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MARC SPITZER NOMINATION

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

THE NOMINATION OF MARC SPITZER TO BE A MEMBER OF THE FEDERAL ENERGY REGULATORY COMMISSION

JUNE 28, 2006

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MARC SPITZER NOMINATION

WEDNESDAY, JUNE 28, 2006

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

The committee met, pursuant to notice, at 10:30 a.m., in room SD–366, Dirksen Senate Office Building, Hon. Pete V. Domenici, chairman, presiding.

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

The CHAIRMAN. Will you please come to order. Senator Bingaman has authorized me to start in his absence. He indicated that he will be here very shortly, so I will proceed.

The committees will come to order.

We are here this morning to consider the nomination of Marc Spitzer to be a member of the Federal Energy Regulatory Commission. Before we begin, our colleagues, Senator McCain and Senator Kyl, have asked to make a few remarks. We will start by asking Senator McCain to proceed and will be followed immediately by Senator Kyle.

Senator McCain.

STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR FROM ARIZONA

Senator MCCAIN. Thank you very much Mr. Chairman and thank you for allowing me and my friend, Senator Kyle, to introduce Marc Spitzer of Arizona who has been nominated for a membership position on the Federal Energy Regulatory Commission, known as FERC.

Mr. Chairman, I've known Marc Spitzer for more than 20 years. During that time, I have had the opportunity to witness first-hand his professional expertise leadership and personal commitment to the public service. His integrity for the Municipal Act, along with his broad experience and ability has a consensus builder are just a few of the attributes he would bring to the FERC.

He served as a member of Arizona Corporation Commission with honoring distinction over the past 6 years and as chairman for 3 years. He has presided over several cases of national significance and throughout his career he has promoted a pro-market philosophy while making sure that Arizonans received reliable, affordable and safe utility services. His public service and understanding of the watering power generation and supply sector, has contrib-

uted much to the benefit of Arizona consumers and producers. I am confident that he would be a great asset to the Commission.

Before he served on the Arizona Corporation Commission, he had a distinguished career as an attorney and an Arizona bar-certified specialist in tax law. In 1992 he was elected by the Arizona State Senate where he served his term in the judiciary and finance committees. The respect he commended among his colleagues and his dedication to citizens of Arizona earned him a position of Senate Majority Leader in 1996. In that capacity, Marc Spitzer established a strong legislative record as an advocate of consumer protection and tax relief and reform.

I'd like to thank the Committee for allowing me to be here, and I urge your careful and favorable consideration of this fine man. He's a person of exceptional ability and experience who is recognized among Republicans and Democrats alike as a leader and energy expert. Our Nation's energy future is at a crucial juncture and it's essential that the FERC position be filled by an experienced and astute leader like Marc Spitzer.

Mr. Chairman, just two additional points I'd like to make. I know of the chairman's commitment on nuclear energy issue. Marc Spitzer [inaudible] having been the last nuclear powerplant constructed in the United States. Marc Spitzer brings a great deal of expertise and knowledge about this particular successful utility and power generating establishment in our city of Phoenix. So he is very well-versed in the issue of nuclear power and an interest at full disclosure, and I hope the chairman will not to hold it against him. He has been involved in a number of my political campaigns for which I hope the chairman will be forgiven.

I thank the chairman for allowing me to be here today. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much Senator and that will all be taken into consideration. I don't know what the outcome will be.

Senator Kyl would you proceed please.

STATEMENT OF HON. JON KYL, U.S. SENATOR FROM ARIZONA

Senator KYL. Thank you Mr. Chairman. Let me associate myself with the remarks by my colleague, Senator McCain in support of Marc Spitzer and perhaps just add a few other quick comments.

In his position as the Senate Majority Leader in the Arizona State Senate, he occupied the same position that Justice Senator O'Connor before him occupied and it was said with her sentencing to the Supreme Court that gave her a special understanding of the legislative process, the role of the legislators in our Government here in Washington, and I think throughout her years on the Court, she demonstrated that experience, that life experience of hers, brought a unique perspective, and I think the same thing is true of Marc Spitzer. It's hopeful I think that FERC which is an administrative, a crazide judicial, but an administrative body, had that kind of experience represented on her and Marc Spitzer brings that perspective to the Commission.

And second, the kinds of issues that he has dealt with are very similar to the kind of issues that he will have to deal with on FERC. Let me just mention a few. During his time as chairman of the Arizona Commission, we focused on policies which encouraged

expansion of the natural gas infrastructure. Specifically, distribution and storage, creating a demand side management policy enhancing the Commission's renewable standard and advancing consumer privacy concerns in the telecommunications area. He presided over very contentious issues such as the planning and the permitting of new transmission line sites and for electric generation. Cases arising from the California energy crisis came up during his tenure as chairman. A major rate cases for gas, electric and telecommunication companies and the Qwest communications' entry into the long distance market which was a very large issue at the time. He as chairman was noted for balancing all of these interests while ensuring that Arizonans received safe and economical and reliable utility services. And I believe he will bring that experience to the FERC as well. So, he is a person I think is uniquely qualified to serve in this position and along with Senator McCain, I urge the committee's favorable and speedy consideration of his nomination.

The CHAIRMAN. Thank you very much. We thank you both for your remarks.

Now, Mr. Spitzer, do you have members of your family that are present?

Mr. SPITZER. Yes, I do.

The CHAIRMAN. Would you please introduce them if you would like.

Mr. SPITZER. I would certainly. Thank you, Mr. Chairman. Present behind me seated is my wife, Jacque; my mother, Edie Spitzer from Philadelphia; a close personal friend of the family, Len Barkan; and my brother also from Philadelphia, John Spitzer. Thank you, Mr. Chairman.

The CHAIRMAN. You are all welcome to the hearing and your genuine abiding interest in this nominee certainly is helpful.

Are there any Senators who wish to make opening statements or submit them for the record?

Now we will proceed under the rules of the swearing in. The rules of the committee which apply to all nominees require that they be sworn-in in connection with their testimony. Would you please rise and raise your right hand please.

