



November 29, 2012

Commissioner Tony Clark

STATEMENT

Statement of Commissioner Tony Clark at EBA Mid-Year Conference

"First, a little about myself, since I suspect that I may be new to a number of you here in this room, especially if you are primarily engaged in a federal practice.

"By birth, and upbringing and temperament I am about as Midwestern as they come - born in Wisconsin and raised, mostly, in the Dakotas - that particular sense of place probably defines a lot of who I am and how I see the world.

"I got my start in government and politics at a very young age. I was 22 when I ran - successfully - my first state legislative campaign. I turned 23 just a couple of weeks before the election.

"I may not have always used the best discretion in choosing a career path. I had two opponents for that seat in the legislature.

"One was a Professor at the University I attended - in fact in the very college in which I was studying.

"The other was a fellow who was well known about town as the kindly gentleman who wore a big white beard all year round and played Santa Claus in the local Fargo downtown Christmas festival.

"I like to say that when you first make your name in politics by beating Santa Claus...you have no where to go but up.

"So I served a couple of terms in the legislature and then moved over to the executive branch - eventually serving as Labor Commissioner in the Cabinet of then-Gov. Ed Schafer.

"And in 2000, I made the decision to run for statewide office.

"In my legislative career, I had always had an interest in energy and telecommunications issues so the choice to seek a seat on the state Public Service Commission was, on one hand, an easy one - I knew I would enjoy the job.

"On the other hand, the fellow who held the seat was an institution in state government.

"He had served on the PSC for almost 39 years continuously, and was widely believed to be running again - and he was still young enough where he could have done it.

"Well, I figured I would run anyway and it would be a good experience and maybe it would help me build a statewide profile and maybe another seat would open at some point and I would have a leg up.

"Then a funny thing happened.

"Shortly after I announced I would run, by pure chance, the incumbent decided to call it a career.



"All of a sudden a seat I didn't think I had a prayer of winning became winnable - and a year later I found myself on the state Public Service Commission.

"And having gotten there - something rather remarkable happened.

"North Dakota found itself at the center of an energy revolution.

"I sometimes used to think, "How lucky am I?"

"If you had an interest in this line of work and you could pick any time in my state's history to serve on that particular commission - you probably would have picked the 12 years I had the opportunity to serve.

"Because not only did you have a front-row seat for one of the great energy revolutions in the nation's history - you were able to have a say in how it has developed.

"You see while the state had long had a significant electricity export business through a fleet of mine-mouth lignite plants - and had important, though somewhat modest production of oil and gas - something much bigger was about to happen.

"On the electricity side - renewable energy was just getting its footing and the state saw a great deal of investment because of it - literally billions of dollars.

"The state went from zero MW of commercial wind production to about 1500MW over just a few short years.

"And you all probably know the oil and gas story. Because of the confluence of technology, private-sector profit seeking, risk-taking, American know-how and a positive legal, tax and regulatory climate; North Dakota went from just a couple of hundred thousand barrels of production per day to over 700,000 per day as of today - and that number is increasing.

"As just a brief aside - there is one other reason this boom has taken place in North Dakota and a handful of other states, - it's because North Dakota has a lot of private land and very little federal land.

"In states like North Dakota it may take 10 days to 3 weeks to permit a well - while on federal lands it takes over 300 days. And while that may be good for billable hours it is not so great for American consumers or the economy.

"In any event, North Dakota went from ninth in U.S. state oil production to second, all over the course of about 6 years.

"I say all this not to simply brag on my home state - not that it isn't nice to be known for something other than our pleasant winter weather.

"I say it because it is important to remember that North Dakota is just one example of a transformation that is taking shape across United States - but there are other potential North Dakota's out there and all of this is a huge benefit to our nation.

"For 40 years - my entire life - a succession of Presidential administrations - Republican and Democrat alike - has called for American energy security.

"I hesitate to say "independence," because these are global commodity markets in some cases - but security - yes.

"And just think how that changes not only our economic outlook but our global political position as well.



"In other words, in years past, energy security was nice rhetoric, or a nice talking point, but perhaps not reality.

"Today it is a choice. We can choose to have it, or we can make choices that keep us from having it.

"Now, at this point in my speech, I think it bears mentioning that there are a couple of different schools of thoughts when it comes to energy policy.

"At the heart of one school is the notion that energy usage and production is, in and of itself, a bad thing.

"That it may be somewhat necessary, but it is at best a necessary evil.

