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BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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IN THE MATTER OF: :
CONSENT MARKETS, TARIFFS AND RATES - ELECTRIC :
CONSENT MARKETS, TARIFFS AND RATES - GAS :
CONSENT ENERGY PROJECTS - MISCELLANEOUS :
CONSENT ENERGY PROJECTS - CERTIFICATES :
DISCUSSION ITEMS :
STRUCK ITEMS :
- - - - -x

953RD COMMISSION MEETING

OPEN SESSION

Commission Meeting Room
Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C.

Thursday, December 17, 2009
10:10 a.m.

1 APPEARANCES:

2 COMMISSIONERS PRESENT:

3 CHAIRMAN JON WELLINGHOFF (Presiding)

4 COMMISSIONER SUEDEEN G. KELLY

5 COMMISSIONER MARC SPITZER

6 COMMISSIONER PHILIP MOELLER

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHAIRMAN WELLINGHOFF: Good morning, everyone.
4 This is the time and place that's been noticed for the Open
5 Meeting of the Federal Energy Regulatory Commission, to
6 consider matters that have been duly posted in accordance
7 with the Government in the Sunshine Act.

8 Please join us for the Pledge of Allegiance.

9 (Pledge of Allegiance recited.)

10 CHAIRMAN WELLINGHOFF: Before we go into our
11 Agenda Items, I've got a couple of administrative matters.
12 First of all, the Secretary of the Commission ensures that
13 the processing of filings and Commission actions on those
14 filings, are orderly, transparent, and in accordance with
15 the applicable statutes and our Rules and Regulations.

16 The Secretary of the Commission serves as the key
17 focal point for the clearance and transmission of documents
18 among the Chairman, the Commissioners, Commission Staff, the
19 general public, including promulgating and publishing all
20 Commission Notices, Orders, Rules and Regulations, and other
21 official actions of the Commission.

22 The Secretary of the Commission is currently
23 located within the Office of the Executive Director. Given
24 the importance of their functions to the Commission and the
25 critical impact that they have on the public, it's been

1 determined that the Office of Secretary, should be made a
2 separate, autonomous office, that is independent from the
3 other Offices within the Commission.

4 Kim Bose will be the Office Director.

5 Congratulations, Kim. Kim has been the Secretary --

6 (Applause.)

7 CHAIRMAN WELLINGHOFF: Kim has been the
8 Secretary of the Commission since March of 2007. In that
9 capacity, she's led an effort to streamline procedures
10 within the Secretary's area. For example, Kim implemented a
11 new process to consolidate gas filing notices, to reduce
12 publishing fees by more than \$200,000, and reduced the time
13 involved in preparing and providing public notice.

14 Kim was also instrumental in initiating efforts
15 to allow more types of filings to be made electronically.
16 These efforts resulted in a 37-percent increase in the
17 number of e-filings received in 2008, and a 22-percent
18 increase in 2009.

19 Prior to becoming Secretary, Kim held the
20 positions of Managing Attorney in the Office of General
21 Counsel, Energy Markets Division. She received her law
22 degree from Howard University Law School in Washington,
23 D.C., and a B.S. from Hampton University in Hampton,
24 Virginia.

25 I am confident that Kim will continue to be an

1 innovative and outstanding manager. We're very pleased to
2 have you, Kim. Thank you.

3 The next thing I want to do, and it's with a bit
4 of sadness, but, hopefully, a happy future, and that is, I
5 want to give Commissioner Kelly her flags. She is leaving
6 us. This is to be her last meeting with the Commission.

7 I have been proud and honored to serve with
8 Commissioner Kelly in the time that I've been here, and she
9 has been a colleague and a friend, and I'm going to miss her
10 very much.

11 (Presentation made; applause, standing ovation.)

12 CHAIRMAN WELLINGHOFF: Suedeen?

13 COMMISSIONER KELLY: Well, thank you, Jon. The
14 flags are beautiful. You will notice the brilliant yellow
15 of the flag of New Mexico.

16 I just have a few thanks that I'd like to express
17 today.

18 Before I even came to work at FERC, I knew that
19 it as a pretty special place. I needed to prepare for my
20 confirmation hearing, and I was just welcomed with open arms
21 and lots of support, not just by Pat Wood, who was the
22 Chairman at the time, but also by Tom Herlihy, Don Shambly,
23 Rosa Blocker, and Steve Rothenberg.

