One-Page Summary of Testimony of Larry R. Parkinson
Director, Office of Enforcement, Federal Energy Regulatory Commission
Before the Energy and Commerce Committee, Energy and Power Subcommittee
United States House of Representatives
June 3, 2015

Thank you for the opportunity to testify. My name is Larry Parkinson, and I am the Director of the Office of Enforcement of the Federal Energy Regulatory Commission (FERC or the Commission). My office's work can be broken into two stages: an investigative stage (during which staff gathers facts to decide whether to recommend further action by the Commission) and an adjudicative stage (during which the Commission hears facts and arguments and decides whether to impose civil penalties and other remedial measures). The proposed legislation reflected by the discussion draft suggests changes to FERC's regulations governing the investigative stage.

The Commission has a deep commitment to transparency and engagement with the subjects of our investigations, and such subjects have many formal and informal opportunities throughout the investigation to present their facts and defenses to the Commissioners and staff. FERC is one of the most process-oriented and transparent agencies in the federal government when it comes to communicating and sharing information with subjects, but we recognize that too much process and associated delays can impose costs on market participants, the public, and the investigative subjects.

We always are willing to consider changes in the way we conduct investigations, but I would like to raise the following concerns regarding the proposed legislation:

- Subsection 4212(1): The Commission already discloses exculpatory material to subjects. The proposed mandate to disclose "helpful or potentially helpful" materials (possibly including non-factual material) and to ensure that any third party that "assists" with our investigation does the same would pose a tremendous burden on our investigations;
- Subsection 4212(2): The Commission already provides witnesses access to their transcripts on a timely basis and delays such access only when doing so is necessary to preserve the integrity of our fact-finding process. The proposed legislation could be read to undermine our investigative work and infringe the rights of third parties;
- Subsection 4212(3): Existing Commission regulations and policy already wall-off investigatory staff from Commissioners and advisory staff at the adjudicative stage. Erecting a wall at the investigative stage would interfere with the Commissioners' management of the agency and impede access of investigatory staff to subject matter experts at the agency;
- Subsection 4212(4): Subjects already have the right to submit written materials to the Commissioners regarding settlement, or any other topic, at any point in the investigation. Mandating that subjects be allowed to communicate regarding settlement to the same extent as investigatory staff fails to recognize that attorneys who serve as investigative staff have an attorney-client relationship with the Commission and, therefore, are on a different footing than investigative subjects.

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Mr. Chairman, Ranking Member Rush, and members of the Subcommittee: Thank you for inviting me to testify today. My name is Larry Parkinson, and I am the Director of the Office of Enforcement of the Federal Energy Regulatory Commission (FERC or the Commission). I appear before you as a staff witness, and the views I present are not necessarily those of the Commission or any individual Commissioner.

Background

I will begin my testimony today with some background on how the Office of Enforcement—the arm of the Commission tasked with surveilling, investigating, and resolving violations of FERC's authorizing statutes—functions. Our enforcement work can be broken down into two stages. The first is an investigative stage, during which Commission staff analyzes potential misconduct in FERC markets to determine whether a participant in one of those markets may have violated a FERC authorizing statute. Our job at this stage is, simply put, to gather the facts. After we do that, we determine whether those facts and applicable law indicate that we should recommend to the Commission that it proceed with a further action (usually a settlement or enforcement proceeding) that may result in the imposition of civil penalties, disgorgement, and other remedies against that participant.

The second stage is an adjudicative stage. That stage begins if the Commission determines that there is reason to believe that a violation occurred and the investigative subject declines to settle the matter on terms that are in the public interest. During this second stage, staff and the investigative subject present their arguments and facts directly to the Commission, which determines whether civil penalties or other remedies should be imposed. If the Commission concludes that a violation occurred and assesses penalties, the investigative subject can seek review of that conclusion and assessment in federal court (and the procedures for seeking such review depend on whether the investigation arises under the Federal Power Act or the Natural Gas Act).