"This school teaches that energy usage and production is incompatible with the environment and that the goal of government energy policy should be to raise its cost and to coerce its citizens to use as little of it as possible - and if that means spreading economic misery - especially to those least able to afford it - because energy costs are, after all, regressive in nature, then so be it.

"It probably will not surprise you to hear that I do not subscribe to that particular school.

"Rather, I believe that history teaches us that there is a strong correlation between energy usage and human health, safety, well-being and quality of life.

"This is not to deny that energy production and transmission needs to be done appropriately and in the right way - and with full acknowledgment that environmental protection must be a key consideration.

"But it does reject the premise that it is the economic regulator who should be playing social engineer in such a way as to equate energy usage with alcohol, tobacco and firearms.

"Rather, I see it as my job to attempt to create a positive regulatory environment, that promotes investment in affordable, economically efficient energy - and yes energy that meets all applicable environmental laws.

"This is a philosophy that acknowledges the limitations of regulator or government led political tinkering.

"For example, making uneconomic choices to advantage one particular source of generation over another - even those that maybe otherwise meeting all separate environmental and reliability standards.

"Or caving in to legislative or regulatory rent-seeking - one of my very least favorite spectator sports.

"Or systematically taking all new forms of energy off the table because every source - be it solar, wind, hydro, oil, gas, coal, nuclear, biomass is unacceptable to one group or another.

"It leads me to one of the key areas of focus that I hope to be pursuing during my tenure at FERC, and that is the goal of expanded infrastructure investment.

"Now as a regulator I hesitate to say "promote" infrastructure investment because it is a loaded word that can lead one down those paths that I just warned against - tilting the regulatory field to advantage one particular investment over another.

"Rather, what I am referring to is an acknowledgement that this nation has a lot of work to do if it is to meet its desire for energy security - and that starts with infrastructure investment in things like new pipelines for the emerging shale plays, transmission lines, and a more intelligent grid and it extends into ensuring that infrastructure is secure, safe and reliable - which is a potentially expensive ongoing effort with our sometimes aging networks and increasing security threats.



“My goal is to help create a regulatory climate that encourages capital investment, generally, but without being overly prescriptive and heavy handed in determining specific outcomes.

“And in saying that, I hasten to add that this is not a commentary on market structure or a lack thereof, regulated or restructured states.

“While I suppose we all have our favorites, I firmly believe there can be good and not-so-good outcomes in all different constructs. They each have their advantages and disadvantages - and what I am about to lay out I believe applies equally to both.

“So, what is the roadmap to achieve this goal of increased infrastructure development?:

1. Start by encouraging true, appropriate economic signals and avoiding political ones. It is all too easy for regulators, or for that matter other policymakers, be they legislators - state or federal, governors, White House administrations to start with the proposition that they like something so we must build a construct around that preference. In a separate context, in the housing market, especially in the 1990's, government decided home ownership was good - which it is - but then created an entire system of incentives and regulatory, and financial and public policy constructs to promote home ownership as a good in and of itself. Now, those that pointed out the shortcomings of regulations being developed, or the problem of government compelling loans that should not be made, or the unholy alliance between government and private interests, or the obliteration of appropriate price signals were told to shut up and get with the program - home ownership was good. What resulted was the near total financial meltdown of the American economy. We must learn from these experiences. I am not suggesting the entire American economy is on the brink of being put over the edge by an energy bubble. I am suggesting we regulators must resist the temptation to pick favorites and to run with them simply to promote the one thing we like best. Whether it be coal, whether it be nuclear, whether it be wind or hydro, whether it be demand response, whether it be promoting generation in one particular state or region to the exclusion of other factors, whatever it may be. Sound engineering and economics that focus on affordable energy needs to drive our decisions - not politics.
2. Make decisions on a record and promote due process. As a regulator, this can sometimes be constraining - but after all, that is the idea of due process and record-based decision making. Is it more fun to do whatever you want? Well maybe, but at the end of the day, your credibility as an agency before the courts or other institutions of governments or with capital markets suffers and ultimately you and the consumers you are there to protect pay a price for that. To me it was a source of pride that in my years on a state commission, we were very rarely overturned or had cases remanded to us. And I always felt this focus on the rule of law was important for both protecting our consumers and for creating a pro-investment business climate.
3. My third suggestions is related to the second: to the greatest degree possible, promote certainty and avoid surprises. This is not to say regulators should blindly follow bad precedent. From time to time regulators make the wrong call and that should be corrected. But when we make course corrections, we should try to do so - again - with a solid footing in the law and the record. And in so doing should explain ourselves in plain language and with a minimal surprise factor. Uncertainty is the bane of investment and with the amount of investment needed in the industries FERC deals with - we should be particularly mindful of that fact. A reluctance for capital to invest in these industries on reasonable terms has impacts across the economy and for consumers in particular, so we should always be mindful of the fact.
4. When all else fails, make timely decisions. I will be honest, every now and then, in my career as a regulator, I have come to the end of a case and I look at the record, and I say to myself, “well, that’s a mess.” In such instances, I find that time is not always your friend. Sometimes you just need to make a call. You do your best with what you have. It may be the right call, it may be the wrong call, either way it will probably be appealed, but better to make a decision than dithering and keeping the whole world waiting.



