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KELLY AND DEARBORN NOMINATIONS

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

TO CONSIDER THE NOMINATION OF SUEDEEN GIBBONS KELLY TO BE A MEMBER OF THE FEDERAL ENERGY REGULATORY COMMISSION

AND

TO CONSIDER THE NOMINATION OF RICK A. DEARBORN TO BE ASSISTANT SECRETARY OF ENERGY FOR CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

SEPTEMBER 9, 2003



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KELLY AND DEARBORN NOMINATIONS

TUESDAY, SEPTEMBER 9, 2003

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

The committee met, pursuant to notice, at 10 a.m. in room SD–366, Dirksen Senate Office Building, Hon. Pete V. Domenici, chairman, presiding.

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

The CHAIRMAN. The hearing will please come to order. We would ask you to please keep the silence in the room. We won't be here too long, so it shouldn't be too difficult for anybody. Good morning, everyone. Senator Sessions, I understand, will be here to introduce Rick Dearborn. Rick, just be patient, we don't intend to proceed to you until he has introduced you. That will be worked into this, and I'm sure he'll be here in a moment.

The rules of the committee which apply to all nominees require that they be sworn in in connection with their testimony. So I would ask that each of you rise and raise your right hands. Do you solemnly swear that the testimony that 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?

Mr. DEARBORN. I do.

Ms. KELLY. I do.

The CHAIRMAN. Please be seated. Before you begin your statement I will ask you three questions addressed—each of the nominees will have to answer it for the committee. So let's start. Let's both sit at the table and we'll put the Senator in in a moment. All right, we'll start with you, Ms. Kelly. 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?

Ms. KELLY. I will.

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

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

The CHAIRMAN. Are you involved or do have you have any assets held in blind trust?

Ms. KELLY. No, I don't.

The CHAIRMAN. It is your responsibility to ensure that the Federal Energy Regulatory Commission, FERC, has sufficient—it's our responsibility that it has a sufficient number of commissioners to conduct the business of the agency. Currently FERC has only three members, that's a bare minimal quorum for FERC to meet its, to meet and issue orders. One of these three is serving on borrowed time, since his term technically expires in June. He can only serve until the end of this session of Congress.

And unless action is taken soon, FERC will lose the necessary quorum to meet and issue its orders, disabling FERC, the agency charged with regulating our interstate transmission grid. Particularly in the wake of the August 14 blackout that's not acceptable to me.

Today we have the opportunity to hear from Ms. Kelly, to move her nomination along in the process. and furthermore, I remind the committee that another FERC nominee, Joe Kelliher, who the committee voted on in February, has been waiting an opportunity to be voted on by the Senate on the floor. And I might ask Senator Bingaman as I understand it, there will be no objection to the approval of the two together as soon as we report out Ms. Kelly, is that correct?

Senator BINGAMAN. Mr. Chairman, that is correct. I think we should approve the two together.

The CHAIRMAN. The Senate has a duty in my opinion to act to ensure that the agency with responsibility over regulation of the interstate transmission grid continue to function, moving forward on these nominations is part of that duty, and I would also like to thank Mr. Dearborn for his willingness to serve as Assistant Secretary for Congressional Affairs at the Department of Energy. We look forward to his, to hearing from him on his job.

Now, in the absence of Senator Sessions, if you don't mind, we will start by asking that Senator Bingaman make his remarks with reference to Ms. Kelly. And when the Senator arrives he will make remarks regarding you, and I'm hopeful the two will overlap. If not, we will proceed with her.

Senator Bingaman.

[The prepared statements of Senators Bunning, Craig, Reid and Ensign follow:]

PREPARED STATEMENT OF HON. JIM BUNNING, U.S. SENATOR FROM KENTUCKY

Thank you, Mr. Chairman.

Today, we have before us Ms. Suedeen Kelly, nominee to be a member of the Federal Energy Regulatory Commission, and Mr. Rick Dearborn, nominee to be Assistant Secretary of Energy, Congressional and Intergovernmental Affairs.

The nomination of Ms. Kelly is especially important given the electricity problems that plagued the northeast with the recent blackouts and FERC's proposal to change the nation's electricity grid.

Kentucky residents enjoy the lowest electricity rates in the country. Its electricity market has worked. Kentucky has not experienced rolling blackouts, price spikes, or market manipulation seen in other parts of the country, and Kentucky does not expect to under its current power grid.

As a member of FERC, it will be Ms. Kelly's job to examine the nation's current electricity policies and determine a structure that allows consumers to benefit from a competitive market. She will deal with FERC's SMD and mandatory RTO pro-

posals. This is a big job and I expect Ms. Kelly will stay receptive to suggestions and comments by members of Congress.

We also have Mr. Dearborn before us today. As some of my colleagues on the Committee know, we have been dealing with contamination at the uranium gaseous diffusion plant in Paducah, Kentucky for some time now.

Many workers at the plant have also been exposed to radioactive materials and have subsequently become ill. During my tenure in the House and Senate, I have worked hard to help those workers receive compensation for their illnesses due to radiation and beryllium.

On both the cleanup and worker compensation issues much remains to be done. I hope that if the Senate confirms Mr. Dearborn he will work hard to make sure that the DOE effectively completes them.

I look forward to the testimony of both nominees today.

Thank you.

PREPARED STATEMENT OF HON. LARRY E. CRAIG, U.S. SENATOR FROM IDAHO

The need for FERC Commissioners with technical and practical regulatory expertise has never been more compelling. The very stability of the gas and electric utility industries depends on a high degree of competency of each member of this Commission.

The most well-researched economic theory is useless in the hands of those with an inadequate understanding of business systems and poor business judgment.

We must never forget that regulation is an extraordinary grant of government power that must be applied cautiously, responsibly, and respectfully to ensure that our business and investment communities continue to trust and have confidence in the decisionmaking of our regulatory agencies.

I will submit questions to Ms. Kelly to answer for the record that will probe her depth of experience and knowledge of FERC regulatory matters, particularly as those matters effect the West.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF HON. HARRY REID AND HON. JOHN ENSIGN, U.S. SENATORS FROM NEVADA

Mr. Chairman, thank you for your courtesy in sharing with the Committee and the nominee before you, Ms. Suedeen Kelly, these brief comments and for including our joining statement in the official record of this hearing.

As recent events spanning the country have underscored, the Federal Energy Regulatory Commission is one of our nation's most important independent regulatory bodies.

Mr. Chairman, we have sought this time to share with the Committee and Ms. Kelly our profound concern that the Commission has thus far failed to fulfill its fundamental mandate to protect ratepayers, and the result of that failure could be catastrophic for the ratepayers of Nevada.

Nevada's ratepayers and its leading utility now stand on the brink of a second financial disaster because of FERC's failure to protect it from the predatory acts of one of the most ravenous corporate swindlers of modern history—Enron.

Specifically, FERC has ruled that even though Enron was guilty of violating the law, its regulations, and its tariffs—violations which had the purpose and effect of manipulating and distorting the market for electricity—and even though those violations earned Enron the so-called "death penalty"—the withdrawal of its right to sell power in the open market in the future—Nevada's ratepayers are not entitled to any relief from its long-term contracts with Enron. What good does it do to prospectively give the death penalty to an already dead corporation rather than retrospectively granting relief to those it defrauded?

The result of this ruling has been nothing short of a disaster; not only have Nevada's ratepayers been forced to pay prices for electricity under its contract with Enron that are clearly unjust and unreasonable, but adding insult to injury, just 10 days ago a bankruptcy court judge found that since FERC had refused to reform the contracts, Nevada ratepayers owe Enron an additional $300 million for power that Enron never even delivered. On the day that order was issued, the Nevada utility was forced to issue a warning regarding its financial viability. A utility on the financial precipice is not in anyone's interest—it hurts ratepayers, shareholders, and taxpayers alike.

Mr. Chairman, we recognize that there are different points of view with respect to the appropriate standard FERC should use in reviewing long-term contracts.

Some believe that FERC has the obligation to use the "just and reasonable" standard in this situation, a standard that would allow FERC to look at the rates, terms and conditions in the contract more critically; others, including a bare majority of the sitting Commissioners, believe that the stricter "public interest" standard applies, a standard principally designed to preserve the "sanctity of contracts."

Contracts freely entered into should only be disturbed in exceptional circumstances. We cannot think of circumstances more exceptional than those found here: on the one side, you have one of the biggest perpetrators of fraud and deceit standing to benefit again from the very fraud it committed; and on the other side, you have a utility and ratepayers that have been the victim of this fraud on the verge of financial ruin. Regardless of what standard is used, the only just result; the only result that doesn't reward criminal behavior; the only result that protects rather than punishes the victim; is a result that frees Nevada ratepayers from the unjust and unreasonable consequences of its contracts with Enron.

Mr. Chairman, again, thank you for your courtesy in allowing us to address the Committee and nominee on this very critical issue for our constituents.

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

Senator BINGAMAN. Thank you very much for having the hearing, Mr. Chairman. I've known Suedeen Kelly now for more than 20 years. When I first became acquainted with her, she was an attorney in the public utility section of the attorney general's office when I was attorney general. From there she went on to serve as a commissioner and ultimately chairwoman of the New Mexico Public Service Commission. Since then she has simultaneously pursued a successful career in the private practice of law in Albuquerque, and also a career as a law school professor.

In my view, President Bush made a wise choice in nominating Suedeen for a seat on the Federal Energy Regulatory Commission. She'll bring to the Commission over two decades worth of academic knowledge and practical expertise with energy law and with public utility regulation. She's looked at these issues as a State regulator, as an attorney for all segments of the regulated industry and from the perspective of the consumer. In short, she'll bring to the Commission broad experience and a deep understanding of utility issues. I'm pleased that she is before the committee today and urge colleagues to support her nomination.

I've not had the opportunity to meet Mr. Dearborn before. I've reviewed his credentials and I'm pleased to support his nomination for the position of Congressional and Intergovernmental Affairs position with the Department of Energy. I hope both nominees can be reported quickly to the Senate for action. As you indicated, I think we should at the same time urge the Senate to act as well on Joe Kelliher's pending nomination to the Federal Energy Regulatory Commission. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Bingaman. Any other Senator have anything to say? If not we'll ask Senator Jeff Sessions to speak to us for a few moments regarding nominee Rick Dearborn.

We're very glad to have you, Senator, and glad to make room for you to testify immediately so you won't waste any of your time. Would you please proceed.

STATEMENT OF HON. JEFF SESSIONS, U.S. SENATOR FROM ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman, and thank you for your leadership on this very important committee that's important to America's economy and growth, and we appreciate your steadfast leadership and work, as all the members of the committee have worked on this energy bill that's so important coming up.

Rick Dearborn is one of the finest people I've gotten to know in Washington. He was originally from Oklahoma, University of Oklahoma, which had a little bout with the University of Alabama the other day and came out on top again. But we gave them a good run for their money even though they're number one in the Nation.

