC, utilities, NARUC, the RTOs/ISOs, and industry to understand the impacts

of changes in policy and understand any reliability impacts that might occur as a result of such changes.

*Question 2a.* As you may be aware, the Energy Law Journal recently published an article that alleges numerous due process and substantive violations in FERC enforcement. Has the Commission adopted a definition of market manipulation? What definition does the Commission use to identify market manipulation?

Answer. The Commission adopted a definition of market manipulation in Order No. 670 in 2006. Under the Commission's regulations, "[t]he Commission will act in cases where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission." An essential element of our anti-manipulation rule, as noted, is scienter—which refers to the state of mind of the individual or company engaging in the conduct. To establish a violation of the rule, the Commission must show that the subject of a market manipulation investigation engaged in the conduct at issue with actual intent or recklessness. That being said, the Commission is early in our work on manipulation cases and I believe the Commission should continue to assess whether additional guidance may be helpful going forward.

*Question 2b.* Should a person or company be liable for acting consistently with the governing market rules?

Answer. Under Order No. 670, "[i]f a market participant undertakes an action or transaction that is explicitly contemplated in Commission-approved rules and regulations, we will presume that the market participant is not in violation of the Final Rule." However, this presumption is not dispositive of whether or not an entity has violated Commission rules and regulations, and market manipulation under the Commission's Rule 1c is not limited to tariff violations. In considering enforcement matters before the Commission, I always take into account the principle set forth in Order No. 670.

*Question 2c.* Do you believe FERC investigations should be reformed to follow guidelines similar to those adopted by the SEC?

Answer. My understanding is that many of the rules that govern FERC investigations are similar to those adopted by the SEC. While there may be some differences in the text of the rules and investigative practices, I am not aware of any specific FERC rules or practices that should be changed to make them more similar to the SEC's investigative guidelines. However, I am always looking for ways to improve our procedures to make them more efficient and fair, and that is true of Enforcement matters and matters throughout the Commission.

*Question 2d.* The law review article asserts when individuals are under FERC investigation, FERC enforcement does not have to provide access to deposition transcripts or provide the information—even if exculpatory—to individuals that has been shared with the Commission. Is this true, and if so, do you personally believe individuals should have timely access to their deposition transcripts and information that was shared with Commissioners?

Answer. Commission regulations set forth at 18 C.F.R. § 1b.12 do require that subjects of investigations be given access to their deposition transcripts. In addition, Commission policy, set forth in the Policy Statement on Disclosure of Exculpatory Materials, Enforcement of Statutes, Regulations, and Orders, 129 F.E.R.C. ¶ 61,248 (2009), requires that "[d]uring the course of an investigation conducted under Section 1b of the Commission's regulations, Enforcement staff will scrutinize materials it receives from sources other than the investigative subject(s) for material that would be required to be disclosed under Brady [the policy requiring the provision of exculpatory information]. Any such materials or information that are not known to be in the subject's possession shall be provided to the subject." I personally believe that individuals should have timely access to both their deposition transcripts and exculpatory material.

I have not previously considered the question of whether subjects of investigations should have access to all of the information that Enforcement staff has shared with the Commission. I note that there are some categories of information that would not be appropriate to share with individual investigative subjects. For example, there are work product, attorney-client, and deliberative process protections that allow Commissioners to communicate effectively with Commission staff—whether Enforcement staff or any other program office staff. However, I am always looking for ways to improve our procedures to make them more efficient and fair, and that is true of Enforcement matters and matters throughout the Commission.

*Question 2e.* Should subjects of non-public investigations have the same access to the Commission as the Enforcement staff at an earlier stage in the proceedings than today? If so, when should parity be imposed? If not, why not?

Answer. The Commission's policies provide that the subject of an investigation may communicate directly with the Commission, in writing, about anything relating to the case that the subject wishes to communicate—and at any time throughout the course of an investigation. Many investigative subjects avail themselves of this opportunity, and some have made multiple submissions directly to the Commission during the investigation stage. I believe this direct communication between subjects and the Commission is important for both the subject and the Commissioners. However, as noted above, I am always looking for ways to improve our procedures to make them more efficient and fair, and that is true of Enforcement matters and matters throughout the Commission.

*Question 3a.* One of the responses to the EPA's regulations on the use of coal is a "rush to gas". Industry is turning to natural gas as an alternative to coal as a result of the lower price and increased supply of natural gas, causing a new reliance on natural gas to fuel existing and new power plants. However, the polar vortex highlighted coordination problems between the gas and electricity markets. What steps should FERC take to ensure that gas-electric coordination does not become a problem in terms of reliability or excessive price volatility? Does FERC have sufficient authority to impose and enforce any necessary solutions?