24 And I knew then that it was a special place to
25 work, and once I got here, I learned that not only is the

1 Staff a supportive one, but it's also exceptional.

2 And I have said this many times, because it's
3 heartfelt: It's an exceptional staff in every way, with the
4 level of knowledge here, the skills, the commitment, the
5 work ethic, and, also, there are a lot of New Mexicans.

6 (Laughter.)

7 COMMISSIONER KELLY: In fact, I think it's the
8 biggest contingent of New Mexicans any place outside of New
9 Mexico.

10 (Laughter.)

11 COMMISSIONER KELLY: And maybe it's because New
12 Mexicans have a special appreciation of energy and its
13 importance to our society, or maybe it's because FERC is
14 really astute and appreciates that New Mexicans are
15 especially hard and good workers.

16 In any event, I've always felt at home here, and
17 I will take away a lot from my experience here. My work
18 here has been totally engaging and often inspiring, and the
19 inspiration has come from my colleagues, with whom it has
20 been a true privilege to work.

21 I've mentioned Pat, my first Chair, who, in
22 addition to being a wonderful person, was a terrific
23 Chairman. He taught me how powerful collaborative
24 leadership can be.

25 And then there were Joe Kelliher and Nora

1 Brownell, and although Joe always professed that the Civil
2 War was his avocation and his interest, he was actually a
3 masterful commander-in-chief and a masterful commander-in-
4 chief here at FERC.

5 He was inspiring in his ability to organize and
6 develop strategic plans. For example, when Congress gave us
7 32 initiatives, when it passed the Energy Policy Act, Joe
8 planned it out and executed them all, and I think we did a
9 great job, and on deadline.

10 And Nora was inspiring in her unwavering
11 dedication to competitive markets and her ability to have
12 them come into being. And I also really appreciate her
13 friendship.

14 When I came here, she said, you know, you can
15 stay with me until you find a place, and, I said, okay. And
16 I don't think she really realized that I was going to stay
17 with her for two months.

18 (Laughter.)

19 COMMISSIONER KELLY: But she was a very good
20 sport and a wonderful hostess. In fact, I actually did
21 consider moving in permanently.

22 (Laughter.)

23 COMMISSIONER KELLY: But nothing tops my present
24 Commission. Jon has inspired me in many ways. Just one,
25 which you know and can share, is how important demand

1 resources and a real commitment to their deployment is to
2 our economic future.

3 And Jon, in his short tenure, has accomplished so
4 much to make that a reality, that no one else could have
5 done. I'm indebted to you.

6 CHAIRMAN WELLINGHOFF: Thank you.

7 COMMISSIONER KELLY: And he still Phil has
8 inspired me in a number of ways. One example, is just how
9 important hydro power is to our country's economic and
10 carbon-free future, and I will always pass on the insight he
11 gave me, that not only can we harness the vast power of
12 water with hydro facilities, but we can also harness the
13 even vaster power of the moon, with hydrokinetic
14 facilities.

15 And Marc has inspired me in many ways. One of
16 them is how important it is, when we're committed to
17 achieving great things together, to see the humor in life
18 and the good things in other people.

19 That may seem like a little thing, but very few
20 people are able to accomplish it -- very few, like Marc.
21 And it's as powerful, if not more so, than having all the
22 knowledge and all the skills needed to get the job done, so,
23 thank you, Marc.

24 And no one tops my Staff Carrie Blocker and Donna
25 Glasgow have been with me from the beginning. At the risk

1 of embarrassing Donna, I will share with you, something that
2 I have said for a number of years now: Donna, when I leave
3 here, I'm going to have to marry you.

4 (Laughter.)

5 COMMISSIONER KELLY: I can't live without you.

6 (Laughter.)

7 COMMISSIONER KELLY: Little did I know then, that
8 the D.C. City Council --

9 (Laughter.)

10 COMMISSIONER KELLY: -- has actually acted to
11 make this possible.

12 (Laughter.)

13 COMMISSIONER KELLY: No further comment.

14 Michael Krauthammer, now an advisor to the
15 Maryland Public Utility Commissioners, helped me get my
16 office started, and Laura Vallance and Maria Boros and Rahim
17 Amerkhail, were the ones who taught me what it takes to be a
18 good Commissioner.

19 Without them, I would have remained what I would
20 describe as a New Mexico roadrunner, skittering from here to
21 there, perhaps admirable in its energy, but ineffective in
22 its ability to harness this energy to accomplish meaningful
23 things. Laura, Maria, and Rahim, gave me the ability to
24 accomplish meaningful things.