Rick, his father was career Air Force, he got involved in politics and worked for Senator Trent Lott and Senator Bob Kasten. He spent 3 years with the Heritage Foundation, and I was able to get him to come as my legislative director.

I didn't know him when I came here; several people told me if you could get Rick Dearborn, it would be the best thing you could do. I interviewed him, I believed that was correct, and my goal was to have the best staff you could have in Washington. I interviewed quite a number of people for that job; I really felt that he had the drive and the energy and the dedication and the commitment to America and the right thing that would be valuable to me and my office.

I've never known a person who would work harder, be there nine, ten o'clock at night; I would make no difference whatsoever. The job needed to be done, Rick Dearborn was there. He had a tremendous reservoir of contacts and knowledge around the Hill which will serve him in great stead and the Secretary of Energy in great stead, as he knows how this system works. For over 6 years, he was my legislative director, and just trained a first great group of people in my office, was a terrific manager of the young people, brought them along, encouraged them and promoted them. He's a person of integrity and ability.

I think that this Department of Energy can't do better that to have him on their staff. I know this. He knows the staff and the Senators in this body, every one of them, he knows the practical difficulties each Senator and each staff must face as they evaluate legislation. He will know how to appeal to them in a direct and honest way. They like him; he is very popular around the Hill. And I just, what was my great loss is going to be a tremendous benefit to the Department of Energy, and I am pleased beyond words to recommend him to this committee. I know he's going to do a terrific job. And thank you Mr. Chairman for allowing me to say these words.

The CHAIRMAN. Senator Sessions, Thank you very much. I know he's a great loss to you and that that will be a great plus to the Department. And while he had a lot to do working for you, I guarantee you, and I guarantee him, he will have plenty of work to do in this job.

Senator SESSIONS. It certainly appears that way, and I do have an Armed Services Committee hearing on Iraq.

The CHAIRMAN. You're excused.

Senator SESSIONS. And will be excused. Thank you so much.

The CHAIRMAN. Yes, indeed. Any other Senator have anything after Senator Sessions? Please.

STATEMENT OF HON. DIANE FEINSTEIN, U.S. SENATOR FROM CALIFORNIA

Senator FEINSTEIN. I would just like to—Mr. Chairman, I really wanted to utilize this hearing; in addition to a question that I will ask Ms. Kelly, I think both these nominees are obviously qualified. I don't have a problem with either of them.

However, I have followed now the Federal Energy Regulatory Commission for a long time. I am increasingly of the view that it's not going to be able to do its job. And this Senator is increasingly of the view that California's only recourse may well be to re-regulate. And I will be having more to say about that in my State, putting forward a case for re-regulation, putting forward a rationale for re-regulation.

I think it begins with the fact that the FERC budget is paid for by the very people it regulates, which to me produces an innate conflict of interest. And I have followed very carefully when California made its presentation of the 3,000 pages, and I never really thought I would hear the comments that I heard from, or that I read from the e-mails of the traders that participated during the California energy crisis. And to me what it meant was such a suborning of morality, such a lack of ethics in that entire energy trading field.

It is my deep belief that energy is not pork bellies; energy is not Rice Krispies. Energy is really in a sense a commodity, and in another major sense not a commodity. And when I viewed the amount of fraud that was inherent over that period of time, and the absence of an adequate response from FERC, despite meetings I've held, despite comments I've made before this committee, it's like they fall on deaf ears, that FERC inhabits another planet.

And so I am now on a road, I won't bring it before this committee but I will bring it before Californians, that we need to take another course in California. And I just hope that you go into that position with a strength of leadership and a view of what is right and what is wrong, because a lot, you know, initially everybody blamed it on a broken law, and California does have a broken law, no question. However, the massive amount of manipulation that took place, and then the fact that FERC doesn't even really have a definition for manipulation. I gather they're now working on it. And that FERC has all the authority to provide just and reasonable rates it really needs. Increasingly I am of the belief that cost-based rates plus a set margin of profit are really the way we ought to proceed in the energy markets, at least for my State. And I want to do everything I can to at least get my State in a position to be able to do that.

So I felt, I came this morning to ask you one question when it's my time to do so. But you come with a vast reservoir of knowledge and I just think that what we need are more people like Bill Massey, who have the gumption on that committee to really be able to tell it like it is, to protect the consumer, to see beyond the veneer of what's happening. And I appreciate the opportunity to say that.

The CHAIRMAN. Thank you, Senator, I'm not going to be able to stay for the entire hearing but I thought what I'd do if you would

not object, Senator Bingaman, is rather than proceed with Suedeen, to ask the questions of the other witness so he will have finished.

I have questions, standard questions of you, Mr. Dearborn. I've asked you these three questions. Will you be available to appear before this committee and any other congressional committees to represent the Department's positions and respond to issues of concern to Congress?

Mr. DEARBORN. I will.

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

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

The CHAIRMAN. Are you involved or do you have any assets held in a blind trust?

Mr. DEARBORN. No.

The CHAIRMAN. All right. Now you've answered all the questions required, and so we're going to proceed in order, complete Suedeen Kelly's testimony and questions and then we'll take you up, Mr. Dearborn. And Ms. Kelly would you proceed with your opening remarks, and make them as brief as possible, please.

TESTIMONY OF SUEDEEN GIBBONS KELLY, NOMINEE TO BE A MEMBER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Ms. KELLY. Thank you, Mr. Chairman and Senator Bingaman and distinguished members of this committee. I am honored to be here today as a nominee for FERC, and I would like to thank the chairman and Senator Bingaman for their support of me and for their leadership on behalf of the people of New Mexico. And I'd also like to express my appreciation to the President for his confidence in me and for nominating me to this position.

I have worked on energy law and policy matters from various perspectives for nearly 25 years and I would like to try to give you just a brief summary of my experience. In the 1980's, as Senator Bingaman said, I had the privilege to serve on the Public Utility Commission of New Mexico, and during my tenure there the condition of Western intrastate natural gas markets was a significant issue. Another significant issue was the bringing into rate base expensive new generation for two of our utilities, that if rolled into rates in the traditional manner would have increased them in excess of 25 percent. With the cooperation and collaboration of affected parties, rate paths were negotiated that avoided rate shock and the natural gas industry in New Mexico was restructured. These experiences left me with great respect for the challenges that are associated with implementing significant regulatory change.

After leaving the commission I joined the faculty of the University of New Mexico School of Law where I have taught public utility regulation, energy law, administrative law and legislative proc-

ess. My work at the school has enabled me to stay abreast of many developments in energy law over the last 18 years. For much of this time I have also served as a trustee on the board of the Rocky Mountain Mineral Law Foundation, a membership organization of western interests concerned with the law and policies surrounding the natural resources of the West. From this association I've learned about the industries that develop, produce and consume these resources in the West.

I have also been a legal advisor to the University of New Mexico and New Mexico State University in their roles as utility consumers and cogenerators of electricity. I've worked for the New Mexico legislature to help draft legislation for the restructuring of New Mexico's public utility commission. Before serving on the commission as Senator Bingaman mentioned, I worked for him in the office that he established to represent the interests of New Mexico's residential and small business customers in utility proceedings before the commission.

Both before and after serving on the commission I have practiced energy law. Over the course of my career I've been fortunate to have been able to represent persons and businesses from many segments of the utility industries, including investor-owned, member-owned and publicly-owned utilities, non-utility generators, companies doing business with utilities, and small and large utility consumers. And I've developed an understanding of the profound importance of energy utilities to the people of our country, to our way of life and to our economy.

From January to August 2000 I worked at the California Independent System Operator, and so I was personally present when California's electricity market experienced its dreadful disruption. That experience was a highly significant one in my life, and has left me anxious to work to assure that nothing even remotely similar ever happens again in California or the rest of our country.

I understand that our electricity, natural gas and hydropower industries are all facing tremendous challenges today and that the solutions to the problems will not be easy to identify or implement. I'm thankful to the members of this committee and to Congress in general for all of their work on energy legislation to this end. It would be a privilege and an honor for me to work to implement your legislation at FERC, and if I am confirmed by the Senate I will work with the commissioners of FERC and with this committee to accomplish the goals of ensuring reliable and safe electric and gas transmission at just and reasonable rates and expeditious relicensing of hydropower projects. And I appreciate this opportunity, Mr. Chairman, to testify before you today and will be happy to answer any questions you might have.

[The prepared statement of Ms. Kelly follows:]

PREPARED STATEMENT OF SUEDEEN GIBBONS KELLY, NOMINEE TO BE A MEMBER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Chairman Domenici, Senator Bingaman, and distinguished members of the Committee, I am honored to be here today as a nominee for the Federal Energy Regulatory Commission (FERC). I would like to thank Senator Bingaman and Chairman Domenici for their support of me and for their leadership on behalf of the people of New Mexico. I would also like to express my appreciation to President Bush for his confidence in me and for nominating me to this position.

I have worked on energy law and policy matters from various perspectives for nearly twenty-five years, and I would like to try to give you a brief summary of my experience. In the 1980's I had the privilege to serve on the Public Utility Commission of New Mexico, and from 1984 to 1986 I was its Chairwoman. During my tenure there, the condition of western intrastate natural gas markets was a significant issue. The Legislature of New Mexico passed a statute to expand the market opportunities for New Mexico gas producers selling into the intrastate market and to allow natural gas consumers to buy gas directly at the wellhead or from a marketer. To accomplish this goal, the legislation called for the restructuring of New Mexico's intrastate natural gas pipelines and local distribution companies, and my two colleagues on the commission and I presided over this momentous change. Another significant challenge the Commission faced while I was there was bringing into rate base expensive new generation for two of our utilities that, if rolled into rates in the traditional manner, would have increased rates in excess of 25%. With the cooperation and collaboration of all affected parties, rate paths were negotiated that avoided rate shock for consumers and financial catastrophe for the utilities. These experiences left me with great respect for the challenges that are associated with implementing significant regulatory change.

After leaving the commission, I joined the faculty of the University of New Mexico's School of Law, where I have taught public utility regulation, energy law, administrative law and the legislative process. My work at the law school has enabled me to stay abreast of many of the developments in energy and natural resources law over the last eighteen years. For much of the time I have been at the law school, I have served as a trustee on the board of the Rocky Mountain Mineral Law Foundation, a membership organization of western interests concerned with the law and policy surrounding the natural resources of the West, including coal, oil, gas, nuclear, hydropower and renewable resources. From this association I have learned about the industries that develop, produce and consume these resources in the West. I have also been a legal advisor to the University of New Mexico and New Mexico State University, in their roles as an electricity consumer, gas consumer and cogenerator of electricity. Additionally, I have worked for the New Mexico Legislature's Legislative Council Service to help draft legislation for the restructuring of New Mexico's public utility commission.