Do you solemnly swear that the testimony that you are about to give to the Senate Committee on Energy and Natural Resources shall be the truth, the whole truth and nothing but the truth?

Mr. SPITZER. I do.

The CHAIRMAN. Please be seated.

Before you begin your statement, in accordance with our rules, I need to ask you three questions that we ask each nominee that comes before us for confirmation. Please respond separately to each question.

Will you be available to appear before this committee and any other congressional committees to represent Departmental positions and respond to issues of concern to the Congress?

Mr. SPITZER. I will.

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

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

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

Mr. SPITZER. No.

The CHAIRMAN. Now with those questions having been completed, we're going to proceed and have you give your remarks, and we will have questions and I assume if nothing changes, I will be the only one who will have questions which means the Senators will submit them in writing and you will respond to them quickly so we can confirm you quickly.

Mr. SPITZER. Thank you, Mr. Chairman.

The CHAIRMAN. With that, will you please give your remarks to the committee as to why we should confirm you to the job the President has nominated you for.

Please proceed.

TESTIMONY OF MARC SPITZER, NOMINEE TO BE A MEMBER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Mr. SPITZER. Thank you, Mr. Chairman. With the preceding statements of my Senators from Arizona, I feel that I've sat through my own funeral eulogy, but I have submitted the written testimony, and I will very briefly summarize, Mr. Chairman.

Mr. Chairman, I'm greatly honored to be before this committee this morning. This is a busy time at the Senate and I appreciate the committee holding this hearing today. I will be very brief again in summarizing my testimony.

Along the many people who have supported me over the years and in this endeavor, I particularly acknowledge Senator McCain and Senator Kyl for their support today. I cannot begin to express my thanks and appreciation for the confidence the President of the United States has shown in me by nominating me to this important position.

Service on the FERC is a challenging and exciting opportunity. I have been fortunate to have had wonderful educational, employment and public service opportunities. I was born and raised in the Commonwealth of Pennsylvania and educated at Dickinson College and the University of Michigan law school, and I am grateful to those institutions. I was trained in law by a brilliant lawyer and a wonderful man, Jim Powers. I have also learned much from my colleagues and the staff of the Arizona Legislature and the Arizona Corporation Commission.

Finally, I could not have accomplished very much without the loving and patient support of my wife, Jacque.

The efforts of this committee have borne fruit in the 2005 Energy Policy Act. Chairman Kelliher and Commissioners Bromwell and Kelly have been working hard to implement its provisions. The FERC now has an historic opportunity to enhance energy infrastructure, strengthen wholesale markets and protect consumers. It's a great honor to be considered and nominated to this position and if confirmed, I very much look forward to sharing in that his-

toric opportunity. I look forward, Mr. Chairman, to responding to the committee's questions and I thank you very much.

[The prepared statement of Mr. Spitzer follows:]

PREPARED STATEMENT OF MARC SPITZER, NOMINEE TO BE A MEMBER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Mr. Chairman, Senator Bingaman and members of the Committee, I am greatly honored to appear before you this morning and appreciate your consideration of my nomination to serve on the Federal Energy Regulatory Commission (FERC). There are many individuals whose support in this endeavor I appreciate, but I must especially acknowledge and thank Senator McCain and Senator Kyl for their support today. I cannot begin to express my thanks and appreciation for the confidence the President has shown by nominating me to this position and for the wonderful opportunity it provides to serve our Country. I would also like to acknowledge the loving support of my wife, Jacque.

If confirmed, I pledge to bring a balanced perspective to the FERC, based on my educational and geographical background and professional experience. After being born and raised in Pennsylvania and attending Dickinson College in the East, I journeyed to the Midwest to attend law school at the University of Michigan. In 1982, I moved to Arizona to be an attorney at an established Phoenix law firm, where my practice focused on Federal income taxation. In 1987, I was certified as a Specialist in tax law by the State Bar of Arizona. I continued to practice law as a partner in that firm until 1997 when I joined a "Big Five" accounting firm as a tax attorney. I have practiced as a sole practitioner since 2001 and have maintained my credentials as an attorney and tax law specialist while in public service.

I have always felt a desire to serve society and contribute meaningfully to my community. This led me to seek election to the Arizona State Senate in 1992 where I subsequently served as Chairman of the Finance and Judiciary Committees and was ultimately selected by my peers to represent them as Senate Majority Leader. As an elected legislator, I quickly learned to listen to all of my constituencies and that wise and effective government requires a careful balancing of competing interests. In my leadership capacities, I was required to manage people and personalities, mediate issues, and always exercise good judgment within the political framework. Having authored legislation, I am deeply respectful of the legislative process. During my tenure at the Arizona Senate, I had the experience of working on energy, tax and environmental issues. Of all the issues I dealt with, I felt these offered the greatest potential benefits to our community.

In 2000, I was elected to the Arizona Corporation Commission. The Arizona Commission is one of several state regulatory bodies subject to popular election. In addition to exercising limited regulatory power over corporations, it is entrusted by the State Constitution with broad regulatory authority over public utilities. As Commissioner, I sit in judgment on contested cases and settlement proposals and render decisions by applying the law to the facts in specific cases. In my capacity as Commissioner, I am called upon to interpret and follow the State Constitution and the intent of the Legislature. Further, my decisions are based upon a written record that documents evidence presented and established at a contested hearing presided over by an administrative law judge. During my tenure on the Arizona Corporation Commission, I have made many difficult decisions, including increasing customers' rates and siting generation and transmission facilities. I am proud to have the reputation as one who treats all parties equally under the law and pride myself on my ability to listen with an open mind to all sides before rendering a decision.

As Chairman of the Arizona Commission from 2003 to 2005, I presided over major proceedings involving electricity, natural gas, water, securities and telecommunications issues. As a Commissioner, I have been attentive to ratepayer concerns and compassionate in the face of rising utility costs. As a trained attorney, I deeply respect the law and recognize legal limits on regulatory authority. If confirmed, I believe my financial and tax background would be an asset to the impressive array of skills which already exist at the FERC.