Those two stages, investigative and adjudicative, are distinct. The purposes of each are different, the applicable rules are different, and the ways in which staff interacts with the Commissioners are different. It is important to keep those distinctions in mind as the Subcommittee considers the proposed changes to the regulations governing our work. This is because the law and procedures that apply to investigative and adjudicative stages are different at federal administrative agencies. And there is a good reason for this: Applying rules from the adjudicative stage to the investigative stage, or vice versa, can undermine good enforcement policy and can interfere with a federal government agency's ability to effectively investigate and enforce federal law.[1]

[1] The differences between the investigative and adjudicative phase of a federal enforcement matter, why those differences are important, and how they work in FERC enforcement cases is explained in more detail in a law review article prepared by Office of Enforcement staff. *See* Allison Murphy, Todd Hettenbach & Thomas Olson, *The FERC Enforcement Process*, 35 ENERGY L.J 283 (2014), *available at* http://www.felj.org/sites/default/files/docs/elj352/15-283-321-Murphyetal-final-11.1.pdf

With that background in mind, my testimony today focuses on the changes that the proposed legislation would mandate to the regulations governing the investigative stage of our work.

The Commission in general, and the Office of Enforcement in particular, has a deep commitment to transparency and engagement with market participants. This commitment has made FERC one of the most process-oriented and transparent agencies in the federal government when it comes to communicating and sharing information with subjects. The Commission's regulations and policy statements give subjects numerous formal, procedural opportunities to present their views at various points in the investigation (in addition to many informal opportunities, as noted below). The first of these procedural opportunities comes after staff completes its initial fact-finding and provides its preliminary findings to the subject. At that point, the subject has the opportunity to draft a response to those findings. If enforcement staff decides to move forward, the subject's response is shared with all members of the Commission.

Second, if the Commission authorizes staff to engage in settlement discussions, the subject has another opportunity to offer its view of the facts and applicable legal theories.

Third, if the matter cannot be settled and staff decides to recommend an enforcement action to the Commission, section 1b.19 of the Commission's regulations requires staff to notify the subject of that intent, to offer the opportunity for response, and to share that response with the Commission.

Fourth, if the Commission determines that there is reason to believe a violation has occurred and issues an Order to Show Cause as to why sanctions should not be imposed, the subject has yet another opportunity to explain its conduct and legal defenses in writing. The Commission considers such explanations before reaching any final determination on whether the subject committed a violation and should be assessed any penalties.

In addition to these formalized processes, our office engages in a great deal of informal back-and-forth with subjects and their counsel. They can, and often do, call or email staff throughout the course of an investigation to discuss the Commission's concerns and to offer relevant analyses, facts, and opinions. In addition, they can, and often do, write to the Commissioners directly during investigations to present their views. This right to submit information throughout the investigatory stage is formally embodied in the Commission's regulations and policy statements.

The formal and informal opportunities that the Commission provides to investigative subjects makes our investigative practice one of the most transparent, if not the most transparent, in the federal government. If anything, there are legitimate questions about whether FERC may have too much process. As important as process is to both the Commission and subjects, too many procedural steps in the course of an investigation can delay resolution of that investigation. Such delays can harm consumers (by delaying the return of unjust profits to market participants affected by unlawful conduct), market transparency (by delaying a public presentation about the types of

market behavior that the Commission has determined to be unlawful), and the subjects themselves (by delaying resolution of the investigation of their conduct).

I now would like to offer my views on section 4212 of the proposed legislation.

Subsection (1)—Disclosure Of Exculpatory Material

I will start with Subsection 4212(1), which would require the Commission to promulgate a rule mandating that staff disclose "any exculpatory materials, potentially exculpatory materials, or materials helpful or potentially helpful" to a subject's defense within seven days of providing a preliminary findings letter. At the outset, I want to make sure that the Subcommittee is aware that the Commission voluntarily adopted a policy mandating disclosure of exculpatory materials more than five years ago. That policy requires enforcement staff to review all materials it receives during an investigation and to provide the subject with any materials that a criminal prosecutor would have to provide pursuant to the United States Supreme Court's decision in *Brady v. Maryland*—that is, to provide the subject with any exculpatory evidence known to the government but unknown to the subject that is "material to guilt or punishment."

The Commission adopted this policy voluntarily. Because there is no Constitutional requirement to have such a policy in a civil enforcement context, not all federal enforcement agencies have adopted policies concerning disclosure of exculpatory information. And those agencies that have adopted such "Brady" policies generally disclose information to subjects *later* in the enforcement proceedings than FERC does. Furthermore, Commission staff takes its disclosure policy seriously—it is trained on how to handle exculpatory material, conducts diligent searches for such materials, carefully

considers any supplemental requests from subjects for additional materials, and promptly elevates any issues to Office of Enforcement management. When staff identifies exculpatory material, it promptly turns over that material to the subject's counsel.