Before serving on New Mexico's Public Utility Commission, I worked for New Mexico's Attorney General, Jeff Bingaman, in the office that he established to represent the interests of New Mexico's residential and small business customers in utility proceedings before the commission.

Both before and after serving on the commission, I have practiced law in the energy and public utility areas. Over the course of my career I have been fortunate in having been able to represent persons and businesses from many segments of the utility industries, including investor-owned utilities, member-owned utilities, county-owned utility, non-utility generators, companies doing business with utilities, and utility consumers. I have developed an understanding of the profound importance of energy utilities to the people of our country, our way of life and our economy.

From January to August 2000, I worked at the California Independent System Operator, and so I was present when California's electricity market experienced its dreadful disruption. That experience has left me anxious to work to assure that nothing remotely similar ever happens again in our country.

I understand that our electricity, natural gas and hydropower industries are all facing tremendous challenges today and that the solutions to the problems will not be easy to identify or implement. I am thankful to the members of this Committee in particular and the members of Congress in general for all their work on energy legislation to this end. It would be a privilege and an honor to work to implement your legislation at the Federal Energy Regulatory Commission. If I am confirmed by the Senate, I will work with the Commissioners of FERC and with this Committee to accomplish the goals of ensuring reliable and safe electric and gas transmission, just and reasonable wholesale electric rates, and expeditious re-licensing of hydropower projects.

I appreciate this opportunity to testify before you today and will be happy to answer any questions you may have.

The CHAIRMAN. Thank you very much. Because I have to leave rather quickly I wonder if you object, if there'd be an objection to us hearing from Rick Dearborn now before we ask questions of Ms. Kelly.

Without objection, please proceed, give us your opening remarks and submit your statement for the record.

TESTIMONY OF RICK A. DEARBORN, NOMINEE TO BE ASSISTANT SECRETARY OF ENERGY FOR CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

Mr. DEARBORN. Thank you, Mr. Chairman, first of all I'd like to thank Senator Sessions for joining us today and for that fantastic introduction. I appreciate having worked for him for the last 6½ years and truly respect the Senator and valued every day I was there working for him.

Mr. Chairman, Senator Bingaman, and members of the committee, I am honored to appear before you today as President Bush's nominee to serve as the Assistant Secretary of Energy for Congressional and Intergovernmental Affairs. There are many challenges confronting this committee, the Department of Energy and our Nation. If confirmed, I look forward to working with you and your staff to meet the challenges we will face together.

Mr. Chairman, I've had the distinct privilege to work for six Senators over the course of 10 years of service on staff in the Senate. I have learned a great deal about public service from each of them. Notably, over the past 6½ years I have served as the legislative director for Senator Jeff Sessions of Alabama. Managing his legislative staff and the portfolio of policy issues he sponsored helped me gain a greater appreciation for and understanding of our legislative branch of government. If confirmed I am confident that my managerial experience in running a legislative office, my understanding of the legislative process and the working relationships I have forged in both parties and in both houses of Congress has well prepared me for service in this administration.

If confirmed I plan to be engaged with the members of this committee during your work on the energy issues that confront our Nation. I believe it is the primary responsibility of the Congressional Affairs Office to ensure that lines of communication between the Department and the Congress are always open. I believe it will be my job to stay in constant contact with Congress and other energy stakeholders to make sure that the laws and the regulations applicable to the Department of Energy are implemented effectively.

I believe the Office of Congressional and Intergovernmental Affairs should serve to provide you the information you may need on any given issue in a timely manner. If confirmed, I also believe it will be my role to provide you assistance with problems affecting your constituents. Having dealt with constituents daily, I would be committed on behalf of the Department to helping each of you serve them.

Understanding the oversight role of this committee, I believe it is paramount to make every effort to provide you the witnesses you may request for your hearings. Further, any documents or information needed for committee hearings or to help you draft or amend legislation will be provided. If confirmed, your official duties on this committee will be our focus in the Congressional Affairs office.

In addition to working with Congress, the Office of Congressional and Intergovernmental Affairs is responsible for working with State and local governments, tribal governments, and interested individual and organizational stakeholders. The Department's activities impact communities all over the Nation. The Department owes

these communities timely and accurate information about our programs and policies and I take this charge seriously.

Finally, if confirmed, managing my department wisely will be one of my top priorities. Everything from meeting my budget to the hiring of staff will receive my undivided attention. As a steward in this office, you have my commitment that your trust and the public's trust will be well placed.

Mr. Chairman, I can't think of a more fascinating and challenging place to work than at the Department of Energy. The opportunity to serve as the assistant secretary to President Bush and Secretary Abraham will be a challenging role, and I look forward to working with you and the members of the committee. Thank you for the opportunity to appear before you today, and I look forward to answering your questions.

[The prepared statement of Mr. Dearborn follows:]

PREPARED STATEMENT OF RICK A. DEARBORN, NOMINEE TO BE ASSISTANT SECRETARY OF ENERGY FOR CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

Mr. Chairman and members of the committee, I am honored to appear before you today as President Bush's nominee to serve as the Assistant Secretary of Energy for Congressional and Intergovernmental Affairs. There are many challenges confronting this committee, the Department of Energy and our nation. If confirmed, I look forward to working with you and your staff to meet the challenges we will face together.

Mr. Chairman, I have had the distinct privilege to work for six Senators over the course of ten years of service on staff in the Senate. I have learned a great deal about public service from each of them. Notably, over the past six and half years I served as the Legislative Director for Senator Jeff Sessions of Alabama. Managing his legislative staff and the portfolio of policy issues he sponsored helped me gain a greater appreciation for and understanding of our legislative branch of government. If confirmed, I am confident that my managerial experience in running a legislative office, my understanding of the legislative process and the working relationships I have forged in both parties and in both Houses of Congress has well prepared me for service in this Administration.

If confirmed, I plan to be engaged with the members of this committee during their work on the energy issues that confront our nation. I believe it is the primary responsibility of the congressional affairs office to ensure that lines of communication between the Department and the Congress are always open. I believe it will be my job to stay in constant contact with Congress and other energy stakeholders to make sure that the laws and regulations applicable to the Department of Energy are implemented effectively.

Further, I believe the Office of Congressional and Intergovernmental Affairs should serve to provide you the information you may need on any given issue and in a timely manner. If confirmed, I also believe it will be my role to provide you assistance with problems affecting your constituents. Having dealt with constituents daily, I would be committed on behalf of the Department to helping each of you serve them.

Understanding the oversight role of this committee, I believe it is paramount to make every effort to provide you the witnesses you may request for your hearings. Further, any documents or information needed for committee hearings or to help you draft or amend legislation will be provided. If confirmed, your official duties on this committee will be our focus in the Congressional Affairs office.

In addition to working with Congress, the Office of Congressional and Intergovernmental Affairs is responsible for working with state and local governments, tribal governments, and interested individual and organizational stakeholders. The Department's activities impact communities all over the nation. The Department owes these communities timely and accurate information about our policies and I take this charge seriously.

Finally, if confirmed, managing my department wisely will be one of my top priorities. Everything from meeting my budget to the hiring of staff will receive my undivided attention. As a steward in this office you have my commitment that your trust and the public's trust will be well placed.

Mr. Chairman, I can't think of a more fascinating and challenging place to work than at the Department of Energy. The opportunity to serve as Assistant Secretary to President Bush and Secretary Abraham will be a challenging role, and I look forward to working with you and the members of the Committee.

Thank you for the opportunity to appear before you today, and I look forward to answering your questions.

The CHAIRMAN. Thank you very much. Ms. Kelly, I regret that I did ask you to introduce your relatives who are present. Would you care to do that, please?

Ms. KELLY. Thank you, Mr. Chairman, I would be happy to do that. With me today is my mother, Dolores Gibbons, who lives near me in Albuquerque, New Mexico. And my brother on my far right, Jack Gibbons, who is director of residential life at the University of California at Los Angeles, and my husband John Kelly, who is a lawyer with the Modrall Sperling firm in Albuquerque. And one of our daughters, Katherine, who is a sophomore at the University of Pennsylvania; she just started school last week and she has permission from her English professor to miss class today.

[Laughter.]

Not with us is our other daughter, Vickie. She just started her first year of medical school at the University of New Mexico and she does not have permission from her professors to miss class today. And I've noticed friends of mine in the audience, and I'd like to acknowledge them, Senator, and thank them for being here.

The CHAIRMAN. Thank you. Rick, do you have any relatives here?

Mr. DEARBORN. Yes, Mr. Chairman. My mother, Joyce Dearborn, is here with me today. I was hopeful that my father could make it but unfortunately he was too ill to travel. And a myriad of friends that I consider part of my Senate family who have joined in the back of the room.

The CHAIRMAN. Great. Thank you all for coming, and congratulations. And now I'm going to yield the chair to the Senator from Wyoming and will wish you both the best. I see no reason why we should not be voting soon on reporting you out and then asking the Senate to confirm you. Thank you.

Ms. KELLY. Thank you.

Senator THOMAS. Mr. Chairman, we'll give you permission to leave for the rest of the day. Thank you.

Senator, would you care to have questions, sir?

Senator BINGAMAN. Mr. Chairman, I had no questions of either nominee. I support the two nominees, as I indicated before.

Senator THOMAS. Okay. Thank you. Well, I do, too. But I do have a couple of questions. Ms. Kelly, obviously things have changed in the generation and distribution of electricity. Years ago if you had a distribution area, why you generated for that and that was then. Now, market generators, of course, are very important and therefore you have to move, to move it.

I guess one of the things that we deal with is the division of responsibility between the Federal Government, and FERC in this case, and the States, and more probably RTOs. Tell me how you view that and how we might move forward in identifying and establishing those responsibilities.

Ms. KELLY. Yes, Senator. Well, in 1935 when the Federal Power Act was passed, Congress set up those responsibilities and gave the Federal Government responsibility for the transmission in inter-

state commerce of electricity and the wholesale sales of electricity and left all other responsibilities to the States. I understand that FERC has proposed RTOs as early as the year 2000 as voluntary organizations for the managing of markets, and that some areas have formed RTOs. I think it's very important that the States be involved at the very beginning in the formation of any RTO.

Senator THOMAS. There obviously are differences among regions, and we find that increasingly as we go into this, and even among States, so I think the movement then interstate, within the RTO, pretty much would remain with the States collectively. Do you agree with that?

Ms. KELLY. Senator, I agree that those markets are regional. And I think that the States have been working individually as well as with other States in their region to determine what kind of market structure they think is best. And I think it's important for FERC to work with the States to determine on a region by region basis what the best market structure is for each region.

Senator THOMAS. One of the difficulties is some of the structures like Bonneville Power, for instance, WAPA, so on, have not been under the jurisdiction, particularly. Now WAPA does allow in their transmission others. How do you think we deal with that?