25 And now I'm blessed with Elizabeth Blaug, Kevin

1 Hiler, and Aileen Roder. Not only are they outstanding in
2 every way, individually, but they are also an exceptional
3 team.

4 They are truly my inspiration today. They
5 accomplish things for me that no one would believe could be
6 done. To the extent I ever looked good in my job, they're
7 the reason.

8 So, as I think about moving on, I feel a little
9 bit sad, because I'll miss you all and I'll miss this work.
10 But I also feel lucky.

11 As they said in the film, "Annie," how lucky I am
12 to have something that makes saying goodbye so hard. So,
13 instead of saying the hard goodbye, I'd just like to leave
14 with, be well, do good work, and keep in touch. Thank you.

15 (Applause; standing ovation.)

16 CHAIRMAN WELLINGHOFF: Thank you, Suedeen. We'll
17 miss you, we will. But we will keep in touch, absolutely.
18 We expect to have a lot of lunches in the future.

19 Madam Secretary, if we could move to the Consent
20 Agenda, please?

21 SECRETARY BOSE: Good morning, Mr. Chairman, good
22 morning, Commissioners. Since the issuance of the Sunshine
23 Act Notice on December 10th, 2009, Item E-21 has been struck
24 from this morning's agenda.

25 Your Consent Agenda is as follows: Electric

1 Items: E-1, E-2, E-3, E-4, E-5, E-6, E-7, E-8, E-9, E-10, E-
2 11, E-12, E-16, E-17, E-18, E-19, E-20, and E-22.

3 Miscellaneous Items: M-3.

4 Gas Items: G-1 and G-2.

5 Hydro Items: H-1, H-2, H-3, and H-4.

6 Certificate Items: C-1, C-2, C-3, C-4, and C-5.

7 As to E-7, Commissioner Kelly is dissenting, in
8 part, with a separate statement. As to H-4, Commissioner
9 Moeller is dissenting, with a separate statement.

10 As to C-1, Chairman Wellinghoff is dissenting,
11 with a separate statement, and, as to C-2, Chairman
12 Wellinghoff is dissenting, with a separate statement.

13 We will now take a vote on this morning's Consent
14 Agenda, beginning with Commissioner Moeller.

15 COMMISSIONER MOELLER: I vote aye, noting my
16 dissent in H-4.

17 SECRETARY BOSE: Commissioner Spitzer?

18 COMMISSIONER SPITZER: I vote aye.

19 SECRETARY BOSE: Commissioner Kelly?

20 COMMISSIONER KELLY: Aye, with the exception of
21 my dissent in E-7.

22 SECRETARY BOSE: And Chairman Wellinghoff?

23 CHAIRMAN WELLINGHOFF: I vote aye, except for my
24 dissents in C-1 and C-2.

25 SECRETARY BOSE: Discussion items?

1 CHAIRMAN WELLINGHOFF: Yes, we'll go to
2 Discussion Items, please.

3 SECRETARY BOSE: Yes, sir. The first
4 presentation for this morning, will be on Item A-3,
5 concerning Report on Certain Enforcement Matters. There
6 will be a presentation by Nicole Brisker from the Office of
7 Enforcement. She is accompanied by Ted Gerarden, Tim Smith,
8 Michelle Veloso, Roger Morie, Steven Reich, and they are all
9 from the Office of Enforcement.

10 MS. BRISKER: Good morning, Mr. Chairman and
11 Commissioners.

12 CHAIRMAN WELLINGHOFF: Good morning.

13 MS. BRISKER: I am Nicole Brisker from the
14 Division of Investigations in the Office of Enforcement.
15 With me today, is Ted Gerarden, also from the Division of
16 Investigations; Tim Smith, Deputy Director for the Division
17 of Audits; Michelle Veloso, Deputy Director for the Division
18 of Financial Regulation; Steve Reich, Acting Director for
19 the Division of Energy Market Oversight, and Roger Morie,
20 Reliability Enforcement Counsel in the Office of
21 Enforcement.

22 Over the past several years, a number of efforts
23 have been made to increase transparency related to
24 enforcement matters, through a variety of mechanisms,
25 including: Policy statements, annual reports, and an

1 Enforcement Conference.

2 The three matters presented today, this one,
3 followed by M-1 and M-2, further these efforts to achieve
4 transparency and clarity. Today, the Office of Enforcement
5 is releasing its Annual Report on Enforcement, as directed
6 by the 2008 Revised Policy Statement on Enforcement.