The language in subsection 4212(1) could undermine existing policy and drastically burden and delay our investigations. Most significant, the proposed language goes far beyond any traditional definition of "*Brady* material" by including the term "materials helpful or potentially helpful to the defense." That term is not defined, and it is unclear as to how staff should go about identifying such information (particularly given that the subject may not have disclosed all of its defenses at that stage), but a literal reading of that term could seriously disrupt the investigative process. As a former federal prosecutor and someone with nearly 30 years of experience in federal enforcement work in several federal agencies, I am not aware of any federal agency that operates under such a requirement. Requiring staff to identify and disclose material that could be "helpful or potentially helpful" to a subject would impose difficult and time-consuming judgments that extend well beyond what even criminal prosecutors are required to undertake.

Moreover, this obligation does not appear to be limited to factual material. The plain language appears to include non-factual material such as staff's internal analyses of the evidence and legal memoranda, and it could be read to override the well-established protections for attorney work product, attorney-client communications, and the agency's deliberative process.

Finally, the requirement to ensure disclosure by other federal agencies, state agencies, and non-governmental organizations that "assist" an investigation would be

extraordinarily difficult to administer in many of our cases. While the term "assist" is not defined, it could refer to any instance in which a third party either (1) responds to a data request or subpoena or (2) engages in any discussion with enforcement staff. If so, the proposed legislation may require Commission staff to ensure that such entities—including state regulatory agencies—search through all of their files and produce any information that could be "helpful or potentially helpful" to the subject. Presumably, staff would need to compel the third parties to conduct such searches and to provide substantial guidance regarding the types of materials that must be disclosed. This type of process, which is unprecedented in federal enforcement as far as I am aware, has the potential to cause extraordinary delay in FERC investigations and to compromise the agency's ability to effectively and efficiently resolve enforcement matters.

Subsection (2)—Access To Transcripts

Subsection 4212(2) would require the Commission to provide any entity or person subject to an investigation access within a "reasonable time" to the transcripts of sworn testimony taken during that investigation.[2] I will provide a little background before addressing the substance of this provision. Commission regulations already entitle a witness to a copy of the transcript of his testimony unless there is good cause to deny the request. Staff almost always makes such transcripts available promptly upon request, and it delays access only in the rare instance where there is a threat to the integrity of the fact-

[2] The sworn testimony that enforcement staff takes during an investigation is not considered to be a "deposition" as that term is commonly used in civil litigation. While many aspects of traditional "depositions"—such as attendance and participation by a witness's counsel—are present during FERC investigative testimony, there are other aspects that are not present. Neither FERC's rules nor the rules of other federal enforcement agencies (as far as I am aware) use the term "deposition" to describe investigative testimony.

finding process. In fact, over the past six years, we have conducted more than ninety investigations and have delayed access to transcripts in only about a dozen of those matters.

Accordingly, the issue under the Commission's existing regulations is not *whether* a witness will receive access to his or her transcript. The issue is whether staff (with management review and approval) can delay such access for a short time in certain, rare instances. This is an issue that has been litigated before the Commission, which concluded that such delayed access is appropriate in some circumstances.

The reference to "reasonable period of time" in subsection 4212(2) may simply codify in statute the Commission's existing regulations and practice. On the other hand, I would be greatly concerned if that language was meant to eliminate the good cause standard for delaying access in the few instances when it is necessary to do so.

I would also be very concerned about the language that provides that the subject would be provided access to "*any* deposition *involving* such entity or person." In many cases, such a requirement would problematic if the subsection were read to require the Commission to provide the investigative subject—and not just the witness—access to the transcripts of all testimony taken during an investigation. During the investigative stage, there is often good reason to avoid giving transcripts of testimony taken of one subject to a different and potentially-adverse subject, particularly if, for example, the witness is a whistleblower or the witness's interests are adverse to the company. It is important that individual witnesses can obtain access to their own transcripts—and, in FERC investigations, they can. But it would be harmful to the investigative process and

compromise the rights of individual witnesses to mandate that every investigative subject automatically gets a copy of all testimony, particularly while an investigation is ongoing. No other agency of which I am aware is required to take that approach, and I do not believe FERC investigations should be treated differently in this key respect.