The Arizona Constitution mandates that the Commission on which I currently serve ensure reliable utility services at just and reasonable rates. But the Arizona Constitution also requires the Commission to authorize a fair rate of return for the retail utilities. Meeting these potentially divergent goals has been challenging in an era of rising energy prices. I believe our Commission has met those challenges by supporting critical infrastructure, including pre-approval of gas pipeline capacity and storage, and siting power plants and transmission lines. The Arizona Commission has also tackled the difficult task of balancing competing interests in setting

retail rates for electricity and natural gas. While raising rates is never pleasant for a utilities regulator, elected or otherwise, it is imperative and ultimately in the consumers' best interests that the regulated utilities—public, private and co-operative—remain financially viable.

If confirmed, I would welcome the opportunity to bring my experience to bear on the many interesting and challenging issues that are before the Federal Energy Regulatory Commission. By enacting the Energy Policy Act of 2005 (EPAct 2005), Congress wisely provided a framework for increasing the supply of energy and diversity of energy resources. EPAct 2005 also builds upon demand side management and energy efficiency strategies. In Arizona, our Commission simultaneously addressed these issues at the retail level. Implementation of Congressional intent at the wholesale and national platforms would be a daunting, but exciting task.

By enacting EPAct 2005, Congress has given the Commission new authorities and tools that will help ensure just and reasonable prices and guard the reliability of the Nation's transmission grid. I commend Chairman Kelliher and the rest of the Commission. Their efforts and the fine work they have done after EPAct 2005 prove that Congress' trust was well placed. I hope that you will give me an opportunity to assist the Commission in carrying out its responsibilities under the law and to ensure that the ratepayers of our Nation receive reliable power at affordable prices.

In closing, my broad experience in public service in both the Arizona legislature and the Arizona Corporation Commission provides me with an appreciation of the governmental process and the need for the various public bodies to work together to achieve successful results. Further, my experiences regulating the energy industry have prepared me well for the great responsibilities with which I would be entrusted, if confirmed. Being born and raised in the East, educated in the Midwest and practicing law and serving in public office in Arizona have given me a wider perspective than would be the case if I were familiar with only one geographic area of the Country.

I thank you very much for your time and consideration and welcome any questions you may have.

The CHAIRMAN. Thank you very much, sir. Two Senators have arrived, one from each side of the aisle. The first one having arrived from the State of Alaska. Would you like to inquire or comment? We will start with the Senator from Alaska and follow with the Senator from Colorado.

STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman and thank you for allowing this hearing to proceed so quickly. I think it's significant that for the first time in many years, we might possibly have a full Commission on the FERC and recognizing what we did through this committee and through this Congress in passing the Energy Act last year. We put a great deal on the plate of the FERC and so it's important that the Commission be rounded out. I had the opportunity yesterday to meet with the nominee, Mr. Spitzer and speak to him about some of the issues that I was particularly concerned with. I wanted to bring up just one this morning, Mr. Spitzer. It's probably not going to be any surprise to you, but it relates to natural gas. We had a chance to discuss the situation in my State of Alaska and, as you know we have some 35 trillion cubic feet on Alaska's North Slope, with hopefully another 150 trillion cubic feet awaiting discovery. The potential for enhancing and increasing our domestic reserves is certainly there, but as with any resource, we've got to figure out a way to get it to market.

Our Alaska legislature is reviewing the terms of a contract as we speak and we're hopeful that we will see very positive movement in the near future on that.

My question to you this morning is from the perspective of importance to the Nation as a whole, how important is it to this coun-

try to have additional domestic supplies of natural gas coming into the market down here in the north ordinate. Specifically, how important is it to get Alaska's natural gas to America?

Mr. SPITZER. Mr. Chairman, Senator, thank you very much. That's a good question. We in Arizona have struggled with high price of natural gas and there is an old saying, "don't put all your eggs in one basket," and electricity is increasingly being generated by natural gas. In Arizona more natural gas goes into generation of electricity than heating homes which is a very interesting and striking fact.

We need to do what we can to increase supply. There are limits to reducing demand of natural gas, so the main issue is on the supply side. I am not saying LNG within the deployment of natural gas is not an alternative, but again to put all your eggs in one basket doesn't seem to be the right choice.

Senator MURKOWSKI. Could you speak a little bit more to the issue of imported LNG and your recognizing that you mentioned from Arizona's perspective, focusing on the infrastructure and the distribution of storage aspects and you certainly have some background there. How wise is it for us as a Nation to be looking to imported LNG to meet this growing demand?

Mr. SPITZER. Well Mr. Chairman, Senator, clearly the supply issue is largely controlled by the Congress at the Federal level, and it would not be in the realm of a State commissioner, nor a FERC Commissioner. But my experience in Arizona suggests that LNG can be problematic. There were tankers headed towards the United States that, based on price volatility, changed direction when there was a crisis in Europe and made delivery to England. So we were without a supply in that circumstance. In the case of long-term fixed contracts, some of the producers in very volatile, turbulent areas of the world are requiring 20-year fixed contracts. The consequence would be trillions of dollars leaving the United States to foreign countries. So again, my hopefully not overly simplistic approach of not putting all your eggs in the basket is to keep diversity of fuel for generation of electricity. In the natural gas area, we seek the same diversity with regard to production. Of course in Arizona we have no coastline, so natural gas travels via pipes. You and I had the opportunity to discuss the issue of a pipeline capacity, which is a very important matter, and FERC has siting authority over pipelines.

Senator MURKOWSKI. And we had discussions, Mr. Chairman about some of the aging infrastructure that we have in this country and the recognition as to FERC's role in overseeing so much of it. If we're going to be able to meet the demand, we have to have that infrastructure capacity.

Mr. Chairman, again I appreciate that you are having this hearing. Mr. Spitzer, I appreciate your comments and your recognition that we do need to have a diversified portfolio of our energy needs and more importantly, that we must focus on the domestic side first so we don't have that exposure, that vulnerability that we have seen certainly with oil. We don't want to go down the same path with natural gas as we currently are with oil and our very heavy dependency on foreign resources. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Salazar.