7 The Report discusses Enforcement's current
8 priorities and reviews the wide variety of activities
9 undertaken during Fiscal Year 2009. I'd like to take this
10 opportunity, briefly, to highlight our priorities and some
11 of the accomplishments of each of the four divisions over
12 the past year.

13 Consistent with the Commission's Strategic Plan,
14 the Office of Enforcement will focus on matters involving
15 fraud and market manipulation, serious violations of the
16 Reliability Standards, anticompetitive conduct, and conduct
17 that threatens transparency in regulated markets.

18 Fraud and market manipulation is a significant
19 risk to the markets overseen by the Commission, and would
20 undermine the Commission's goal of assuring efficient energy
21 services for consumers, at a reasonable cost.

22 Similarly, anticompetitive conduct and conduct
23 that interferes with market transparency, undermine
24 confidence in the wholesale energy markets upon which the
25 nation's consumers rely.

1 The Office of Enforcement will give high
2 priority to cases involving harm to the public or
3 significant gains to the violator or losses to the victims
4 of the misconduct.

5 With respect to the Reliability Standards
6 governing the nation's bulk power system, Enforcement will
7 focus particularly on incidents resulting in actual harm,
8 cases involving repeat violations, and violations involving
9 high risk to the bulk power system.

10 Turning to last year's accomplishments, let me
11 begin with the Division of Investigations. The Commission
12 issued 22 Orders approving settlements reached by
13 Investigation Staff, resulting in the payment of \$38,290,000
14 in civil penalties, and an additional \$38,694,188, plus
15 interest in the disgorgement of unjust profits.

16 These are the highest annual amounts of
17 penalties and disgorgement payments since EAct 2005
18 broadened the Commission's penalty authority. Particularly
19 notable here, are the market manipulation settlements in
20 Amaranth Advisors and Energy Transfer Partners.

21 Staff also completed its investigation into the
22 causes of the 2008 Florida Blackout, and the Commission
23 approved a \$25 million civil penalty settlement in that
24 investigation, one week after the close of Fiscal Year 2009.

25 In matters that did not settle, this past year

1 also saw the first evidentiary hearing involving the -
2 Commission's anti-manipulation authority and the issuance of
3 two Orders To Show Cause.

4 The Division of Investigation continues its focus
5 on market manipulation, with a growing proportion of our
6 investigations falling in this area. Seventy percent of the
7 cases we opened in Fiscal Year 2009, involved potential
8 market manipulation.

9 In other work, Investigation Staff received 122
10 new self-reports of violations, opened ten investigations,
11 and closed 36 investigations. The trend we have seen in
12 past years, of increasing self-reports, continues, with the
13 number of self-reports in Fiscal Year 2009, nearly doubling
14 over Fiscal Year 2008.

15 The Report includes data on self-reports and
16 matters investigated during the past year.

17 Because most matters are closed without action,
18 the Report also includes numerous illustrations of such
19 self-reports, and investigations presented in such a way as
20 to protect the identity of the companies involved.

21 The smaller number of new investigations, ten in
22 Fiscal Year 2009, in part, reflects the focuses on cases
23 involving allegations of market manipulation and certain
24 electric reliability matters.

25 These cases are significantly more resource-

1 intensive, and are more likely to involve litigation.

2 Investigation Staff also operates the Enforcement
3 Hotline, which recieved 509 complaints and inquiries and
4 resolved 485 matters during the past year.

5 Moving on to the Division of Audits, Audit Staff
6 completed 33 audits of public utilities and natural gas
7 pipeline and storage companies last year. Twenty-eight of
8 the audits were non-financial audits, and the remaining five
9 audits, were financial.

10 These 33 audits resulted in 112 recommendations
11 for corrective action, and included \$2.8 million in monetary
12 recoveries from accounting and billing adjustments. Audit
13 Staff also joined Staff in the Office of Electric
14 Reliability, to observe and provide feedback on 12
15 reliability audits conducted by regional entities, and three
16 agreed-upon procedures audits, conducted on behalf of NERC.

17 The Division of Financial Regulation worked on
18 several significant projects in Fiscal Year 2009, including
19 a series of widely attended teleconferences to provide
20 guidance in complying with the reporting requirements of
21 Order Numer 704, a list of Frequently Asked Questions
22 regarding Form Number 552, and review of nearly 5,000
23 electric quarterly report filings.

24 The Chief Accountant, housed in DFR, submitted
25 comments to the Securities and Exchange Commission,

1 regarding the SEC's proposal to adopt international
2 financial reporting standards, and responded to 185 requests
3 for approval of accounting matters.