"There is one other topic that I will briefly touch on as I begin to wind things up, because it is an area in which I and my staff have been spending a good deal of time, and it is an area that I find very important.

"And that is in the area of Enforcement - and more specifically - market conduct.

"Having been at a state commission during the beginnings of a market and our local utilities entry into that market, I can tell you that there are few issues that state regulators have taken as seriously as market monitoring units.

"In fact for some states, not having an MMU would have been somewhat of a deal breaker to even allowing their utilities to enter a market.

"These market monitors serve two distinct purposes.

"Number one, they provide a fresh set of eyes and an independent voice with regard to the market rules and structures themselves.

"This is a valuable service to the market, the states, to FERC and to stakeholders.

"The second purpose is perhaps even more directly related to the work of the F.E.R.C.

"This is the work of monitoring for market power abuses and manipulation - and I take this very seriously.

"The danger that arises out of these actions is more than just the immediate financial impact that flows through to consumers and other market participants - as if that weren't bad enough.

"An equal danger is the impact that such actions can have on needed future investments in infrastructure - to reiterate my overall theme.

"If the wider capital markets find that energy markets are simply the wild west frontier - that games are rampant - be they fraudulent demand response schemes, phantom wheeling transactions, uneconomic withholding or bidding - whatever the scheme may be - then that activity will chase dollars from a sector that needs and deserves investment.

"And conversely, that is why infrastructure investment itself is also important. Things like a more robust transmission grid make it harder for those who wish to engage in manipulation to do so.

"So given all this, it is fair to say that I plan to spend a good deal of my tenure attempting to ensure the strength of market monitoring, by emphasizing the importance of market participants' honest, timely and accurate communications with monitoring units; and also by emphasizing the proper governance structure and the independence of monitoring units.

"The important thing to note, for this audience in particular, is that everything I just spoke of with regard to infrastructure development and market conduct, requires a professional, knowledgeable, ethical, skilled bar.

"This is because the regulator is almost always in the position of having less information than the companies and stakeholders practicing before us.

"We depend on full and complete disclosure - without it - the entire regulatory construct breaks down.

"I can tell you that while there is a lot to enjoy about my new position, one of the things that I do miss about serving on a state commission is actually sitting in a hearing room, listening to cases firsthand, questioning witnesses and watching some very good practitioners of the legal craft.



"And I am here to tell you legal representation makes a difference in that sort of setting.

"The building of a record, anticipating commission questions or intervener objections is a very real skill, and it was fun to be a part of that process.

"So I commend the EBA for the work it is doing to build the capacity of the legal profession as it relates to energy law.

"What you do is very important to American consumers and this nation's economy.

"In closing, from time to time, I like to take a step back and think about the bigger picture of what we are all doing in this field - you and I.

"It may be a result of the part of the country that I come from, but I don't take energy for granted.

"One of the blessings of having to run for one of these positions, as I had to do for over a decade is that you get to meet a lot of wonderful people.

"And campaigning in North Dakota, yet today you still have the opportunity to speak with a lot of people who vividly remember the day that electricity came to their farmstead.

"In many ways, that day became a defining day in their lives because of what it meant to their standard of living. They divide points of reference in the lives to before electricity and after electricity.

"As an aside, if you haven't read any of Robert Caro's biographies of Lyndon Johnson, I would encourage you to do so, or at least scan through a chapter or two that he dedicates in "Master of the Senate" to the history rural electrification and what rural life was like, especially for women prior to electricity coming to the farm.

"My point is that we cannot take for granted what we have. In fact, there are still many parts of the world that yearn for the marvel of the energy delivery system that we have here in the U.S.

"In many ways, what we have is the envy of the world. And the work that you do plays an important part in that, as does the work of FERC and state regulators. Help give us the information we need to make sound decisions.

"Please do what you can to help us in that endeavor, because this work has meaning, and it profoundly impacts people in this nation and around the globe.

"Thank you for being here today and I look forward to working with you over the course of my term on the FERC."