STATEMENT OF HON. KEN SALAZAR, U.S. SENATOR FROM COLORADO

Senator SALAZAR. Thank you very much Chairman Domenici and congratulations to you Mr. Spitzer on your nomination and congratulations as well to your family.

Mr. SPITZER. Thank you, Senator.

Senator SALAZAR. Let me make a comment and just ask a question. I continue to believe that one of the finest moments of the 109th Congress when its looked back in history will be the work that this committee did last year in putting together an energy bill which had eluded the Congress for a very, very long time, and even though there are critics of the bill on both sides, I strongly continue to defend the bill because I think it was the right step and it would not have happened without the bipartisan leadership that we saw in this committee from Senator Domenici and Senator Bingaman. And so I am proud of that work of the 109th Congress.

I have a question with respect to wind energy and other intermittent supplies of the electricity that we might see coming onto the grid and the Order to which has been proposed by FERC, Order 888. It's my understanding that historically there have been excessive transmission tariff penalties on intermittent generators such as wind-powered facilities and that has worked to the disadvantage of these intermittent producers of energy. The proposed Order by FERC, Order 888, would eliminate that disadvantage to our wind power, and I would like one, to ask you if you're familiar with that proposed Order and number two, generally, what your philosophical approach would be to wind power?

Mr. SPITZER. Thank you Senator. I am familiar with that Order and because the Order may ultimately come before the FERC, it would not be appropriate for me to express an opinion on the merits so not to prejudge it. However Senator, while an Arizona commissioner for four years we worked tirelessly on a renewable energy standard of which wind energy is a valuable component. We have purchased, Mr. Chairman, wind energy from New Mexico and look forward to wind energy from other parts of the West being imported into Arizona and having Arizona export some of its wonderful solar energy to create a Western market for renewable energy.

The issue of transmission has been a hindrance to the creation of the west-wide renewable market, and so it's important from a philosophical point of view that wind have equal access to the market. You referred, Senator, to the issue of intermittent resources and the question as to whether some of the tariff imbalance penalties under the current framework are to the disadvantage of wind. If confirmed as a FERC Commissioner, I will give very careful attention to that matter and balance the competing interests. The competing interest on the one hand is access to the market by wind generators. Normally, these generators are non-utility private projects, but that access to the market needs to be balanced against the interests of the transmission owners and the reliability of the system.

So, I look forward to paying very careful attention to the competing interests in reaching a good result.

Senator SALAZAR. Thank you, Mr. Spitzer. Will you expound just a little bit on the program that you alluded to that you have been involved in Arizona for your taking some of the great sun that hits Arizona producing solar-generated electric power and then importing into Arizona some of the wind power from New Mexico?

Mr. SPITZER. Yes, Senator. In fact, there are non-FERC jurisdictional entities that have entered into contracts to purchase wind energy from New Mexico. In an Arizona Public Service rate case that we decided, we imposed a renewable provision into that agreement. So Arizona Public Service went out to market and acquired wind from New Mexico. What I think is appropriate is for States to reach their own conclusions on their own renewable standards. I know that we have a very strong bi-partisan consensus in our legislature with regard to solar energy by virtue of the fact that we have 310 days of sunshine. The sun is shining today in Washington, which is good. We ultimately think there could be great benefit from a west-wide market including the great State of Colorado, but there will be additional transmission enhancements needed. I would point out that in addition to the FERC's responsibility, the Western Governors' Association has convened a number of working groups on green trading and green credits. There's something called the Frontier Line that has been proposed that would help the transmission of both renewable and coal from jurisdictions such as Colorado and Wyoming into the very fast growing areas of the Southwest. Those are the type of consensual approaches the Governors are working on. The State commissions working with the FERC, I think would be very beneficial.

Senator SALAZAR. Well I appreciate your comments and look forward to your service. Thank you very much.

Senator MENENDEZ. Thank you Mr. Chairman. Mr. Spitzer, congratulations on your nomination to you and your family. I was very interested in seeing your biography at your greatest achievements and so I don't know if you know that it says at the bottom of your greatest achievement here.

Mr. SPITZER. I certainly do, Senator.

Senator MENENDEZ. It is not a trick question, but I am proud to see what your greatest achievement is and happy to see you here today. I want to pursue a particular interest that those of us in New Jersey and many other parts of the Northeast have. The people of New Jersey like so many others around the country are facing much higher electric bills this year because of the high cost of natural gas and other fuels and just like last week, New Jersey tax payers began paying over 12 percent more, which is bad but as not as bad as it could have been because the State's competitive auction gets them much better prices than neighboring States.

But the auction system can't work without a vibrant, effective and competitive region of power market and so my question is, if you're confirmed, will you work to ensure that regional markets in the Mid Atlantic, in the Midwest, the Northeast, all of which are critical to power consumers in my State, grow and thrive and can you help guarantee that as many competitive generating companies as possible get access to a reliable open transmission grid so that we can—so that they can compete to provide our constituents with electric power?

Mr. SPITZER. Thank you Senator. In terms of wholesale competition, that is a mandate of the Congress and the FERC is directed to follow the law and follow that mandate and provide for competitive wholesale markets. At the same time Senator, I absolutely agree with you. In Arizona we had a competitive auction that saved Arizona ratepayers $150 million by providing that the utility company purchase power through a competitive solicitation. That was very successful in Arizona. It sounds from your statement that the same success for ratepayers occurred in the State of New Jersey. I know that in some regions of the country there has been resistance to regional transmission organizations. In other parts of the country, they have been embraced, such as in your State.

You may get some confidence from the fact that I grew up across the river in Philadelphia, and I look forward to having competitive markets to the benefit of ratepayers throughout the country.

Senator MENENDEZ. Well I appreciate that answer. The open transmission grid system to a State like New Jersey which is a main point of our electricity is incredibly important, and our regional transmission system has done an excellent job of operating a competitive market and maintaining the reliability of the grid was one of the reasons we didn't have the real consequences of the blackout of 3 years ago as such a significant problem for us. It could have been without this effort, so it's my hope that we won't backslide on the gains we've made.