4 The Division of Energy Market Oversight
5 continued its regular monitoring and analysis of the
6 wholesale natural gas and electric power markets and related
7 financial markets.

8 This past year, DEMO produced three publicly-
9 available market assessments: The Winter Energy Assessment;
10 the 2008 State of the Markets Report; and the 2009 Summer
11 Energy and Reliability Market Assessment.

12 DEMO provided numerous briefings to domestic and
13 foreign delegations of regulators and industry participants,
14 and lent support to several major interoffice projects,
15 including: The Annual Report on Demand Response and
16 Advanced Metering; the Estimation of Existing and Projected
17 Grid Interconnected Renewable and Demand-Side Resources;
18 and the Smart Grid Standards Policy Statement.

19 Thank you. That concludes my presentation, and I
20 would be pleased to respond to questions.

21 CHAIRMAN WELLINGHOFF: Thank you. I want to
22 thank all the team and the entire Office of Enforcement, for
23 all the work you've done in the past year. I especially
24 want to thank Norman Bay for his leadership in the Office.

25 Do any of my colleagues have any questions on

1 this A-3 presentation, before we move on to the M-1
2 presentation? Suedeen?

3 COMMISSIONER KELLY: At the risk of slowing down
4 the meeting, I do have one question.

5 One set of figures that's in the Annual Report,
6 that resonated with me, was, in 2007, the Commission
7 received 31 self-reports of violations, and that number more
8 than doubled the next year, and then nearly doubled again
9 this past year.

10 What do you take from this trend? Do you
11 anticipate it will continue to increase? Is it likely to
12 level off? Is it a good thing?

13 MR. GERARDEN: Well, let me hazzard a repsonse.
14 Yes, we think it's a good thing. It's hard to know, really,
15 the cause of it, but it certainly derives from the enhanced
16 enforcement program that the Commission has had since
17 receiving the broader civil penalty authority in 2005.

18 What we do see, is that companies realize the
19 importance of compliance with Commission requirements, and
20 companies that are subject to those requirements, are
21 putting a great deal more effort into developing internal
22 compliance protocols and programs and more training for the
23 employees.

24 The results of that are that more things come to
25 their attention, that they may have overlooked before, and

1 companies are being much more proactive about contacting
2 Enforcement and telling us about those things.

3 So, we hope it continues. We think, as part of
4 the Commission's overall goal of compliance, that this is an
5 important component, because, as companies develop good
6 compliance programs, they will find things. Reporting them
7 to the Commission, is a good thing, and so we see it as an
8 important aspect of robust compliance by the industry.

9 COMMISSIONER KELLY: Thanks, Ted. To me, that's
10 very encouraging, because I think that our emphasis is and
11 should be and has been on promoting compliance, not
12 enforcing for the sake of enforcement, so I'm encouraged by
13 this. Thanks a lot.

14 CHAIRMAN WELLINGHOFF: Thank you, Suedeen. Do we
15 want to proceed with M-1?

16 SECRETARY BOSE: The next presentation will be M-
17 1, and the presenters for that will be John Kroeger and Deme
18 Anas, and, following M-1, we'll have a presentation on M-2.
19 The presenter will be John Kroeger, as well, along with
20 Wesley Heath.

21 And, Mr. Chairman, we'll take a vote on these
22 following the presentation.

23 MR. KROEGER: Good morning, Mr. Chairman and
24 Commisioners.

25 CHAIRMAN WELLINGHOFF: Good morning, John.

1 MR. KROEGER: I am John Kroeger from the Office
2 of Enforcement, and with me is Deme Anas, also of the Office
3 of Enforcement. Agenda Item M-1 provides for the Secretary
4 of the Commission to issue a Staff's Preliminary Notice of
5 Violation, upon direction from the Director of the Office of
6 Enforcement.

7 The Order is intended to increase the
8 transparency in the Commission's investigations. As the
9 Commission is well aware, investigations conducted under
10 Part 1(b) of its Regulations, are non-public and no
11 interventions are permitted, as a matter of right.

12 As the Division of Investigations completes fact-
13 finding in an investigation, it may preliminarily determine
14 that the subject has violated one or more Commission
15 requirements. In such a case, the Division of
16 Investigations sends the subject a letter that sets forth
17 the basis for the Division's preliminary determination.