Subsection (3)—Communications With Commissioners And Advisory Staff

Subsection 4212(3) would require that any communications between investigatory staff and the advisory staff regarding the merits of an investigation be in writing and on the record. This would be a dramatic change to existing practice and seriously undermine the Commission's ability to administer its enforcement function.

Under existing FERC regulations, policy, and practice governing the adjudicative stage—which starts when the Commission issues an Order to Show Cause—the Commissioners sit as neutral arbiters and they and the Commission staff who may advise them are walled-off from the investigative staff litigating the matter before them. During the investigative stage, by contrast, the Commission itself is responsible for directing, supervising, and setting priorities regarding the work of Enforcement staff. To perform that function properly in the enforcement context, the Commissioners and their staff need to be able to communicate freely with investigative staff on a wide range of topics, including the types of conduct staff is investigating, the progress of those investigations, the merits of potentially settling those investigations, and many other important judgment calls that arise in complex enforcement cases. All of those types of communications may be considered to fall within the phrase "regarding the merits of the investigation." Requiring that they all be in writing—without the ability to have candid back-and-forth

discussions and oral briefings—would be extraordinarily inefficient and would significantly impede the Commission's exercise of its management responsibilities. Further, requiring that such writing be "on the record" would make candid communication almost impossible—particularly given the lack of any express protections for attorney work product, attorney-client communications, or agency deliberative process in the proposed legislation.

Moreover, erecting a wall between investigative staff and advisory staff during the course of an investigation would deprive the investigative staff of the expertise of other FERC offices (and vice versa) during investigations. This would dramatically change current practice and largely isolate enforcement staff from the rest of the agency. The Commission generally considers all staff outside of the Office of Enforcement to be advisory during the adjudicative stage; therefore, if that model were extended to the investigative stage, the proposed legislation would require that all communications with Commission engineers, analysts, economists, lawyers, and other knowledgeable professionals outside the investigative team be in writing. Virtually every complex FERC investigation involves collaboration with a multi-disciplinary team. Enforcement staff relies on these experts to help analyze data and legal theories and reach thoughtful, informed conclusions about what conduct constitutes a violation, and whether such conduct is (or is not) harmful to FERC-regulated markets. Forbidding oral communications and meetings between investigative staff and the Commission's subject matter experts would seriously impede the ability of the Commission to make informed decisions about enforcement matters and enforcement policy.

Investigators have an essential interest in communicating with advisory staff (and vice-versa). I am confident that no other federal enforcement agency—whether the SEC, CFTC, FTC, or others—is subject to the types of limitations suggested in the proposed legislation. FERC should not be subject to these limitations either. This proposed rule has the potential to severely undermine the Commission's ability to carry out the core enforcement role that Congress has given it.

Subsection (4)—Communications Regarding Settlement

Subsection 4212(4) requires that investigative subjects be allowed to "communicate with the Commissioners regarding the substance of settlement consideration to the same extent as such communications occur between the Commissioners and the investigatory staff of the Commission." As noted earlier, the investigative subject's response to staff's preliminary findings is provided to the Commission for its consideration before the Commission decides whether to authorize enforcement staff to engage in settlement discussions. Moreover, subjects already have the right to submit written materials regarding settlement or any other subject directly to the Commissioners during an investigation. It is not clear what this provision is meant to address, but it fails to recognize that the attorneys in the Office of Enforcement act as *counsel to the Commission* and, as such, have an obligation to provide candid advice to the Commissioners regarding settlement considerations during the investigative stage. I believe it would be a significant mistake to interfere with Commissioners' ability to obtain such candid advice from its own attorneys at that stage by treating investigatory staff and subjects as being on the same footing (as they are during the later adjudicative

stage). And, again, no other enforcement agency of which I am aware has such substantial restrictions on the ability of staff and the heads of the agency to communicate freely.

Conclusion

Thank you for inviting me to testify today on the proposed legislation. FERC's Office of Enforcement welcomes constructive analysis of its policies and procedures and is always willing to consider changes in the way we conduct investigations. The provisions in the proposed legislation, however, would be very harmful to the investigative process and, if enacted, could significantly undermine the Commission's ability to carry out Congress's enforcement goals. I look forward to working with you in the future and am happy to answer any questions you have.