And one other question, we have as a State and I'm sure others as well, an interest and I heard some of your responses to Senator Salazar, so I am pleased by what I hear. Seeing the development of renewable sources such as solar power, wind power and demand side resources such as energy efficiencies a means to diversify our resources and reduce our dependence on foreign oil, the State has now created a huge boom in solar power thanks to a number of incentives to homes and businesses, and I have been told by a number of suppliers of energy efficiency devices and renewable sources, that a competitive wholesale power market is the key to stimulating new markets for energy efficiency and renewable resources. Is that something that you agree with and will you work as a member of the Commission to further development of competitive markets and enable these alternative energy sources to grow and develop in States like my own?

Mr. SPITZER. Thank you Senator. New Jersey has done a fabulous job on solar energy, and we in Arizona in crafting our rules, Senator, looked to New Jersey as a model. And each State is obviously going to craft its own renewable rules. I am particularly proud of the Demand Side Management Program that the Arizona commission implemented when I was chairman, through Arizona Public Service, which is a way of modulating demand off-peak to use the least expensive, least cost resource and avoid the most expensive peaking power. Then there was energy efficiency that you alluded to Senator, which is a means of reducing energy demand by using devices that consume less electricity. They both are laudable. I think the great benefit that the FERC would employ with regard to renewable generation, and indeed traditional generation, is a reliable electric grid and that is of course a mandate of the 2005 Energy Act. The FERC is working on that currently and put-

ting a great deal of effort into making sure that the grid is reliable and robust to serve as a vehicle for getting energy to market.

Senator MENDENEZ. Thank you. I look forward to supporting your nomination.

Mr. SPITZER. Thank you, Senator.

The CHAIRMAN. Thank you Senator, now Senator Bingaman has some questions.

Senator BINGAMAN. Mr. Spitzer, congratulations to you and it's good to see you again. I am sure you will be a great addition to the Commission, and I look forward to your service there. Let me ask you just about one section of the Energy Policy Act that we passed last year. This is section 203, that gave the Commission new authorities and new obligations in the review of mergers and acquisitions and dispositions of public utility assets. In that section we tried to replace to the extent that we could the protections for utility customers and for the competitive markets that were lost with the repeal of the Public Utility Holding Act. I supported the repeal of the Public Utility Holding Act, but I did so with the assurance that these new provisions would be there and would be implemented. To me, the key new provision was the requirement that FERC in approving such mergers and acquisitions should make a determination that the proposed merger or acquisition would not result in cross-subsidization of a non-utility associate company and would not result in the pledge or encumbrance of utility assets for the benefit of an associate company. It seemed to me that at the time the only way that his obligation could be fulfilled would be for the Commission to impose some strict structural rules for these inter-affiliate transactions in an emerged company, and that was the way I was envisioning it.

The Commission, however, has now issued a rulemaking which is not final, but it purports to implement this section, this section 203 and in my view, it requires something far different than what I had in mind. The Commission provides that a section 203 applicant, that's some utility who wants to engage in a merger or acquisition must provide an explanation with the appropriate evidentiary support of how it's providing assurance that the proposed transaction will not result in cross-subsidization of an associate company or encumbrance of asserts for the benefit of the associate company. So it's true to an extent that we will know exactly how these protections against cross-subsidization and encumbrance of assets will work, but we won't know until cases have actually been brought and the new rules have been applied, the way I read what the Commission's has now proposed. I talked of this section I have been describing here with sort of a heart of the agreement by which Congress agreed to repeal the Holding Company Act and I think it's very important for consumers to be protected in the future. Could you explain any thoughts you have about how this approach to protecting consumers might work? How we can be assured that consumers are protected from the kinds of behavior that have occurred in recent years stemming from the abuse of these inter-affiliate relationships? I have in mind particularly the collapse of utilities like Allegany Electric and West Star. Those are examples which I think we're all familiar with and any thoughts you have on that subject, I would be anxious to hear.

Mr. SPITZER. Thank you, Senator. I want to be careful not to express an opinion on the pending rulemaking that I may be called to vote upon, so not to prejudge that matter. But I will Senator, respond to this very interesting question. In general terms, one of the most interesting cases I've ever dealt with, including 6 years on the commission, 14 years in public service and 24 years as an attorney, was the proposed acquisition of Unisource, the parent company of Tucson Electric Power by KKR. That transaction was being considered by the commission of Arizona at the same time the Texas Pacific matter was pending before the Oregon commission. In both cases the transactions were denied as not in the public interest by State utility commissions. So the Westar case was not relevant. We delved into the details of the cases, but the decision was made based on State law. The protection of consumer interests and the particularly salient issues of cross-subsidization and asset impairment were crucial in both cases. In both cases there's a term of art used called ring fencing.

The CHAIRMAN. Called?

Mr. SPITZER. I'm sorry, Mr. Chairman?

The CHAIRMAN. Called what?

Mr. SPITZER. Ring fencing is the State commission's authority to build a ring fence around utility assets to prevent cross-subsidization, to prevent from an economic point of view, earnings of the utility company being diverted to non-utility separate investments of the holding company. And Oregon was described as having the gold standard of ring fencing, and in fact, Portland General Electric survived the Enron collapse even though it was a subsidiary of Enron because of the ring fencing in Oregon Law and so it proved very beneficial. In the Kansas—in the Westar case—there was not authority for the Kansas commission to impose ring fencing on Westar. Such authority was granted by the legislature only after closing the barn door after the horses had bolted, but many jurisdictions, I think most jurisdictions have some sort of ring fencing provision. As we went through the process in Arizona, and I followed the process in Oregon, it seemed to me that the State commission taking testimony with witnesses sworn under oath and subject to cross-examination and intervention by the parties including the commission staff, including the Residential Utility Consumer Office, including interveners, resulted in a very robust and thorough discussion on the asset impairment and cross-subsidization issues. And they were ultimately decided by the State commissions in rulings not to proceed with those transactions. So I think the fact that Oregon and Arizona worked in such ways should give the Senator some comfort that those issues are being dealt with on a very granular level by the States and again, serious proceedings that are based on a written evidentiary record decided by State utility commissioners.