18 After the subject of an investigation has had an
19 opportunity to respond to Staff's Preliminary Findings
20 Letter, under the proposed Order, the Director of the Office
21 of Enforcement would be authorized to direct the Secretary
22 to issue a Notice containing the following information: The
23 identity of the entity or entities under investigation; the
24 time and place of the alleged conduct; the Rules,
25 Regulation, statutees, or Orders that the Staff alleges were

1 violated; and a concise description of the alleged wrongful
2 conduct.

3 The proposed Order balances the Commission's
4 interest in transparent proceedings, on the one hand, with
5 the privacy interests of the subject, on the other.

6 The Order resolves this balance in favor of
7 disclosure of the investigation at the time the subject of
8 the investigation, has had the opportunity to respond to
9 Staff's Preliminary Findings Letter. The privacy interest
10 of the company is appropriately accorded weight in this
11 balance, but this interest is limited by the fact that the
12 effect of the proposed Order is to merely accelerate the
13 timing of the public disclosure.

14 In our experience, once a Preliminary Findings
15 Letter is provided to the subject and the subject has had an
16 opportunity to respond, the matter will likely be resolved
17 by either a settlement or an Order To Show Cause, and thus
18 will become public.

19 However, if Enforcement Staff does terminate an
20 investigation after a Notice has been issued, the Director
21 of Enforcement would be authorized to direct the Secretary
22 to issue a public Notice of Termination of Investigation.

23 Two important caveats apply to today's Order:
24 First, the Notice will contain the allegations of Staff
25 only, and not the views of the Commission. Second, the

1 Notice would confer a right on third parties --

2 MS. ANAS: Would not.

3 MR. KROEGER: -- would not confer a right --

4 (Laughter.)

5 MS. ANAS: Sorry.

6 MR. KROEGER: The Notice would not confer a right
7 on third parties, to intervene in an investigation, or any
8 other rights with respect to a noticed investigation.

9 This concludes my presentation. I would be
10 pleased to respond to questions.

11 CHAIRMAN WELLINGHOFF: We knew what you meant to
12 say, John.

13 (Laughter.)

14 MS. ANAS: I wanted to make sure everybody else
15 knew.

16 (Laughter.)

17 CHAIRMAN WELLINGHOFF: And I want to thank the
18 team for their work on this Order, as well. This was one
19 that was very important to all of us.

20 Any questions, before we go on to M-2?

21 (No response.)

22 CHAIRMAN WELLINGHOFF: Thank you.

23 MR. HEATH: Good morning, Mr. Chairman and
24 Commissioners. I am Wesley Heath from the Office of
25 Enforcement. With me is John Kroeger, also from the Office

1 of Enforcement.

2 Agenda Item M-2 is a Policy Statement that
3 provides for disclosure of exculpatory materials in the
4 Commission's Section 1(b) and Part 385 Enforcement
5 Proceedings.

6 In 1963, the Supreme Court held, in *Brady v.*
7 *Maryland*, that the Due Process Clause of the Fifth
8 Amendment, require disclosure of exculpatory or potentially
9 exculpatory evidence material to guilt or punishment in
10 criminal proceedings.

11 In *Giglio v. United States*, the Supreme Court
12 expanded the definition of exculpatory evidence, to include
13 material that impeached a witness, when the reliability of a
14 particular witness may well be determinative of guilt or
15 innocence.

16 Following the Commission's enhanced enforcement
17 authority under the Energy Policy Act of 2005, subjects of
18 investigations and respondents in enforcement proceedings,
19 have raised the issue of whether the Brady Doctrine applies
20 to the Commission's enforcement matters.

21 Although the courts have held that Brady
22 disclosure is not required in administrative enforcement
23 proceedings, the Securities and Exchange Commission and
24 Commodities Futures Trading Commission, have provided for
25 disclosure of exculpatory material in their administrative

1 enforcement proceedings.

2 On the other hand, the Federal Trade Commission,
3 National Labor Relations Board, and National Association of
4 Securities Dealers, have declined to apply Brady.

5 Although the Constitution does not require
6 application of Brady, Staff recommends that the Commission
7 apply the principle of Brady to its Section 1(b)
8 investigations and Part 385 enforcement proceedings.

9 The longstanding practice of the Office of
10 Enforcement Staff has been to provide exculpatory materials
11 to the subjects of investigations and respondents in
12 enforcement matters. Nevertheless, formalizing Brady
13 obligations and procedures for complying with those
14 obligations, serves three important goals:

15 First, the policy will provide guidance to the
16 regulated community, Office of Enforcement Staff, and the
17 Administrative Law Judges, by eliminating uncertainty
18 regarding the Commission's position.