Ms. KELLY. Well, Senator I agree with you that the Federal utilities are not jurisdictional to FERC, and neither are the municipal utilities and neither are the coops. And so again, for an integrated transmission system to operate as a single entity, there has to be agreement among those entities that it would be to everyone's advantage to form that kind of an organization.

Senator THOMAS. The coops are not all out of our bill, just the smaller ones, 4 million hours.

You mentioned I think you were in California with the independent transmission group, is that right?

Ms. KELLY. Yes, Senator, the organization that was operating California's transmission system at the time. And I guess still is.

Senator THOMAS. Were they involved at the time? They didn't seem as if they worked very well.

Ms. KELLY. It did not work very well, Senator. I agree. There was, it was a dreadful, dreadful experience. And now we know that there were many reasons for the problems, but as Senator Feinstein mentioned, there was fraud and market abuse and rampant market manipulation.

Senator THOMAS. But aren't there a number of agencies that are responsible for that, in addition to FERC? Who are responsible when there's fraud, when there's

Ms. KELLY. Well, actually Senator, you're right. FERC does not have express jurisdiction over market manipulation. I know that the committee has considered the possiblity of adding that to the legislation, and I think that would be a good idea.

Senator THOMAS. But there are agencies that do.

Ms. KELLY. Yes, and I understand that they are being prosecuted under criminal law.

Senator THOMAS. I hope so. I have one final question. This independent—what—how would you see we might be able to increase the incentive to invest in transmission? Would third party ownership be an alternative?

Ms. KELLY. I think, Senator, that you've raised a very significant question. In the post-California era and after the blackout in the Northeast, there appears to be inadequate investment in transmission around the country and I think that FERC is responsible or should be responsible for determining what those roadblocks are. There are potentially a number of them. One is the riskiness of building a transmission project with the long lead times that are involved. One is potentially the difficulty with siting transmission, the uncertainty over what the transmission ownership is going to be. And the concern about whether or not there would be a rate path established by FERC and by the States that would allow them to recover their investment. And I think, Senator, that we need to determine what the exact causes are and take steps to eliminate those barriers.

Senator THOMAS. My final question, there's been a lot of resistance, largely from the idea of having some State involvement here on the standard market design. It was my understanding it has pretty much been withdrawn from FERC. What's your view on that?

Ms. KELLY. I think that as you mentioned earlier, that there is not a standard market, there are regional markets. And the concerns of the regions are different. And the generation mixes are different, and the concerns of the region including the concerns of the States should be of paramount importance in determining which market should be structured which way.

Senator THOMAS. Thank you.

Senator Feinstein.

Senator FEINSTEIN. Thanks very much, Mr. Chairman. If I might, Ms. Kelly, California has asked the Commission to order $8.9 billion in refunds for overcharges in 2000 and 2001. And initially FERC said it would not consider almost $7 billion of California's request, so California had to go to the Federal court, and the Ninth Circuit Court of Appeals ordered FERC to allow introduction of evidence of market manipulation into the refund proceeding. The staff report comes out recommending only $1.9 million. Nobody has to admit wrongdoing. And yet you have one company that did 80 percent of their business in wash trades, phony trades, 80 percent of their entire business in phony trades. And I'd like to know how as a commissioner you would assure those of us in California that FERC will fully consider this evidence.

Ms. KELLY. Senator, I understand that that case is pending before FERC, and I hope that I will, if I'm confirmed by the Senate, will sit on that case. And I look forward to considering it with the highest degree of concern. As I said, I was there and I saw the damage that the high rates did and rate increases of 400 percent, people unable to do their business—I read about an owner of a laundry, and he said all he really does is buy and resell electricity, and he had to close his business—and the disaster it's wreaked on the economy of California. And I will make it one of my priorities.

Senator FEINSTEIN. Well, don't let them intimidate you. Mix it up a little bit.

Ms. KELLY. Thank you.

Senator FEINSTEIN. I think that's really important, because I think there's a lot of intimidation when it comes to energy. So be strong.

I have to ask another question because a constituent brought this to my attention. And I want to be careful in the way I ask it because it's in litigation. But this has to do with your representation of Valencia Energy Company that wants to build a natural gas powerplant 86 feet from a residential community outside of Albuquerque. And apparently, and I have the transcript, you stated that the natural gas plant would emit only water vapors and carbon dioxide into the air, and yet the plant has gone in for an environmental permit to allow it to essentially emit a large amount of other toxic materials into the air.

Ms. KELLY. Thank you, Senator.

Senator FEINSTEIN. Do you stand by that, that that plant would not emit any toxic vapors into the air?

Ms. KELLY. I'd like to explain the context for that case.

Senator FEINSTEIN. Please. Thank you.

Ms. KELLY. I do represent the Valencia energy facility being built by People's Energy, and the facility had received two permits, a site design permit from the county commission and a clean air permit stating that it was a minor source from the New Mexico Environment Department. And Mr. Alba, your constituent, who owns property across from the industrial park that is undeveloped land, did not appeal the clean air permit. However he did appeal the county's site design approval. He sued the county and People's Energy intervened. And in the case, the issue was whether the county interpreted their zoning ordinance correctly to allow gas-fired electric generating facilities in a heavy industrial park.

And during the course of oral argument, the judge posed a hypothetical to me and said in essence, if the county commission interprets their ordinance in this manner, doesn't that mean that a nuclear powered facility could be placed in the industrial park. And I was trying to distinguish the chemical process associated with the combustion of natural gas from the chemical process associated with the fission of uranium. And I guess I would point out that I was not testifying; it was oral argument. Mr. Alba was represented by an attorney on rebuttal who did not take issue with any of my statements. I am certain that being unprepared for the question, I could have been and should have been more artful in my response.

Senator FEINSTEIN. So pollutants—the question I had, I mean, this is 87 feet from homes, if I understand it correctly. It is not?

Ms. KELLY. There are no homes on the property. The property was subdivided in the 1960's and the corporation went bankrupt and no infrastructure was ever put in the property, so there's no utilities, there's no water lines or gas or electricity. And the, it was actually rather fraudulent sales. It was sold to people all over the country, retirees. It is a very sad situation. And there has been no development on that land. It is platted as a residential community of 3,000 lots, but it is a wasteland.

Senator FEINSTEIN. Thank you, Thank you very much.

Senator THOMAS. Thank you very much.

Senator.

Senator BINGAMAN. Mr. Chairman, let me just ask one question. On standard market design, there has been a lot of controversy about whether or not there is any standard market, and whether or not FERC should be stepping in. The issue that sort of confronts us as a result of the blackout in the Northeast is much more with regard to reliability. And I'd be interested in any thoughts you have as to the role FERC can usefully plan in ensuring that the transmission system we have around the country is reliable.

Ms. KELLY. Thank you, Senator. In particular with respect to the blackout in the Northeast, I look forward to finding out what the precise cause or causes were and having, hopefully, FERC involved in insuring that those problems are solved. More generally, FERC does not have a specific reliability mandate in the Federal Power Act, and I know that Congress is considering the adoption of mandatory reliability standards, and they would be mandatory and enforceable. And I think that would be an excellent step in the right direction.

Also, it is time for individual transmission owners to plan individually and regionally for the adequacy of transmission, and also for States to plan regionally for their future needs, and I would like to see FERC involved in the planning efforts with the States. And then finally as I mentioned before to Senator Thomas, I think it's incumbent upon FERC to determine what the roadblocks are, specifically, that exist with the necessary investment in adequate transmission infrastructure and work to eliminate those road blocks.

Senator BINGAMAN. Thank you very much.

Senator THOMAS. Thank you. Mr. Dearborn, you know, of course, that we are in process of an energy policy which we hope will be a policy that shows us where we want to be in 10 or 15 years or 20. Do you expect that the department will be involved with that, and be able to assist with their ideas and points of view?

Mr. DEARBORN. Senator, I'm very hopeful that they already have been. If confirmed, I look forward to working with you and the members of this committee to provide you with the administration's views on energy policy.

Senator THOMAS. Thank you. Unless you have further questions, Senator.

I thank both of you. Certainly I'm impressed by both of your backgrounds and I just want to point out how important it is for us to get these FERC nominations in place. By the time this Congress is over it will be a desperate situation unless we do. So we need to do that. And then of course we are faced I think with the challenge of an energy policy for this country, in order to not have blackouts, in order to not have shortages. At the same time of course create a better economy and stronger jobs.

We look forward to dealing with you quickly, and I hope positively. So all additional questions for the record will be submitted to the chief counsel's office by 5 this afternoon. Otherwise, thank you so much for being here. The committee is adjourned.

[Whereupon, at 10:50 a.m., the hearing was adjourned.]

APPENDIX

RESPONSES TO ADDITIONAL QUESTIONS

DEPARTMENT OF ENERGY,
CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, September 15, 2003.

Hon. PETE V. DOMENICI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Enclosed are answers to the post-hearing questions submitted to Rick Dearborn in writing by members of the Committee on Energy and Natural Resources following his appearance before the Committee as Assistant Secretary for Congressional and Intergovernmental Affairs-designate for the Department of Energy.

Please let me know if I can be for any further assistance.

Sincerely,

SHANNON D. HENDERSON,
Acting Assistant Secretary.

[Enclosure]

RESPONSES OF RICK DEARBORN TO QUESTIONS FROM SENATOR BUNNING

Question. The Department of Energy is setting up an office in Lexington, Kentucky to provide direct funding and communication between Paducah and the DOE, which presently goes through the Oakridge DOE office. It has taken the DOE almost two years to establish this direct funding and communication leaving uncertainty and confusion at the Paducah Plant. I have had assurances from Assistant Secretary Roberson that this office would be set up in October. Will you work to make sure that the DOE will meet its deadline of opening the Lexington office in October and that the office will work effectively?

Answer. If confirmed, I will be committed to assisting the new Lexington office as needed in meeting the Department's responsibilities. To this end, several positive actions have taken place including the signing of an office lease and the posting of job vacancies. In addition, I understand that the new office manager, Mr. William Murphie, has relocated to Kentucky and is transitioning into his new position. I believe these actions are clear indicators of the Department's commitment to the success of the Lexington office. The Department remains committed to opening the Lexington office this fall.

Question. Kentucky and the DOE recently signed a letter of intent to complete an accelerated cleanup agreement for the Paducah plant. Does the DOE expect that an accelerated cleanup agreement will be signed by the end of September?

Answer. The Office of Environmental Management is working diligently with Kentucky to achieve a signed accelerated cleanup agreement by the end of September. Collaboration and commitment by all parties are critical to achieving this goal. Reaching an agreement also involves resolving several complex enforcement matters that remain outstanding. It is my understanding that the Department believes it is possible for those issues to be resolved by the end of September; however, this requires the State to remain actively engaged with DOE to resolve outstanding issues.