Answer. FERC has proactively engaged the electric and natural gas industries to work to enhance gas-electric coordination. The Commission convened conferences throughout the country in 2012; they were widely attended by gas and electric industry stakeholders, representatives from state regulatory commissions, and staff from NERC. The subjects at these conferences—communications and scheduling—were discussed at length over the series of meetings. The result was that the Commission issued a Final Rule allowing interstate natural gas pipelines and electric transmission operators to share non-public operational information to promote the reliability and integrity of their systems. In addition, in March of 2014, the Commission issued a NOPR to gather public comments on its proposals to revise the natural gas operating day and scheduling practices used by interstate pipelines to schedule natural gas transportation service. In order to address gas-electric coordination issues, the proposed revisions include starting the natural gas operating day earlier, moving the Timely Nomination Cycle later, and increasing the number of intra-day nomination opportunities to help shippers adjust their scheduling to reflect changes in demand.

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

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

*Question 3b.* Does the shale gas revolution raise the prospect of an overreliance on a single fuel for U.S. power generation? What would this mean for electric reliability?

Answer. An adequately diverse fuel supply can help in addressing a range of possible risks or problems. For example, coal supplies were recently affected by delivery curtailments; this summer, hydropower generation may be affected in some locations by drought conditions. Similarly, natural gas delivery can be impacted by pipeline constraints. As noted in my answer to Question 3(a), the Commission has focused extensively on the coordination of the electric and natural gas industries, and will continue to do so. The broader issue of fuel diversity was discussed at our April technical conference on winter market operations in the RTOs/ISOs.

*Question 3c.* What in your view are the reliability implications of increasing natural gas use for electricity generation, especially in the Northeast? Are existing federal policies and initiatives adequate to ensure gas-electric interdependency does not become a reliability problem in the future?

Answer. The rapid increase in the use of natural gas for electricity generation will continue to require significant work by the industry, State commissions and FERC to ensure that reliability is maintained. While natural gas can provide economic



benefits, its increased use in the generation of electricity contributes to potential coordination issues. As noted in my answer to Question 3(a), the Commission has proposed certain regulatory changes to address this issue.

*Question 3d.* Does FERC have a role in encouraging the development of gas pipeline infrastructure to serve regions of increasing demand but with limited logistics?

Answer. FERC plays a key role in facilitating interstate pipeline expansions to serve regions of increasing demand by issuing certificates for the construction of new facilities. Over the past 10 years (since the beginning of 2003 through the present), FERC has certified 93.1 Bcfd of capacity in new pipelines and expansions, 1,053.7 Bcf of storage capacity, and nearly 37 Bcfd of LNG regasification capacity. The Commission has also approved 2.76 Bcfd of LNG liquefaction capacity at one terminal. With respect to encouraging pipeline infrastructure development in other ways, at our April technical conference on winter market operations in the RTOs/ISOs, there was discussion concerning the pricing of fuel security into the wholesale power markets. The Commission is presently evaluating this issue in its evaluation of the comments received from the technical conference.

*Question 4a.* Regarding capacity markets: What is the appropriate path forward with respect to organized and bilateral wholesale markets? Can and should they co-exist or should all utilities ultimately be in organized markets?

Answer. I do not believe that there is one particular path forward with respect to market participation. Membership in an RTO or ISO is voluntary, and I believe it should continue to be voluntary. Thus, organized and bilateral wholesale markets will continue to co-exist. The Commission exercises its jurisdiction to ensure that rates, terms and conditions of service are just and reasonable over both organized and bilateral wholesale markets.

*Question 4b.* Do you believe that the wholesale electricity markets operated by regional transmission organizations are achieving net benefits for consumers as compared to those regions without RTOs?

Answer. It is difficult to validly compare results in RTO and bilateral market regions since those areas of the country with historically higher energy costs have been more likely to utilize competitive markets. However, I believe that those entities that have voluntarily joined organized regional wholesale markets have found significant benefits associated with RTO membership, such as greater price transparency, access to more efficient ancillary and balancing services, more efficient transmission grid management, and decreased opportunities for discriminatory transmission practices. As detailed in the Commission's April 2011 report to Congress on performance metrics for RTOs and ISOs, security constrained economic dispatch and ISO/RTO efficiency programs have yielded demonstrable benefits. For example, PJM was able to reduce annual generation production costs by \$122 million due to improved generation dispatch in 2009. Security constrained economic dispatch also reduced reliance by ISOs and RTOs on less efficient and less reliable physical and manual procedures, such as transmission loading relief, to resolve system constraint problems.

*Question 4c.* Do you think that there is a sufficient level of transparency in pricing and other relevant data from the electricity markets, particularly those operated by RTOs?