19 Second, the policy will promote the Commission's
20 goals of open and fair enforcement, investigations, and
21 proceedings.

22 Third, the policy will promote efficiency, by
23 providing a framework within which disclosure of exculpatory
24 materials are made, and, hence, will avoid unnecessary
25 consumption of regulated entities' and Office of Enforcement

1 Staff's resources.

2 That concludes my presentation, and I would be
3 pleased to respond to questions.

4 CHAIRMAN WELLINGHOFF: Thank you, Wesley. Again,
5 I thank this team for their work on this Order. I have no
6 questions, but I have some comments, a statement on A-3, M-1
7 and M-2.

8 In the previously-issued Policy Statement on
9 Enforcement, the Commission instructed Enforcement Staff to
10 release annual statistical reports summarizing our
11 enforcement activities for the preceding year, to provide
12 additional transparency to the public regarding Staff's
13 enforcement work.

14 In order to further the Commission's Strategic
15 Plan, Enforcement Staff has gathered information about
16 market behavior, market participants, and market rules, to
17 support the Commission in meeting its obligation to oversee
18 regulated markets, to bring entities into compliance with
19 applicable statutes, Commission Rules, Regulations, and
20 tariff provisions.

21 The report issued today, provides transparency
22 regarding how the Office of Enforcement supports the
23 Commission in this goal.

24 Enforcement Staff has done a significant amount
25 of work this year, and I thank them for their efforts.

1 In addition, our actions today on M-1 and M-2,
2 provide further transparency regarding the Enforcement
3 Staff's non-public investigations and how Staff conducts
4 those investigations.

5 I believe our actions today strike the
6 appropriate balance between the need to keep preliminary
7 investigations, non-public, and the need for transparency.

8 In addition, we are clarifying our policy to
9 provide exculpatory evidence to subjects of investigations
10 and respondents in administrative enforcement proceedings.

11 I support these actions, because they further the
12 Commission's goals of transparency and enforcement of our
13 Rules and statutes. Thank you.

14 Questions? Comments? Commissioner Moeller?

15 COMMISSIONER MOELLER: Thank you, Mr. Chairman.
16 I want to commend the teams that gave the presentations, who
17 worked so hard on the report.

18 I am hoping that our entire regulated community
19 will take a look at this, because it's an excellent report.
20 Norman Bay, I want to thank you for the leadership you've
21 provided on these efforts, culminating in today.

22 I was told we couldn't increase the transparency
23 of our investigative process. Obviously, we have, through
24 these Orders and through this report.

25 I was told we couldn't set out our enforcement

1 priorities, but we did in this report. I was told we
2 couldn't put case studies together about voluntary
3 submission by entities, but it's obvious, if you look
4 through this report, there are many, many cases where we set
5 out the case, we describe what happened and what the
6 consequences were.

7 This is a major effort toward increasing the
8 transparency of our enforcement process.

9 Suedeen, your legacies will be wide-ranging in
10 this Commission for many years to come, but one of them will
11 be the fact that you suggested to Jon that he talk to Norman
12 Bay about coming here to be the head of our enforcement.
13 That will have positive, long-range implications, and I
14 personally thank you for it.

15 I'll be honored to vote for these Orders, Mr.
16 Chairman.

17 CHAIRMAN WELLINGHOFF: Thank you. Suedeen?

18 COMMISSIONER KELLY: Thank you. Today's Orders,
19 as well as the Annual Report, are not only culmination of
20 this past year's efforts to provide well-defined rules of
21 the road, as we call them, for market participants in
22 wholesale markets. They also advance our goal of providing
23 effective and fair regulatory oversight for competitive
24 energy markets.

25 Since the Energy Policy Act of 2005, the

1 Commission has consistently stated that compliance with the
2 Commission's requirements, is our primary enforcement
3 objective.

4 The path for meeting this objective, must be
5 marked with guidance, guidance, and guidance. Since the day
6 EPCRA 2005 was enacted, we have listened and we've heard
7 from industry, and others, and they've informed us, what our
8 determinations of what the standards for compliance should
9 be.

10 This is a constantly evolving effort, and I'm
11 confident that the Enforcement program will continue to
12 develop and mature, particularly given the Commission's good
13 fortune in having smart, dedicated Enforcement Staff with
14 strong and effective leadership. Thank you.