Question. During the Cold War, workers employed at the Department of Energy sites across the country served our country by helping to make nuclear weapons. Many of these workers subsequently became ill due to their work with radioactive and toxic substances at the sites. The DOE has worked to align the Physician's Panel rule for the Energy Employees Occupational Illness Compensation Program Act with Congressional intent. However, workers' claims for the Physician Panel under Subtitle D of the Act are backlogged. Do you think that the DOE will be able

to meet Secretary Abraham's assurances of having almost 100 cases per week processed?

Answer. As I understand the situation, the Department has proposed an FY03 reprogramming request that is currently on the Hill in the amount of $9.7 million that would allow the Department to dramatically accelerate the processing of these cases.

Question. The DOE General Counsel has indicated that the DOE does not have entities that will pay claims for many workers whose claims have been approved by the Physicians Panels. This problem involving thousands of claims has not been solved in states such as Kentucky, Iowa, Missouri, Ohio, and Colorado. This problem was revealed to Congress nearly a year ago, and was identified by your advisory committee nearly 18 months ago. Last year, I co-sponsored legislation that would give the Department of Labor a role in helping to solve some of the obstacles to DOE's implementation of this program. I believe that you don't fix something that isn't broken, but we know this is broken so it should be fixed. Do you have any recommendations on how to fix this problem?

Answer. At this time, I do not. I know that DOE is trying to help as many applicants as it can, consistent with the constraints of the EEOICPA statute itself. I would be glad to discuss this issue with you further.

September 16, 2003.

Hon. PETE V. DOMENICI,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Enclosed are my responses to questions for the record of the Senate Energy and Natural Resources Committee's September 9, 2003 hearing to consider my nomination to be a member of the Federal Energy Regulatory Commission.

If you have any further questions or need additional information, please let me know.

Sincerely,

SUEDEEN G. KELLY.

[Enclosure]

RESPONSES TO QUESTIONS FROM SENATOR DOMENICI

Question 1. Describe your view on how the delineation between State and Federal oversight of our electrical system should function and where the greatest challenges lie as wholesale competitive markets develop.

Answer. In 1935, with the passage of the Federal Power Act, Congress gave FERC authority over wholesale sales and interstate transmission of electricity provided by public utilities. States have authority over retail sales and local distribution, as well as the siting of generation, transmission and distribution facilities. As wholesale competitive markets develop, one challenge will be ensuring that federal and state policies are not working at cross-purposes. Ongoing communication and coordination among the states and FERC is essential to avoiding this problem. FERC and the states must also work together to ensure the transmission infrastructure is adequate and reliable.

Question 2. What are the major lessons we should learn from the recent blackout?

Answer. Clearly, a robust transmission system is essential to the health, safety and welfare of all Americans, and we must make sure our county has adequate and reliable transmission. When we know the precise causes of the blackout, we must determine and implement the appropriate solution to ensure this does not happen again. Even without knowing the precise causes of the blackout, we know reliability will be enhanced if we institute mandatory and enforceable reliability standards. It is also important for FERC, the States and transmission owners to determine what other barriers stand in the way of assuring that adequate and reliable transmission is in place and operated dependably throughout the country, and then to act to remove those barriers.

Question 3. How well do you think FERC has done in recent years collaborating with States and stakeholders as the agency has moved forward in its Order 888 and Order 2000 efforts as well as Standard Market Design?

Answer. In some areas of the country the transmission owners are voluntarily forming RTOs and ISOs and there seems to be a fair amount of collaboration among FERC, those States and those stakeholders. However, in other areas of the country,

particularly in the West, there is little collaboration and some significant hostility to Standard Market Design.

Question 4. Describe your view of the Mobile-Sierra Doctrine and how its application affected the long-term contracts in the West.

Answer. The Mobile-Sierra Doctrine, which derives from United States Supreme Court case law, permits parties to enter into fixed rate contracts that may not be revised unless they are found to be contrary to the public interest. I am aware that the issue of the Mobile-Sierra Doctrine and its application to long-term contracts in the West is still pending on rehearing in several cases at the Commission. Therefore, it would be inappropriate for me to prejudge any decision I might have to make on such cases if my nomination is confirmed by the Senate.

RESPONSES TO QUESTIONS FROM SENATOR BUNNING

Question 1. Kentucky has the lowest residential electricity rates in the country. The FERC's proposed Standard Market Design rule, or SMD, appears to penalize states with low costs to benefit those with high costs. Do you believe that FERC's SMD rule will negatively affect Kentucky's rates?

Answer. I do not believe that FERC should adopt a rule that penalizes states with low costs to benefit those with high costs. I am not able to predict whether FERC's proposed SMD rule would negatively affect Kentucky's rates without understanding in some detail the generation resources available in Kentucky and the surrounding region and the adequacy of transmission in Kentucky and the region. I would not support a rule that penalized Kentucky's ratepayers.

Question 2. One size does not fit all. The nation's electricity market is not uniform, and instead, each region of the country has different needs. Do you believe that SMD takes into account unique regional differences and individual state interests?

Answer. I agree that the country has regional electricity markets, each with different needs and different state interests. SMD as proposed by FERC did not take these differences into account.

Question 3. A portion of Kentucky is served by TVA. It is my understanding that public power companies within TVA will not be subject to SMD. How do you propose that the SMD rule will benefit the country if public power companies and TVA, which make up a large portion of the nation's electricity market, do not even have to follow it? How will this affect the rest of Kentucky companies that will be forced to follow SMD?

Answer. I am not certain that SMD would achieve its goals of enhancing reliability of transmission and non-discriminatory open access to transmission if, non-FERC jurisdictional transmission owners do not follow it. Kentucky's FERC-jurisdictional companies should follow it only if the benefits of SMD outweigh its costs.

Question 4. TVA recently announced a rate increase for its customers. Currently, TVA is not subject to FERC jurisdiction for its rates, charges, and terms, and therefore is not subject to any oversight other than by themselves and Congress. Placing TVA under FERC would require it to be subject to the same regulatory requirements as other utility companies. What do you think of FERC overseeing TVA for how it operates its transmission grid and how it charges its customers for wholesale electricity? Do you think FERC oversight will bring more competition into the TVA's region that right now operates under its monopoly?

Answer. I understand that TVA's public power customers are contemplating legislative changes that would allow them to buy a large share of their power from sources other than TVA. In return, they are willing to accept some measure of FERC regulation over TVA's transmission to facilitate their access on equitable terms and conditions. To the extent they support some FERC regulation, they must believe they will benefit from it. As I understand it, they would support the Commission having authority over TVA's terms and conditions of transmission service, but not over full public utility regulation over TVA's rates. If Congress chose to empower FERC with the authority to oversee TVA in this fashion, I would support Congress' choice. If Congress chooses to bring more competition in wholesale electricity sales to Tennessee Valley, then some FERC implementation and increase in FERC oversight of the wholesale market, for which FERC has responsibility under the Federal Power Act, would naturally follow from that decision. However, whether more competition would actually occur would depend on whether the buyers in the Tennessee Valley decide to purchase from sellers other than TVA and the sellers decide to sell.

RESPONSES TO QUESTIONS FROM SENATOR MURKOWSKI

Question 1. As I'm sure you know, during the past year natural gas prices have reached near historic levels. As stated by many industry experts and confirmed by the DOE Natural Gas Summit last June, the fundamental reason for these high natural gas prices is a mismatch between supply and demand. Simply put, demand for natural gas is exceeding supply. This is the result of many factors including the reliance of most new electric generating facilities on natural gas and the fact that gas is an environmentally desirable fuel.

Many of my colleagues on this Committee know the impact the natural gas shortage has had on industries and employment in their states—not to mention on homeowners energy bills. Even Chairman Greenspan testified before Congress about the significant negative impact the natural gas shortage was having on the economy.

We in Alaska know we can be part of the solution to this looming crisis. In addition to providing many new employment opportunities, the Alaska Natural Gas Pipeline will significantly increase the supply of natural gas available to American consumers. Most importantly, this will be a secure, domestic source of energy. The Energy bill now in Conference includes language authorizing the Federal Energy Regulatory Commission to certificate the construction of an Alaska Natural Gas Pipeline. The Commission is also designated as the lead agency for purposes of the environmental review necessary for pipeline construction. I'd appreciate hearing your thoughts on the importance of prompt Commission action on the pipeline certificate application.

In this regard, would you consider securing the services and expertise of local Alaska contractors to facilitate the expeditious review and certification of the pipeline project?

Answer. I share your concern for the rising cost of natural gas, and agree that Alaskan gas can play a key role in increasing America's gas supply. The Commission will play a strategic role in the autirorizatior1 of any natural gas pipeline that would deliver Alaskan gas to the lower 48 states. In that vein, I would ensure that the Commission takes all steps necessary to expeditiously review and act on an Alaskan gas pipeline certificate application as soon as that application is filed by the project sponsors. I have discussed this with Commission staff and understand they are preparing for the receipt of an application by holding early discussions with other federal and Alaska agencies on coordinating reviews. Further, I understand the Commission staff has opened discussions with Native Alaskans to speed the identification of issues and facilitate their resolution. From what I have learned of the Commission's preparation andmy own interest in this critically important resource, I feel confident that the Commission will respond to the challenge.

The Commission staff frequently uses environmental contractors to assist them in conducting their required environmental reviews of pipeline proposals. In most instances, staff uses a "third-party" contracting process under which it selects contractors based on a review of submitted proposals in consideration of both expertise and cost, and evidence that an organizational conflict of interest does not exist. I support the principle of the federal government using locally available services, and 1 am sure that local Alaskan consulting firms with local Alaskan expertise would compete well in the Commission staff's open bidding process.

RESPONSES TO QUESTIONS FROM SENATOR DOMENICI ON BEHALF OF SENATORS REID AND ENSIGN

Question 1. Generally, do you believe that the "public interest" standard or the "just and reasonable" standard should be used in the context of reviewing long-term contracts entered into in a manipulated and fraud filled market, in the midst of the electricity crisis that affected the West?

Answer. The Mobile-Sierra Doctrine, which derives from United States Supreme Court case law, permits parties to enter into fixed rate contracts that may not be revised unless they are found to be contrary to the public interest. The "just and reasonable" standard in the Federal Power Act imposes on FERC the duty to prevent unjust and unreasonable rates for the sale of wholesale electricity. Which standard Congress intended to have FERC apply in the context of reviewing long-term contracts entered into in a manipulated and fraud filled market in the midst of the electricity crisis that affected the West is a complex question of first impression and whether these standards were violated is a question of fact. Both these questions are central in several cases now pending before the Commission. If confirmed by the Senate, I would sit on these cases and I have a legal responsibility not to prejudge the issues in them, and to make decisions based on the record.

Question 2. Do you believe that it is sufficient to only prospectively take away Enron's certificate to sell power in the wholesale electricity market, or should its

certificate be revoked retroactively to the point in time when Enron first violated the law, FERC's regulations and its tariff obligations?