Now with that being said, there is certainly a role for FERC with regard to the market power issue and to ensure that no merger or acquisition gives market power over wholesale generation to the surviving entity. And of course the Justice Department has its own review under the anti-trust umbrella, the anti-trust standard. It may be Senator that some consideration of cross-subsidization and asset impairment might be appropriate where the State jurisdiction

and State utility commission lacks the authority, but certainly in Arizona and Oregon, those cases suggest that the State commissions were paying very careful attention. The State commissions had authority under organic State law to deal with these issues.

Senator BINGAMAN. Well, obviously as you say you can't give the opinion as to the specifics of the pending rule. It's my view that in some of the mergers and acquisitions that are likely to move ahead in coming years, the ability of some States to properly monitor and properly protect consumers in those cases may not be adequate, and I think FERC needs to have this started. That's why we put it in the statute, and that's not just the authority, but the responsibility to ensure that the cross-subsidization not exist. So, I hope you'll look carefully at that. As I say, I think that it's a core part of what we tried to do in last year's energy bill, and I think if you're looking ahead 5, 10 years and saying where can we get into difficulties with things that were in last year's legislation, I feel that this is one area where we could find ourselves in difficulties if FERC is not sufficiently energized or focused on this exact problem.

Mr. SPITZER. Senator if confirmed, I will be zealous not only in following the mandates of the Congress and Federal law, but zealous in protecting the interest of consumers to the extent there is any regulatory gap. The statute suggests that there needs to be protection of the customers.

Senator BINGAMAN. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you Senator Bingaman. Let me on the same subject Mr. Spitzer, let me suggest a Senator like this one waited 25 years to see PUCA disappear and probably one of the most exciting parts of the bill to finally be able to say that PUCA had left the scene. Now we being from the same State, working hand in blood bi-partisan lives just didn't happen to agree totally on PUCA versus an open-market with reference to mergers. The most compromised we could do is the language read to you about this. So, we're speaking of what Senators think, I would like to make sure you know that others thinks as I do that one of the very powerful features of the Energy Act is the fact that you might get huge new investments into the utility industry because PUCA has left the scene. And the reason for that is that mergers will occur and that if FERC takes the position that they're going to put a rule in that says PUCA disappeared but only temporarily while we went ahead and put it back in by our rule when obviously you had done a great injustice to the hard work that went into getting rid of PUCA, and I am hopeful that you understand what I am saying, and I am sure you do.

Mr. SPITZER. Very clearly, Senator.

The CHAIRMAN. I appreciate that and having said that, let me say—let me try you on a couple of questions and we will finish.

The Electric Reliability Organization and we'll speak about that for a minute. The EPA Act directed to ensure the reliability and security of the Nation's Bulk Power System pursuant to the energy bill, a single Energy Reliability Organization, an ERO will have the authority to establish and enforce mandatory reliability standards. We're now in the process of transitioning a system of voluntary

compliance to this new mandatory regime. I am sure you're aware of that. In order to avoid a one size fits all approach, Congress was careful to provide a substantial role for the Regional Reliability Organizations. The National ERO which set the reliability standards must reputably presume that a standard proposed by a regional entity is valid. You understand that, reputably presumed?

Mr. SPITZER. Yes, Mr. Chairman.

The CHAIRMAN. As a Commissioner, how will you address the issue of regional flexibility? How will this fit into the ERO's National standard and their enforceability?

Mr. SPITZER. Well Mr. Chairman, if confirmed I would of course follow the law and an organization such as the ERO, the reliability organization for the West. The statute is clear. As the chairman said, there's a rebuttable of presumption. The competing interests are the national necessity for reliability, but it is imperative that the FERC work with the State reliability organizations in a cooperative manner, and I would look forward to doing so.

The CHAIRMAN. There has been sustained under investment in transmission in recent years. In order to encourage global investment, the EPA Act directed FERC to issue a transmission incentives rule to establish incentives for greater investment. Do you think there is a need for greater transmission investment? And if so, would you comment on whether you believe transmission incentives are the way to secure that investment or to pursue more vigorously?

Mr. SPITZER. Mr. Chairman, if confirmed, I would be zealous in following the congressional mandate for greater incentives. It is very clear that we need additional transmission not only in my State where 12,000 people move to Arizona every month, but across the country to enhance a transmission grid to provide for reliability, to provide for stronger electricity interconnections and to provide for vibrant wholesale markets. So investment in infrastructure is critical. In addition, it is very difficult in some parts of the country to site transmission lines. I, Mr. Chairman, am an elected commissioner, and I've been called upon to vote for powerplants and transmission lines that people didn't want in their neighborhoods, but I voted for them because they had to be built. In other words, Mr. Chairman, it's a problem. Hostility in some parts of the country to siting transmission, as well as delays make it very difficult to finance these types of projects. I look forward, if confirmed, to working with local communities, with the companies, with the stakeholders, to try and get the transmission built that needs to be built.

The CHAIRMAN. Mr. Spitzer, I want to talk about two issues that I hardly can quantify and hardly can question properly on, but I want to make the point and do the best I can.

First, you understand you will no longer be a commissioner for Arizona right?

Mr. SPITZER. That is very clear, Mr. Chairman, yes.

The CHAIRMAN. You will be a Commissioner for the United States, correct?

Mr. SPITZER. The entire United States. Yes, sir.

The CHAIRMAN. Is it clear to you that whatever experience you had in Arizona will be an experience you had from Arizona, but

that it's incumbent upon you to seek information from other States in what their problems are as quickly as you can so that you're not too depending upon information that comes to you from your state which you served admirably for such a long period of time?

Mr. SPITZER. Mr. Chairman, the national position is very exciting. We're moving our family to Washington, and I am very much interested in serving the entire country and will work very hard to that end.