15 In passing the Energy Policy Act, Congress
16 entrusted to the Commission, significant new enforcement
17 authorities to help create a culture of compliance. I
18 believe that over the last four and a half years, we've
19 responded promptly and responsibly in discharging our
20 expanded authorities, by providing compliance road maps,
21 improving transparency, clarifying the rights of those being
22 investigated, and establishing measures to ensure that
23 entities are treated fairly.

24 It's hard to believe that only four years ago,
25 FERC issued its first Policy Statement on Enforcement, and

1 that set out the remedies available to FERC and explained
2 how we would determine the appropriate remedy for a
3 violation.

4 We have since followed up with a number of
5 Orders, including today's, that set forth the hallmarks of
6 our Enforcement program. In the end, compliance is what we
7 do and what regulators should hope for, what industry should
8 constantly strive for, and what consumers deserve.

9 Thanks to Staff's hard work, not only just on
10 today's efforts, but over the last four years, for advancing
11 our goals. I am pleased to vote for both of these Orders.

12 CHAIRMAN WELLINGHOFF: Thank you, Suedeem.
13 Marc?

14 COMMISSIONER SPITZER: Thank you, Mr. Chairman.
15 I'm going to post a more full statement on these matters,
16 but a brief encapsulation on M-2: We are providing, with
17 this Order, a measure of due process that is greater than
18 required by law, but we're providing that extra measure of
19 due process, not because we are compelled to do so, but
20 because doing so is the right thing to do, and I am in
21 support and appreciative of that.

22 On M-1, as has been noted in the Order and by my
23 colleagues, we are balancing competing interests. The
24 competing issues are transparency and notice of FERC's
25 investigations, on the one hand, with the privacy interests

1 of the regulated entity, as well as the inherent bilateral
2 nature of the investigation, on the other, and I think we
3 have accomplished that balancing in a very informed and
4 analytical way.

5 Finally, the Report on Enforcement, A-3, is an
6 extraordinary document. It really has a wealth of
7 information, and, in particular, the case studies are highly
8 informative as to, first, the scope of the law, in a very
9 complicated area, as well as the evolution of individual
10 cases, the numbers, particularly, suggesting a high degree
11 of self-reports, more than half, result in dismissal of the
12 action, ab initio, reflects that we are, again, balancing
13 competing interests, and the ultimate motivation of this
14 body is compliance with the law of the United States, the
15 timeframe of EPAct 05, reflecting, to some degree, a crisis
16 of confidence of the people in the energy markets.

17 It's fair to say that has been restored, and I
18 would be remiss, without reflecting upon the tenure of
19 Commissioner Kelly in that regard. The depth and power of
20 her ability, is extraordinary, and is, in large measure,
21 resulting in that restoration of the faith and confidence of
22 the people of this country in our energy sector and energy
23 markets.

24 Her professionalism is reflected in her spending
25 time discussing her colleagues that she served with at FERC,

1 rather than her own ability, but those abilities have been a
2 motivation to me, and I'm honored to have served with her.

3 Thank you, Mr. Chairman.

4 CHAIRMAN WELLINGHOFF: Thank you. Madam
5 Secretary, if we could vote on the three items, please.

6 SECRETARY BOSE: The vote begins with
7 Commissioner Moeller.

8 COMMISSIONER MOELLER: Aye.

9 SECRETARY BOSE: Commissioner Spitzer?

10 COMMISSIONER SPITZER: Aye.

11 SECRETARY BOSE: Commissioner Kelly?

12 COMMISSIONER KELLY: Aye.

13 SECRETARY BOSE: And Chairman Wellinghoff?

14 CHAIRMAN WELLINGHOFF: Aye.

15 Those are all the matters we have, I think.

16 COMMISSIONER MOELLER: Mr. Chairman?

17 CHAIRMAN WELLINGHOFF: Yes.

18 COMMISSIONER MOELLER: May I make an
19 announcement? This kind of follows on to Commissioner
20 Kelly's discussion about the quality of people here, but, as
21 you may know, we have just concluded the Combined Federal
22 Campaign, and this Agency exceeded its goal by 123 percent.

23 This shows that this is a generous group of
24 people, in addition to highly professional people, and I
25 think the public should know that.

1 And I will echo, in my rough voice, the comments
2 of Commissioner Spitzer, that it's been an honor to serve
3 with you, Suedeen, and I look forward to our continued
4 friendship and working with you and getting your insight,
5 for many years to come.

6 CHAIRMAN WELLINGHOFF: Thank you. If there is
7 nothing else to come before the Commission, we're adjourned.

8 (Whereupon, at 10:52 a.m., the Open Meeting was
9 concluded.)

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