Answer. I believe that the Commission has enacted rules that provide for transparency in the electricity markets. First, each public utility transmission provider must post information on available transmission capacity on its website. In addition, Commission regulations require sellers of wholesale services to make quarterly reports detailing transactions, and this information is made available to the public roughly one month after it is submitted. The RTOs and ISOs also provide a source of price transparency by posting pricing data on their websites. I believe that the Commission should always remain open to ideas to promote additional transparency.

*Question 4d.* How might FERC ensure that the capacity markets do not impede local and state resource decisions?

Answer. The Commission staff issued a white paper and held a technical conference in September 2013 to consider how current centralized capacity market rules and structures are supporting the procurement and retention of resources necessary to meet future reliability and operational needs. The issue of how capacity markets can support local and state resources decisions was a key issue in this technical conference. The Commission is presently evaluating this issue in its consideration of possible next steps as a follow-up to the technical conference.

*Question 4e.* Do you believe a 3-year capacity market commitment period used by RTOs is the appropriate time period to capture the value of capacity?

Answer. Both the staff white paper on capacity markets and the September 2013 technical conference explored the issue of what is the appropriate commitment and

forward period in centralized capacity markets. The Commission is presently evaluating this issue in its consideration of possible next steps as a follow-up to the technical conference.

*Question 4f.* Do you believe the RTO capacity markets are attracting and/or retaining baseload power resources?

Answer. The centralized capacity markets are designed to provide appropriate price signals to facilitate entry of new resources as needed and provide for the appropriate price signals for the orderly retirement of older, less efficient resources. The capacity markets have been attracting and retaining many types of resources, including baseload resources. For example, PJM's base residual action for 2017/2018 procured about 4,800 MW of new combined cycle generation. The Commission is presently evaluating this issue in its consideration of possible next steps as a follow-up to the technical conference.

RESPONSES OF NORMAN C. BAY AND CHERYL A. LAFLEUR TO QUESTIONS FROM  
SENATOR FLAKE

*Question 1.* In response to a question from Senator Cantwell, you indicated that you have "dissented on a few orders to show cause in terms of the application of the penalty guidelines, and [you have] also had some procedural dissents in some of the procedures that are used in the investigations." Please list your dissents to cases that were brought before the Commission during Mr. Bay's tenure as the head of the enforcement division?

Answer. My dissents (and relevant concurrences) in public Commission enforcement orders are as follows:

Competitive Energy Services, LLC, 140 FERC ¶ 61,032 (2012) Rumford Paper Company, 140 FERC ¶ 61,030 (2012) Barclays Bank PLC, 143 FERC ¶ 61,024 (2013) Competitive Energy Services, 144 FERC ¶ 61,163 (2013) Richard Silkman, 144 FERC ¶ 61,164 (2013) Lincoln Paper and Tissue, LLC, 144 FERC ¶ 61,162 (2013)

I have also dissented on one non-public order related to the timing of access to deposition transcripts in a confidential enforcement matter.

Finally, although not strictly an enforcement case, I dissented in J.P. Morgan Ventures Energy Corporation, 141 FERC ¶ 61,131 (2012), a rate case related to alleged misrepresentations during the course of an enforcement investigation.

*Question 2.* Please identify the specific investigative procedures employed by Mr. Bay's enforcement division that you opposed?

Answer. As I noted during the May 20 hearing, the bulk of my enforcement-related dissents were focused on procedural issues.

One such issue was the application of the Commission's Penalty Guidelines, which were established in two policy statements from which the Commission has the discretion to depart.<sup>1</sup> In the Competitive Energy Services, LLC (CES), Lincoln Paper and Tissue, LLC (Lincoln), and Rumford Paper Company (Rumford) cases cited above, I dissented (or, in some instances, concurred) with respect to the narrow issue of the calculation of the civil penalty range. Specifically, I believe that in those cases strict adherence to the Penalty Guidelines had the effect of double-counting the duration of the violations and unduly increasing the amount of the civil penalty range.

The Commission's Penalty Guidelines increase penalty levels based on the cumulative value of the monetary loss caused by the violation, which in those cases was directly attributable to the duration of the behavior at issue. The Penalty Guidelines also include a separate duration adder that increases the penalty level based on the number of days the behavior persisted. Thus, in the CES, Lincoln, and Rumford cases, the duration of the violation was counted twice in calculating the civil penalty range, as much as tripling the top end of the range that would have been resulted if duration had not been double counted.

I believe that civil penalties should reflect the magnitude of the fraud committed and that applying a separate duration adder may be appropriate in some circumstances. However, when the Commission exercises its civil penalty authority, it must do so with care and due regard for the circumstances of the particular violation. In some situations, the Commission may have to depart from the Penalty Guidelines and assess a civil penalty that is tailored to the circumstances at hand. I believe that in order to appropriately match the penalty to the violations in the

<sup>1</sup>Revised Policy Statement on Penalty Guidelines, Enforcement of Statutes, Orders, Rules, and Regulations, 132 F.E.R.C. ¶ 61,216 (2010); Policy Statement on Penalty Guidelines, Enforcement of Statutes, Orders, Rules, and Regulations, 130 F.E.R.C. ¶ 61,220 (2010) (collectively, "Penalty Guidelines").