The CHAIRMAN. Now second Mr. Spitzer, I want to talk about the issue of being a Commissioner versus being an independent operative, being a chairman, being in charge of. Do you understand that way this Commission is structured under Federal Law, there's only one Chairman, right?

Mr. SPITZER. Yes, sir.

The CHAIRMAN. You may be a chairman some day. That's fine, but for now the chairman is not you and you won't be chairman for awhile. It's kind of understood, right?

Mr. SPITZER. Mr. Chairman, yes.

The CHAIRMAN. You won't have any difficulty serving in a collegial matter as one of a number working together to achieve national significance under this act that creates you and gives you your authority. Is that a fair statement and would you speak to it for a little bit to give me your assurance that that's the case in terms of how you will react?

Mr. SPITZER. Mr. Chairman I was elected to the Arizona commission in the year 2000. I was sworn-in as a member and I worked with the chairman at that time, it was Bill Mundell. He is a great man. I worked together with him as part of a team. In 2003 I became chairman and Mr. Mundell was just a commissioner and we continued to work together as part of a team. As I sit here, I am not the chairman of the Arizona commission and I worked with the current chairman, Jeff Hatch-Miller, and I am pleased to do so. Joseph Kelliher I consider a friend, as well as Chairman of the Commission. I think he's doing a fine job, and I look forward to serving as part of his team.

The CHAIRMAN. That does not appear to give you any difficulty with reference to maximizing your service. You feel comfortable doing that?

Mr. SPITZER. I believe I can serve the people of the United States as a Commissioner working as part of that team, yes sir, Mr. Chairman.

The CHAIRMAN. Having said that, I have no further questions, nor will I submit any in writing. If any other Senator has any others, I will rule today. We're going to do it quickly I understand.

If you have questions, you need to get them in by 5 o'clock today. If you don't get them in by 5 o'clock, you don't get them in, so don't waste your time tomorrow, do it today and you don't have to answer them, sir if they come in next week. We're finished. We're going to get you out of here before this place leaves on vacation, so we will try very hard.

Mr. SPITZER. Mr. Chairman, thank you.

The CHAIRMAN. With that, I want to thank your relatives for all the time they have taken to come here and I hope it has been an

interesting hearing for you. It's interesting for us. They're all interesting even as old as I am, they're interesting.

We're in recess.

Mr. SPITZER. Thank you, Mr. Chairman.

[Whereupon, at 11:30 a.m., the hearing was adjourned.]

APPENDIX

RESPONSES TO ADDITIONAL QUESTIONS

ARIZONA CORPORATION COMMISSION,
Phoenix, AZ, July 6, 2006.

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

DEAR MR. CHAIRMAN: Enclosed are my responses to questions for the record of your Committee's June 28 hearing to consider my nomination to be a member of the Federal Energy Regulatory Commission for the term expiring June 30, 2011.

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

Sincerely,

MARC SPITZER.

[Enclosure.]

RESPONSES TO QUESTIONS FROM SENATOR DOMENICI

ELECTRIC TRANSMISSION INFRASTRUCTURE

Question 1. We discussed at your hearing the need for new investment in transmission and FERC's role in providing incentives to industry to build these facilities. One of the obstacles in building transmission is cost allocation. FERC has taken different approaches to this issue in different regions, which seems appropriate. However, some have urged FERC to roll in all transmission expansion costs so that all users of the system share in its costs. Do you believe FERC should roll in all transmission expansion costs?

Answer. Not in all cases. The FERC has discretion under the law to assign transmission costs on a case-by-case basis. The competing interests to be balanced are the rights of native load customers not to be improperly burdened against reasonably priced open access to transmission.

FERC-STATE RELATIONSHIP

Question 2. With FERC's new expanded responsibilities in the areas of reliability and backstop transmission siting, there is the potential for federal/state conflict. How do you propose to promote greater cooperation and coordination with the states in these areas? How can FERC best work with the states to identify and resolve congestion issues?

Answer. The Arizona Commission had the responsibility to site electricity power plants and transmission lines. During my tenure on the Commission, no application for construction of a transmission line was denied. While I believe states generally do a good job siting infrastructure, I did not oppose the EPAct "backstop" provision, nor Federal line-siting authority where necessary. I believe FERC should at a minimum consult with state and regional authorities and cooperate with them as appropriate.

Regarding congestion issues, communication is again the key. FERC should work with stakeholders to identify those areas in need of improvement and work towards a collaborative solution, if possible.

Question 3. How would you suggest that FERC and the states better coordinate to provide regulatory consistency on transmission expansion issues such as cost allocation and cost recovery?

Answer. Again, communication is critical. During the planning stages of transmission projects, communication between FERC and the stakeholders to identify regional cost allocation and recovery issues is essential.

OPEN ACCESS TRANSMISSION

Question 4. Rather than pursue a Standard Market Design proposal, which would have fundamentally restructured the electric power industry, FERC is now focused on revising the Commission's open access transmission policy under Order 888. How will you approach revision of Order 888?

Answer. While I would carefully study the record to arrive at a final conclusion about the proposed revisions to Order 888, I am convinced that a review of that Order is necessary since a myriad of changes have occurred in the electric industry since the FERC first issued Order 888. I believe first and foremost that Order 888 revisions should enhance grid reliability, while simultaneously affording open access to wholesale markets in a non-discriminatory and transparent manner.

Question 5. In Section 1231 of EPAct, Congress gave FERC the authority to require government-owned utilities and electric cooperatives to provide open, non-discriminatory transmission access on their systems in a comparable manner to that required for public utilities. In its recent NOPR on Order 888, the Commission chose not to propose a generic rule to implement Section 1231, but instead to apply its provisions on a case-by-case basis. Do you agree with this approach?

Answer. While I would carefully study the record to come to a final conclusion about the NOPR, my experiences with large governmental-owned utilities and rural cooperatives lead me to believe the correct approach is to apply EPAct 2005 to those entities on a case-by-case basis. It is important to note wide disparities in the economics of transmission with respect to rural cooperatives, even within the same jurisdiction, so treatment of cooperatives is particularly appropriate case-by-case.

