

June 4, 2014

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

Dear Chair Landrieu:

Thank you for the opportunity to testify before the Committee on Energy and Natural Resources on May 20, 2014 on my nomination to the Federal Energy Regulatory Commission.

Attached are my responses to questions for the record posed by the members of the Committee. Please let me know if I can be of further assistance.

Sincerely,

Cheryl A. LaFleur
Acting Chairman

Attachment

QUESTIONS FOR THE RECORD FOR MS. CHERYL LaFLEUR

FROM SENATOR MURKOWSKI

Question 1. Lessons learned from surviving January's polar vortex revealed that key systems relied on coal capacity slated for retirement to keep the power on. For example, I was told AEP relied upon 89 percent of the coal capacity that is slated for retirement next year, in order to meet demand. You recently stated that during the polar vortex the electricity grid was "close to the edge" of breaking. Commissioner Moeller has said that "the power grid is now already at the limit." The Department of Energy estimates that EPA rules will force several hundred coal-based electricity plants to close, and pending rules for greenhouse gases could close another 100 power plants.

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

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

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

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

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

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

- C.** What do you believe are the three largest threats to baseload generation?

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

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

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

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

Question 2. As you may be aware, the *Energy Law Journal* recently published an article that alleges numerous due process and substantive violations in FERC enforcement.

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

Answer: The Commission adopted a definition of market manipulation in Order No. 670 in 2006. Under the Commission's regulations, "[t]he Commission will act in cases where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3)

in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission.” An essential element of our anti-manipulation rule, as noted, is scienter—which refers to the state of mind of the individual or company engaging in the conduct. To establish a violation of the rule, the Commission must show that the subject of a market manipulation investigation engaged in the conduct at issue with actual intent or recklessness. That being said, the Commission is early in our work on manipulation cases and I believe the Commission should continue to assess whether additional guidance may be helpful going forward.

B. Should a person or company be liable for acting consistently with the governing market rules?

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

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

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

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

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

should have timely access to both their deposition transcripts and exculpatory material.

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

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

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

Question 3. One of the responses to the EPA's regulations on the use of coal is a “rush to gas”. Industry is turning to natural gas as an alternative to coal as a result of the lower price and increased supply of natural gas, causing a new reliance on natural gas to fuel existing and new power plants. However, the polar vortex highlighted coordination problems between the gas and electricity markets.

- A.** What steps should FERC take to ensure that gas-electric coordination does not become a problem in terms of reliability or excessive price volatility? Does FERC have sufficient authority to impose and enforce any necessary solutions?

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

Cycle later, and increasing the number of intra-day nomination opportunities to help shippers adjust their scheduling to reflect changes in demand.

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

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

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

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

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

Answer: The rapid increase in the use of natural gas for electricity generation will continue to require significant work by the industry, State commissions and FERC to ensure that reliability is maintained. While natural gas can provide economic benefits, its increased use in the generation of electricity contributes to potential coordination issues. As noted in my answer to Question 3(a), the Commission has proposed certain regulatory changes to address this issue.

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

Answer: FERC plays a key role in facilitating interstate pipeline expansions to serve regions of increasing demand by issuing certificates for the construction of new facilities. Over the past 10 years (since the beginning of 2003 through the present), FERC has certified 93.1 Bcf of capacity in new pipelines and expansions, 1,053.7 Bcf of storage capacity, and nearly 37 Bcf of LNG regasification capacity. The Commission has also approved 2.76 Bcf of LNG liquefaction capacity at one terminal. With respect to encouraging pipeline infrastructure development in

other ways, at our April technical conference on winter market operations in the RTOs/ISOs, there was discussion concerning the pricing of fuel security into the wholesale power markets. The Commission is presently evaluating this issue in its evaluation of the comments received from the technical conference.

Question 4. Regarding capacity markets:

- A. What is the appropriate path forward with respect to organized and bilateral wholesale markets? Can and should they co-exist or should all utilities ultimately be in organized markets?

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

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

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

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

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

- D.** How might FERC ensure that the capacity markets do not impede local and state resource decisions?

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

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

Answer: Both the staff white paper on capacity markets and the September 2013 technical conference explored the issue of what is the appropriate commitment and forward period in centralized capacity markets. The Commission is presently evaluating this issue in its consideration of possible next steps as a follow-up to the technical conference.

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

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