Answer. This is a significant question of fact and law that is central in a case pending before the Commission. For example, a seller's violation of FERC approved tariff requirements may justify the imposition of a remedy for the period before the refund effective date, however, the Commission needs to consider all of the circumstances to ensure that imposing a particular remedy is lawful. If confirmed by the Senate, 1 would have a legal responsibility not to prejudge these issues in this case, and to make decisions based on the record.

Question 3. Do you believe that it is either ire the public interest or just and reasonable to allow Enron to enforce its contracts in light of its violations of the law, FERC's regulations, and its tariff obligations?

Answer. Whether Enron's wholesale electricity contracts can be set aside as contrary to the public interest standard or just and reasonable standard of the Federal Power Act in light of Enron's violations of the law, FERC's regulations and its tariff obligations is an important question of fact that is now pending in a case before the Commission. If confirmed by the Senate, I would sit on this case and I have a legal responsibility not to prejudge this issue, and to make decisions based on the record.

RESPONSES TO QUESTIONS FROM SENATOR CANTWELL

Question 1. In June FERC issued rulings in several cases concerning whether refunds should be owed for forward contracts signed in the West during the 2000-2001 electricity crisis. In each instance, the Commission declined to grant refunds oil the basis that the complainants failed to meet the so-called "public interest" standard. The Commission refused to apply the Federal Power Act's statutorily mandated "just and reasonable" standard of review to the consideration of these contracts. Do you believe the Federal Power Act authorizes FERC to apply any standard other than the just and reasonable standard?

Answer. The "public interest" standard of review derives from United States Supreme Court case law interpreting the FPA. It permits parties to enter into fixed rate contracts that can be revised only if they are found to be contrary to the public interest. The "just and reasonable" standard imposes a duty on FERC to ensure no wholesale rate is unjust or unreasonable. The question of whether the "just and reasonable" or "public interest" standard should be applied to the contracts is a significant question of first impression on which the sitting commissioners have split. In fact, this question is now pending before the Commission again in cases that ate on rehearing. These cases also involve significant questions of fact. If confirmed by the Senate, I would sit on these cases and therefore I have a legal responsibility not to prejudge these issues and to make decisions based solely on the record.

Question 2. One of the controversial issues that arose in these forward contract cases is whether the Mobile-Sierra doctrine's public interest standard can be applied to market-based rate contracts. Under the old regime, when FERC had a cost-based contract before it the Commission would first approve the contract pursuant to the just and reasonable standard contained in Section 205 of the Federal Power Act. Subsequently, when someone tried to change the rate, FERC would (at times) apply the public interest standard. Do you believe the public interest standard can be applied to market-based rate contracts when FERC has never originally approved the contract pursuant to Section 205 of the Federal Power Act? If so, what circumstances would have to exist for you to apply the public interest standard?

Answer. I believe the question you pose is a significant one of first impression, and it is currently pending before the Commission on rehearing. I understand that its resolution could have widespread impact on consumers and electricity producers in the West. If confirmed by the Senate, I would sit on this case, and I have a legal responsibility not to prejudge the issue. Additionally. I would not want to decide the issue without giving thorough consideration to the record created by all the parties to the case.

Question 3. Do you believe a contract rate can ever be in the public interest if is was the result of market manipulation or a dysfunctional spot market, such as existed in California and Western markets?

Answer. Whether a rate in a contract for the purchase of wholesale electricity that is high as a result of market manipulation or a dysfunctional spot market can be set aside as contrary to the public interest standard or just and reasonable standard of tile Federal Power Act is a question of fact that must be decided on a case by case basis. With respect to the contracts entered into in the California and Western markets in the midst of the 2000-2001 market upheaval in California and tile West, this very issue is pending before the Commission. If confirmed by the Senate, I

would sit on those cases and therefore, I cannot prejudge this question and must decide it based on tile record.

Question 4. In the Pacific Northwest, regional stakeholders are divided about the prospect of forming a regional transmission organization (RTO) and are almost unanimously opposed to FERC's Standard Market Design (SMD) proposal. Movement to an RTO or compliance with SMD would represent significant changes in the structure of our energy markets. In particular, I have been vocally opposed to SMD. Before any proposal moves forward too quickly, we must be certain there has been considerable input and participation from all regional interests, and that any RTO or market structure's costs and benefits are sufficient to merit such a change. Do you agree that individual regions should be encouraged to find solutions that meet their unique needs and fit their characteristics and that regional processes and solutions should be respected and acknowledged?

Answer. Yes. I believe that regional solutions should be encouraged and respected. Having the stakeholders in a region agree on what is best for their region is tile best way to take into account the unique local characteristics and requirements of regional electricity markets.

RESPONSES TO QUESTIONS FROM SENATOR THOMAS

Question 1. Do you believe that the level of wholesale trade in electric power that presently exists throughout the country is generally beneficial?

Answer. Yes, I believe the wholesale electricity trade that exists today is beneficial. Today's wholesale transactions are voluntary, and they would not be occurring unless both consumers and sellers are benefiting from them.

Question 2. Would the wholesale markets for electric energy in the various parts of the country benefit from greater regional cooperation and greater cooperation between state and federal regulators? Could Regional Transmission Organizations (RTOs) be a vehicle for accomplishing these goals? Should participation in such organizations be voluntary or mandatory on the part of FERC jurisdictional entities?

Answer. Wholesale electricity markets have benefited in the past from cooperation among buyers and sellers within regions and between state and federal regulators. For example, in the West, such cooperation has been the basis for much of the seasonal trading in electricity. More cooperation is important today, and RTOs could be one way to facilitate these types of cooperation. RTOs were provided for in early 2000 and have been forming voluntarily since then. Making RTOs mandatory has been proposed in a proceeding now pending at FERC, so I do not want to prejudge this issue or decide it without reviewing the record. Two issues that I have questions about are whether FERC has the legal authority to make them mandatory and whether this is necessary to achieve non-discriminatory open access to transmission. Also, even if FERC has the authority to order FERC-jurisdictional entities to participate in RTOs, there are many transmission owners, particularly in the West, that are not jurisdictional; thus I am not convinced it would make sense to mandate RTOs where there might be significant regional non-participation.

Question 3. Realizing that Public Power entities such as the Bonneville Power Administration, Western Area Power Administration and other non-FERC jurisdictional entities own substantial amounts of the electric transmission grid in the west, do you believe that regional cooperation on planning, expanding and operating the interconnected system can be accomplished without tile full participation of the non-jurisdictional entities? Should participation in RTOs by these entities be voluntary or mandatory?

Answer. I do not believe that worthwhile regional cooperation on planning, expanding and operating tile interconnected system can be accomplished without the full participation of the significant non-jurisdictional entities in the west. It is vital that all federal power, public power, and other non-jurisdictional transmission owning entities participate fully in any such cooperative region-wide process for it to be successful. The West has a history of credible cooperative planning through such institutions as the Western Electricity Coordinating Council (WECC) that encompasses public and private entities, jurisdictional and otherwise. For example, the WECC's predecessor agency, the Western Systems Coordinating Council, facilitated the development of an agreement for the coordinated use of phase shifters to help control problematic power flows throughout the western interconnection. Because entities like Bonneville Power Administration and Western Area Power Administration are not subject to FERC's jurisdiction, participation by them in RTOs would have to be voluntary.

Question 4. Do you believe that there should be a strong role for federal/state cooperative oversight and monitoring of wholesale power markets that includes the

ability to take corrective action against market participants who violate established market rules?

Answer. State and federal cooperation is important to the establishment and ongoing function and monitoring of power markets. in order for markets to function with clear rules, federal responsibility for oversight of wholesale markets operating under federal law, working with states, and complementary state responsibility for oversight at tile retail level of entities operating under state law must be in place with appropriate authority to revise rules and take corrective action against market participants that violate rules at each level.

Question 5. Do you believe, as a matter of national policy, in cases where a regional or national public interest can be shown, that there is a federal role, perhaps at FERC, in assuring that transmission projects that meet such regional and national interest standards, can be permitted, sited and constructed?

Answer. Under the current law, the states generally have exclusive authority to site transmission. (There is a federal role in the siting of transmission when the land through which it will go is under the control of the federal government.) I do not believe Congress should change this unless a case can be made that state siting is not working.

Question 6. Do you believe that greater standardization of wholesale market rules and greater standardization of wholesale electricity services would facilitate greater competition in tile wholesale trade of electric energy? Would this benefit customers?

Answer. I would like to distinguish between standardization within a region and across the country. Because our electricity markets are regional, if a market region lacks uniform wholesale market rules and electricity services, making these more uniform in a manner tailored to the particular needs of the region could facilitate sales that are beneficial to customers. However, I am not convinced that greater standardization across regions would facilitate greater competition in the wholesale trade of electric energy.

Question 7. What is your view on establishing mandatory reliability standards and establishing enforcement and penalty mechanisms for non-compliance? Would FERC have a role in establishing or enforcing such standards?

Answer. A system of mandatory reliability standards established and enforced by a reliability organization subject to the Commission's oversight is necessary to assure the reliability and security of our Nation's transmission's system. In order to ensure compliance with these reliability standards, I believe the Commission should have the ability to establish a penalty mechanism.

Question 8. What is your view on the development of incentives to foster private investment in transmission infrastructure? How would such incentives be developed?

Answer. Adequate and reliable transmission is essential to the well being of Americans. FERC needs to identify the factors that prevent necessary investment in transmission infrastructure and work to eliminate them. These factors may include the long lead times needed to plan and site transmission, the uncertainty that surrounds the outcome of the transmission permitting processes, the uncertainty as to whether all the infrastructure costs will be allowed to be recovered in wholesale and retail rates, the uncertainty over the ownership and operation of the transmission being invested in, the return allowed on the investment, and the time necessary for recovery of investment. To the extent any of these are determined to be barriers, and to the extent it has the authority to do so, FERC needs to provide clarity and certainty in regard to these issues, revise the allowed return, shorten recovery time and work with states to make necessary state-jurisdictional reforms.

Question 9. Given the catastrophic blackout that occurred in the northeast last month, which we all collectively desire to avoid repeating in the future, do you have any other suggestions or ideas for us that would lead to a more reliable and efficient electric service in the future?

Answer. We need to find out the precise cause or causes of the disruption to our power supply and delivery systems that occurred over such an extensive area of the nation before we decide what specific, long term corrective actions are necessary. However, even now, we can say with some assurance that a more reliable and efficient electric service system will depend upon mandatory and enforceable electric reliability standards. Additionally, the transmission owners and operators should work with the states in their region to determine what is needed to make sure there is adequate and reliable transmission to meet today's and tomorrow's needs. The states and FERC must also work to remove regulatory obstacles to appropriate transmission investment and siting.