CES, Lincoln, and Rumford cases, the Commission should have exercised its discretion to depart from the Penalty Guidelines.

Similarly, in Richard Silkman, I dissented in part, with Commissioner Norris, on the narrow issue of the penalty assessed on Dr. Silkman, who as a managing member at CES was involved in fraudulent behavior in the ISO-New England market. Commissioner Norris and I agreed with the majority that Dr. Silkman, as an individual, and CES, as the corporate entity, were separately liable for violating the Commission's regulations. However, we disagreed with the penalty amount determination because it failed to account for the fact that Dr. Silkman, as a managing member, would likely also be required to pay some portion of the penalty imposed upon CES, a fact recognized in the Commission's order assessing a civil penalty on CES. Therefore, we believed that the Commission should have considered the collective impacts of both the penalty against CES and the individual penalty against Dr. Silkman in determining the appropriate penalty amount.

I have also dissented on two procedural matters unrelated to the assessment of civil penalties. First, in the Barclays case cited above, I dissented from the majority's decision to reject Barclay's motion to quash a subpoena. The Office of Enforcement sought to enforce a subpoena against Barclays after the Commission had issued an Order to Show Cause why Barclays should not be found to have violated the Anti-Market Manipulation Rule, and after Barclays had elected, under Section 31(d) of the Federal Power Act, to forego a hearing before an administrative law judge and instead have the Commission "promptly assess" a civil penalty for the alleged misconduct that could be reviewed in U.S. District Court. In my view, the statutory directive that the Commission "promptly assess" a civil penalty could not be reconciled with further investigation into the conduct that was detailed in the Order to Show Cause and that would be reviewed by a District Court. Second, I dissented in a non-public order related to the timing of an investigation subject's access to deposition transcripts. The Commission's regulations state that even if good cause exists to deny witnesses a copy of his or her deposition transcript, "[i]n any event, any witness or his counsel, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony." I believe this regulation does not permit a delay in providing access to transcripts.

Finally, in the J.P. Morgan Energy Ventures case cited above, I disagreed with the majority's decision to suspend J.P. Morgan's market-based rate authority (which allows a utility to sell energy and ancillary services at market-based rather than cost-based rates) in response to J.P. Morgan's alleged misrepresentations during the course of an investigation into whether the company violated the prohibition on energy market manipulation. I viewed such a suspension as inconsistent with the Commission's market-based rate regulations. Instead, I believe that any misrepresentations should have been addressed as part of the ongoing investigation into J.P. Morgan's bidding activities, either as separate counts of obstruction, or as aggravating circumstances factoring into the determination of a civil penalty.

*Question 3.* Environmental Protection Agency ("EPA") regulations are having a significant impact on the nation's energy portfolio. With plant retirements and the prospect of stringent EPA rules on the horizon, plant retirements are occurring and more are likely. Those retirements could have a corresponding impact on the reliability of the electric grid. To what extent do you believe EPA should consider the impact its regulations will have on reliability of the grid?

*Answer.* It is critically important that reliability be sustained in the face of any change in federal policy. Commission staff reviewed parts of the draft Greenhouse Gas rule as a part of the OMB interagency review process and provided input to the EPA from a reliability perspective. EPA issued its proposal on June 2. I am reviewing that proposal and note that that it gives significant flexibility to states and permits regional approaches to compliance. I look forward to discussing the proposed rule with the EPA, utilities, NARUC, ISOs/RTOs, NERC and industry.

*Question 4.* What do you believe FERC's agenda should be in the next year?

Answer. As I noted in my recent nomination hearing before this Committee, the nation is going through a significant change in energy supply, which is shaping much of the Commission's agenda on both infrastructure and markets. In the area of infrastructure, we are seeing substantial investment in electric transmission, gas pipelines, and liquefied natural gas facilities, which is driving work at the Commission on both electric and gas ratemaking and project permitting. In addition, the changes in the nation's resource mix will require continued oversight of competitive electric markets, to ensure they are fair and efficient and attract investment needed to support reliability and compliance with environmental regulations. Finally, grid reliability and security, including the Commission's oversight of NERC, must remain a high priority, with particular emphasis on emerging issues like cyber and physical security. As I noted in my testimony at the hearing, these priorities will require that FERC continue to engage with other federal agencies like the EPA and the Commodities Futures Trading Commission, and with our state counterparts.

○