RESPONSES TO QUESTIONS FROM SENATOR CRAIG

Please provide with each answer to these questions a statement explaining whether the staff of the Federal Energy Regulatory Commission or current Commissioners of FERC provided assistance in preparing your response and describe the form of that assistance (e.g., written draft of a proposed response, review of your written response, etc.).

Question 1a. Background for Standard Market Design questions: The proposed SMD rule contains no evidence of systematic discrimination in access to the transmission system. The minimal anecdotal evidence in the proposed rule is from experiences in the Eastern Interconnection. The Commission has been unwilling or unable to provide systematic evidence of transmission discrimination in the Western Interconnection despite the fact that the Commission's Order 888, which prohibits such discrimination, has been in effect since 1996. Before jettisoning the Commission's original remedy for discrimination (Order 888) in favor of imposing SMD in the West, the Commission should be obligated to present systematic evidence of transmission discrimination in the Western Interconnection.

Prior to making decisions on the Commission, will you require that systematic evidence be presented on the issues?

Answer. Yes, I agree that SMD should not be imposed by the Commission without systematic evidence of transmission discrimination.

(FERC staff provided me with a copy of the Notice of Proposed Rulemaking for SMD but otherwise provided me no assistance in answering this question.)

Question 1b. In the case of the proposed SMD rule, the Commission has not presented systematic or even anecdotal evidence of discrimination in access to transmission in the Western Interconnection. Remedying discrimination is the fundamental objective of the SMD rule. Will you commit to developing such information prior to rendering a decision oil the proposed SMD rule?

Answer. I would not agree to the adoption of SMD without evidence of discrimination in access to transmission.

(FERC staff provided me with no assistance in answering this question.)

Question 2a. In numerous orders the Commission has stated that electricity markets are regional in nature, and specifically that the boundary of the Western electricity market is defined by the electrically-separate Western Interconnection which covers all or parts of 14 states, two Canadian provinces and Northwest Mexico. Do you agree that electricity markets are fundamentally regional in character and that FERC policies need to reflect the needs of such regional markets?

Answer. Yes, I agree that electricity markets are fundamentally regional in character and that FERC policies need to reflect the needs of the regional markets.

(FERC staff provided me with no assistance in answering this question.)

Question 2b. In devising policies to meet the needs of regional markets, do you believe that the states within those regions that are affected by such policies should have a role in deciding such policies? Specifically, would you support FERC granting deference to the collective advice it receives from states in the Western Interconnection?

Answer. I believe that the states in the regions that are affected by FERC policies should have a substantial role in the development of FERC policies. I would support FERC granting deference to the collective advice it receives from states in the Western Interconnection to the extent it is consistent with FERC's primary responsibility to carry out the obligations that Congress has given it.

(FERC staff provided me with no assistance in answering this question.)

Question 3a. For at least the last 20 years, no Commissioner on the Federal Energy Regulatory Commission has brought to the Commission first-hand experience in working in the Western Interconnection. This serious lack of experience with the Western electricity system has hampered the Commission in taking appropriate action in response to challenges in the West. You share this lack of experience in the Western Interconnection. To overcome this Commission handicap would you advocate that the Commission hold decision meetings in the West when addressing Western issues?

Answer. As a Westerner with twenty-five years' experience in the public utility and energy industries in the West, including their regulation, I do have significant first-hand experience with the Western electricity system. Nevertheless, given the importance of the Western Interconnection to the health, safety and economic well-being to the people of the West, I believe it is important for me to know even more about the Western Interconnection, to spend time in the West to accomplish this, and not to lose first-hand contact with the people and experiences in the Western Interconnection. I also agree that the Commission should hold meetings in the West.

(FERC staff provided me with no assistance in answering this question.)

Question 3b. The existing FERC Commissioners have undertaken some efforts to make FERC less of a Beltway-insular agency through devices such as regional panels. However, this attempt has been half-hearted and typically amounts to little more than an opportunity for state PUC commissions to get on a conference call with FERC Commissioners. For FERC Commissioners to understand the realities of the Western electricity system and hear directly from the people impacted by the Commission's policies, the Commission needs to better engage those affected by FERC policies. Would you advocate that the Commission experiment in the Western Interconnection with new approaches, such as joint boards under Section 209, to provide for joint decision-making by the Commission and the states on electricity issues before FERC that affect citizens of the West?

Note: Section 209 (16 USC §§ 824h)

824h. References to State boards by Commission:

(a) Composition of boards; force and effect of proceedings. The Commission may refer any matter arising in the administration of this Part [16 USC §§§§ 824 et seq.] to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall he appointed by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

Answer. I think that the idea of joint boards under Section 209 is an interesting one, and, if confirmed by the Senate, I would look into that idea as an approach for the Commission to better engage those affected by FERC policies.

(FERC staff provided me with no assistance in answering this question.)

Question 4a. The reliability provisions of pending energy legislation authorize governors in a region to create regional advisory bodies to oversee regional reliability councils and advise FERC. The legislation provides that where regional advisory bodies cover an entire interconnection, FERC may defer to the advice of such bodies. If an interconnection-wide body is created in the Western Interconnection, will you defer to the advice of that body?

Answer. I would defer to the advice of such regional advisory bodies to the extent it is consistent with FERC's primary responsibility to carry out the obligations that Congress has given it.

(FERC staff provided me with a copy of the reliability provisions of pending energy legislation but otherwise provided me no assistance in answering this question.)

Question 4b. Will you vote to direct regional reliability councils to use their fee collection mechanism that is authorized in the pending reliability legislation to support state-created regional advisory bodies?

Answer. If the reliability legislation authorizes regional reliability councils to use their fee collection mechanism to support state-created regional advisory bodies, as a general matter I see no reason why they should not do so, up to a reasonable amount. However, any vote by the Commission on this issue would have to be based on the record, and, accordingly, if confirmed by the Senate, I would vote on this issue based on the record.

(FERC staff provided me with no assistance in answering this question.)

Question 5. If a state agency, such as a PUC or Attorney General, has in place provisions to prevent the release of confidential data, will you vote that FERC should promptly share all of its market monitoring information with such agencies if they request such information?

Answer. I support the release of market information to the public subject to constraints the law imposes, and I also support FERC's cooperating with state regulators and federal and state enforcement authorities regarding market monitoring. However, any vote by the Commission on this issue would have to be based on the

record, and, accordingly, if confirmed by the Senate, I would vote on this issue based on the record.

(FERC staff provided me with no assistance in answering this question.)

Question 6a. If Congress were to give FERC the authority to grant eminent domain for transmission lines, under what circumstances would you vote to exercise such authority?

Answer. As a general matter, I believe authority to site transmission lines, as well as any eminent domain authority connected to it, should stay with the states. If confirmed by the Senate, and if Congress were to give FERC the authority to grant eminent domain for transmission lines to FERC, I would vote to exercise this authority consistent with the law, the facts and, to the extent permissible given the law and the facts, my general philosophy that it should remain a state decision.

(FERC staff provided me with no assistance in answering this question.)

Question 6b. If you would exercise "backstop" eminent domain authority, what would you advocate FERC do to prevent project sponsors from submitting sham or incomplete permit applications to states (that states are unable to review and make decisions on) as a means of getting their application to FERC as quickly as possible?

Answer. I would advocate that FERC work with the states to encourage them to implement regulations prohibiting the filing of sham or incomplete permit applications.

(FERC staff provided me with no assistance in answering this question.)

Question 6c. Under what circumstances would you substitute your judgment for a state's judgment on the issuance of a permit for a transmission line:

> (A) The state was arbitrary and capricious? (B) You didn't like the tradeoff the state made between land use values and the desirability of new transmission? (C) The line is needed to maintain reliability and there are no alternatives (e.g., siting generation near loads)? (D) The line is needed to mitigate the exercise of market power and there are no other options (e.g., price caps or "must run" requirements in the transmission constrained area)? (E) You believe the line is needed to allow consumers in a transmission constrained area to buy power from different types of resources (e.g., coal or renewable energy generators) located outside the constrained area?

Answer. If confirmed by the Senate, I would not substitute my judgment for a state's judgment on the issuance of a permit for a transmission line unless I was authorized to do so by law and if, based on the facts and law in the record of the case, such a decision was necessary for FERC to carry out the obligations that Congress has entrusted to it—unless the law establishes a different legal criteria for exercise of such judgment. In the hypotheticals presented in this question, it appears that scenarios (C) and (D), relating to situations where it is necessary to maintain reliability and to mitigate the exercise of market power, would meet this criteria because these are obligations Congress has directed FERC to carry out.

(FERC staff provided me with no assistance in answering this question.)

Question 6d. Would you commit to FERC commissioners personally attending and participating in public meetings in the region where FERC is considering exercising eminent domain for a transmission line?

Answer. Yes. I think it is important that government decisionmakers understand how people affected by the decision feel about the issue.

(FERC staff provided me with no assistance in answering this question.)

Question 7a. Unlike most other parts of the country, major parts of the transmission system in the Western Interconnection are owned by parties not under FERC jurisdiction (e.g., Western Area Power Administration, Bonneville Power Administration, Salt River Project, Los Angeles Department of Water and Power, etc.). In some cases, FERC-jurisdictional utilities are surrounded by public power (e.g., Xcel, aka Public Service Company of Colorado). Particularly in the Southwest, many of the major transmission paths are partly owned by FERC-jurisdictional entities and partly owned by entities not under FERC jurisdiction. Do you think it makes sense to push for the creation of RTOs in the West when non-jurisdictional utilities elect not to join the RTO?

Answer. RTOs have been proposed as a means to enhance reliability of transmission and non-discriminatory open access to transmission. One problem with their formation in the West, as you suggest, is that if less than all transmission owners join, these goals may not be able to be achieved. Additionally, I would not support the formation of an RTO where reliability and open access are thwarted rather than enhanced.

(FERC staff provided me with no assistance in answering this question.)

Question 7b. What would you do to entice non-jurisdictional entities to participate? Would you force a FERC-jurisdictional entity to do things under an RTO that a non jurisdictional member of an RTO would not be required to do?

Answer. It seems to me that a non-jurisdictional entity would decide to participate if, on balance, participation benefited its consumers. If an RTO were deemed to be desirable in a particular region, I would encourage FERC-jurisdictional and non-jurisdictional entities to work together to create one that would mutually benefit their customers. If an RTO were formed by FERC-jurisdictional and non-jurisdictional entities, I believe that the goal should be equal rights and responsibilities under the RTO and that any difference in their rights or responsibilities should not be discriminatory of either entity.

(FERC staff provided me with no assistance in answering this question.)

Question 8. The Blackout of 2003 affected parts of the Northeast and Midwest regions, not the entire nation. Do you agree that the immediate problem in preventing another blackout concerns reliability of the grid, namely, ensuring that procedures exist to prevent outages from spreading and operators follow those procedures?

Answer. It is my hope that the Task Force that is investigating the Blackout of 2003 will be able to identify the cause or causes of the blackout so that we can determine and implement the proper solution to ensure that this does not happen again. However, even without knowing the cause of the Blackout of 2003, I agree that ensuring that procedures exist to prevent outages from spreading and that operators follow those procedures is of immediate importance.

(FERC staff provided me with no assistance in answering this question.)

Question 9. Would you agree that imposing on the entire country standard market design, or wholesale market platform, which involves designing generation markets, congestion (which was not an issue in the Blackout) and matters beyond reliability and incentives for investment should wait until we fix the reliability issues in the Northeast and Midwest and provide incentives for transmission investment? Please explain.

Answer. Because electricity markets in our country are regional and because within each region we have different generation mixes, different types of transmission owners and different market-related issues, I do not think a standard market design or wholesale market platform should be imposed on the country. Additionally, I do not think any change should be made to any market without determining that the benefits of any change will outweigh the costs and that the time is right for a change.

(FERC staff provided me with no assistance in answering this question.)

Question 10. Do you favor mandatory Regional Transmission Organizations, even for parts of the country that have done well under traditional structures? If so, in light of the fact that the FERC admitted its mistake in approving the California ISO, do you think you can design an RTO that fits the urban fossil-fired Northeast and the rural hydro-based West and Southeast without creating the potential for a national, rather than statewide disaster?

Answer. RTOs were provided for in early 2000 with Order 2000, and since then RTOs have been forming voluntarily. Making RTOs mandatory has been proposed in a proceeding pending before FERC so I do not want to prejudge this issue or decide it without reviewing the record. Two issues that I have questions about are whether FERC has the legal authority to make them mandatory and whether this is necessary to achieve non-discriminatory open access to transmission. Also, even if FERC has the authority to order FERC-jurisdictional entities to participate in RTOs, there are many transmission owners, particularly in the West, that are not jurisdictional; thus I am not convinced it would make sense to mandate RTOs where there might be significant regional non-participation.

(FERC staff provided me with no assistance in answering this question.)

Question 11. Unlike the Northeast and parts of the Midwest, the rest of the country, including the West, operates under the traditional retail regulation. Do you favor protection of native load customers in those states that have such laws?

Answer. Yes, I favor protection of native load customers.

(FERC staff provided me with no assistance in answering this question.)

Question 12. Where do you draw the line between federal and state authority over electricity?

Answer. Congress drew this line in 1935 with the passage of the Federal Power Act. The federal government was given jurisdiction over transmission of electricity in interstate commerce and wholesale sales of electricity. The suites have jurisdiction over transmission in intrastate commerce and retail sales, as well as the siting of generators, transmission and distribution lines.

(FERC staff provided me with no assistance in answering this question.)

Question 13a. Where do you stand on participant funding?

Answer. I believe that a policy of having the beneficiaries of the transmission addition pay for it is the fairest pricing policy.

(FERC staff provided me with no assistance in answering this question.)

Question 13b. Do you think the FERC has defined it in a meaningful way when it talks about beneficiaries? Is it not true that, on a transmission networks, all customers benefit from the network, so that the FERC really wants to continues its current policy that has led to insufficient investment? How do you define the concept?

Answer. It is not clear to me how FERC is defining participant funding or whether FERC wants to continue its policy of rolled-in pricing. In its SMD Notice of Proposed Rulemaking, FERC suggests a default pricing policy, in the absence of an independent regional planning process, that would allow rolling-in on a region-wide basis all high voltage network upgrades of 138kV and above. In its White Paper, FERC effectively states that a definition of the types of economic enhancements that benefit customers within a region can be more or less expansive. In the White Paper, FERC proposes to allow RTOs and ISOs flexibility in choosing a definition. How to define the concept of participant funding is a complex issue. Additionally, because it is part of a pending FERC proceeding, if confirmed by the Senate, it would not be appropriate for me to reach a conclusion on this question without thoroughly studying the record being made on it. As a general matter, though, I would want it to be defined so that the burden of paying for it follows the benefits received by it, it is fair to the ratepayers and it encourages sufficient investment in transmission.

(FERC staff directed me to those portions of FERC's SMD Notice of Proposed Rulemaking, White Paper, and rule on Standardization of Generator Interconnection Agreements and Procedures that discuss participant funding but otherwise provided me with no assistance in answering this question.)

Question 14. What other incentives for investment do you favor? Does the FERC have current authority to enact them? Why do you think the FERC has not stuck with the incentives in Order No. 2000?

Answer. Adequate and reliable transmission is essential to the health, safety and welfare of Americans. FERC should determine what the precise barriers are in each region to having adequate investment in transmission and work to remove them, including implementing incentives to remove them. Barriers could include a long lead time and expensive process associated with regulatory requirements for siting, coupled with uncertainty whether the siting will ultimately be approved; uncertainty that the federal and state regulators will allow the recovery of the transmission investment in rates; uncertainty over who will ultimately operate, or perhaps even own, the transmission facilities; lengthy time for recovery of investment; and inadequate return on investment. To the extent regulatory uncertainty is a barrier, FERC should remove its uncertainties and work with states to do the same. To the extent the time associated with the siting process or the period of recovery of investment is too long, FERC should shorten it and work with states to do the same. To the extent inadequate return on investment is a barrier, FERC should increase the return. I believe FERC has the authority to do these things. I do not know whether FERC has stuck with the incentives in Order No. 2000 and, if not, why not.

(FERC staff provided me with a copy of FERC's Notice of Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid and directed me to the portions of Order No. 2000 that discuss transmission rate treatments for RTOs but otherwise provided me no assistance in answering this question.)

Question 15. I continue to have serious concern about the lingering legal question of the Commission's authority to order dam removal at the end of a relicensing proceeding. First, do you agree that the Commission's legal authority to order dam removal in a factual scenario similar to the Edwards Manufacturing case (Project No. 2389) is a lingering legal question?

Answer. Yes, I believe the Commission's legal authority to order dam removal in a factual scenario similar to the Edwards Manufacturing case is a lingering legal question.

(FERC staff provided me with FERC's Orders (1) Denying New License [to Edwards Manufacturing Co.] and Requiring Dam Removal; (2) Granting Rehearing for Further Consideration; (3) Approving Settlement; (4) Denying Motion to Vacate; and (5) Denying Rehearing, and FERC's Policy Statement on Project Decommissioning at Relicensing, but otherwise provided me no assistance in answering this question.)

Question 16. In more than 70 years prior to the Commission's decision in the Edwards case on November 25, 1997, the Commission never ordered a licensee to remove a dam at its own expense when the licensee is in good standing and wishes to continue operating its project. Thus, the issue that was before the Commission

in the Edwards case on November 25, 1997 was one of first impression. Moreover, the Commission's decision on its authority to order dam removal in that proceeding was not unanimous.

Clearly, the question concerning the Commission's authority to order dam removal is an extremely important one. Without judicial review, Congress and the citizens of this country are left without a definitive legal answer to this question.

Please provide your opinion on the legal significance of the Commission's Edwards dam decision and explain how you would have approached that case if you had been a sitting Commissioner at the time this matter was before the Commission. Include in that discussion your views on the dissenting opinions that were filed by Commissioners Bailey and Hebert in those proceedings.

Answer. The Commission's Edwards dam decision is a commission precedent but not a court precedent. Thus, a subsequent FERC panel could follow it or not, explaining in the latter case why it was not following it.

In reviewing the orders issued in the Edwards dam case and FERC's 1994 Policy Statement on Project Decommissioning at Relicensing, I observe that the Federal Power Act has no language addressing dam removal. A review of the legislative history discussed in the opinions and in the policy statement also reveals no evidence that Congress ever had a discernible intent regarding dam removal. The majority and the dissent both seem to agree with these statements. Rather, they disagree regarding what to do in the face of legislative silence on this issue.

The commissioners had before them a case where "all federal and state resource agencies [but not the licensee, at least not initially] participating in the relicensing proceeding support[ed] the denial of the license and removal of the dam." The majority addressed this issue head-on and determined that the license should be denied and the dam removed, citing dam removal as the "only alternative that will be consistent with all comprehensive plans that have been identified under Section 10(a)(2)(A) of the FPA" and concluding that this was authorized by the FPA because otherwise "the Commission would be powerless to carry out the comprehensive development function that is recognized as the central purpose of the Federal Power Act." In a later order in this case, the majority adds that "the Commission found that the public interest was best served by dam removal." Commissioner Bailey, in dissent, does not agree or disagree that the public interest would be best served by dam removal in this case, but explains that she cannot support such a decision because she finds nothing in the language of the FPA or its legislative history that supports "the conclusion that the Commission has the authority to order dam removal." Commissioner Bailey explains that "there are major social consequences, in the broadest sense, that derive from the decision to imply the authority to order dam removal, and I remain unwilling to do so." In a subsequent order issued in the case, Commissioner Hebert, in dissent, criticizes the majority for postponing indefinitely a decision on the merits such that Edwards is unable to pursue a court appeal of the Commission's decision regarding its authority to order decommissioning of the project. In the final order issued in this case, Commissioner Hebert, again in dissent, explains his position that "no authority can be found in the text and legislative history of the Federal Power Act to allow the Commission to deny a hydroelectric license and to direct decommissioning." The Commissioner also explains that, as a matter of policy, he believes the majority's choice is bad because "it inhibits development of low-cost and environmentally-friendly hydroelectric generation." Finally, Commissioner Hebert argues that since subsequent to the issuance of the initial decision all the parties have settled the case by agreeing to have the license transferred from Edwards to the State of Maine and the State, in turn, has removed the dam, the Commission should vacate its initial decision.

Although it is difficult to know exactly how I would have approached this case if I had been sitting since I do not have timely access to the record of this case, I believe that in recognition of the fact that the Commission was dealing with a case of first impression with absolutely no legislative guidance on the issue, I would have, first, labored mightily to have the parties settle the case prior to having to issue a decision (which they ultimately did, but not until after a decision had issued). If that failed, I believe I would have tried to have a decision issue with a stay attached to it so as to allow and encourage an immediate appeal along the lines suggested by Commissioner Hebert so that the courts could ultimately decide the question and the citizens of the country could have a definitive legal answer. In the meantime, I would have asked Congress to provide the Commission with some legislative guidance in the, hopefully unlikely, event a similar case presents itself. It also seems to me that, given the settlement, the Commission should have vacated its original decision.

(FERC staff provided me with FERC's Orders (1) Denying New License [to Edwards Manufacturing Co.] and Requiring Dam Removal; (2) Granting Rehearing for

Further Consideration; (3) Approving Settlement; (4) Denying Motion to Vacate; and (5) Denying Rehearing, and FERC's Policy Statement on Project Decommissioning at Relicensing, but otherwise provided me no assistance in answering this question.)

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