RELIABILITY INVESTMENT

Question 6. Reliability, of course, is one of FERC's top priorities. The Commission had indicated that for prudent reliability expenditures, such as vegetation management charges, it will consider separate rate recovery mechanisms, such as surcharges. Consequently, companies need not undertake a full blown rate case.

When utilities seek rate recovery for a reliability investment, do you agree that the Commission should address this in a single issue rate case rather than examine the utility's entire set of rates?

Answer. Yes. Companies would be encouraged to make timely repairs and maintenance if they knew they could timely recover their costs without the delay and expense inherent in a full blown rate case. However, surcharge applications should not be filed in lieu of necessary rate cases and their use should be limited to reasonable and prudent reliability expenditures.

NATIVE LOAD

Question 7. In EPAct, Congress provided that utilities with service obligations to their native load customers are entitled to use the transmission they own or hold under contract to meet these service obligations. Do you agree that the statute makes clear that there is nothing discriminatory about exercising this right?

Answer. As a state commissioner, I concur with the Congress' intent to protect service to native load customers. If confirmed, I would uphold the Congressional intent that a utility's use of transmission it owns or holds under contract to meet service obligations under state law is not unduly discriminatory, to the extent the transmission is required to meet the service obligations.

Question 8. Where there are competing uses of utility transmission under the open access framework, do you believe that the Commission must recognize the utility's statutory right to use its transmission to serve its native load customers?

Answer. Yes. In EPAct 2005, Congress' intent was clear that such uses of transmission "shall not" be considered unduly discriminatory, to the extent the transmission is required to meet the native load obligations.

NATURAL GAS

Question 9. Inadequate gas storage capacity contributes to volatility of gas prices. In order to reduce volatility, the Energy Policy Act of 2005 authorized FERC to grant market-based rates to gas storage developers, even if they have market power, as long as a proposal meets a three part test: (1) it is in the public interest, (2) market based rates are needed, and (3) customers are adequately protected. I recognize it is unusual for Congress to authorize market-based rates to a company that has market power.

Are you prepared to support implementation of this provision and authorize market-based rates, assuming the public interest, need, and adequate protection criteria are met?

Answer. Yes, assuming the three part test is met, I would adhere to both the law and Congressional intent.

Question 10. According to FERC, Liquefied Natural Gas (LNG) presently comprises 2% of the natural gas used in the Northeast and it could provide up to 17% by 2025. Additionally, there are currently about 40 LNG terminals either before FERC consideration or being contemplated by the natural gas industry.

As we meet this growing trend toward LNG in the U.S., what do you envision FERC's priorities should be and how do you think FERC can meet these priorities?

Answer. As with all sources, FERC's priority is to ensure reliable, affordable wholesale energy and competitive markets. With LNG terminals, safety is of paramount importance. While on the Arizona Commission, I have advocated for diversity of fuel supplies and sources, including coal, nuclear and renewables. The observed trend towards LNG is significant and presents unique challenges. Second to public safety, FERC's goal should be to ensure adequate infrastructure so that LNG terminals are used efficiently. LNG is certainly part of the equation but not the entire solution.

Question 11. In the Energy Policy Act of 2005, Congress clearly grants FERC exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Do you see any practical threats to this authority by those opposed to the construction of LNG facilities through the use of other laws to potentially place roadblocks to the construction and siting of LNG facilities? If so, how do you think this is best alleviated?

Answer. EPAct 2005 indeed confirmed and strengthened FERC's authority over siting of LNG terminals. Not having adjudicated an LNG siting case, it is difficult for me to evaluate threats to FERC's legal authority. However, if confirmed, I would seek to enhance FERC's outreach to affected communities to explain the paramount importance of safety and the economic and societal benefits of increased energy supply, particularly to business, economic development and low income organizations. Further, FERC should work with state and local officials and other stakeholders early in the siting process. Finally, I recognize that lawsuits are inevitable in siting matters, so FERC should strive to have a strong factual record to sustain its orders and decisions.

NATURAL GAS MARKETS

Question 12. Please comment on what you think the impact of commodities trading is on the price of natural gas. Do you believe that executive branch currently has the appropriate authority to effectively oversee the energy markets? Do you think that FERC has the appropriate authority necessary?

Answer. Large industrial consumers of natural gas communicated with me in my capacity as an Arizona Commissioner suggesting a nexus between non-commercial (i.e. speculative) natural gas transactions and price volatility. In theory, arbitrageurs mitigate rather than exacerbate volatility in commodity prices. My expression of concern elicited a response from the Commodity Futures Trading Commission stating that no new legislation was needed to protect consumers.

I believe sunshine is a wonderful disinfectant. Transparency is synonymous with accurate and timely information to market participants and regulators. As an advocate of free and fair markets, I believe FERC should use all the information available to eliminate market manipulation and thereby protect consumers.

Question 13. In recent testimony before another Senate Committee, Commissioner Brownell stated, "The natural gas and electricity markets are inextricably linked. . . . The emergence of renewable wind energy as an important electricity supply alternative, for example, will have a mitigating impact on natural gas prices." First, do you agree with this statement?

Answer. Yes.

Question 14. Secondly, do you believe that the authorities under current law are effective with respect to advancing the production of renewable energy on federal lands and federal submerged lands?

Answer. I do believe the current laws are sufficient. However, my experience siting transmission lines in my capacity as a state commissioner has taught me that without the cooperation of other Federal agencies, such as the U.S. Forest Service and the Bureau of Land Management, advancing any proposed project, including renewable energy projects, may be challenging.

Question 15. The *Mobile Sierra* doctrine and the public interest standard were established by the U.S. Supreme Court in a series of cases a half-century ago. The public interest standard does not protect sellers, it protects contracts, it protects the agreement. Sometimes the public interest standard works to the advantage of the seller, sometimes to the advantage of the buyer. Recently, it has worked to the ad-

vantage of the buyer. The power sales contracts between Calpine and California are costing Calpine $1 billion, and helped drive it into bankruptcy. Under the just and reasonable standard, there is little doubt the contract would have been modified. Under the public interest standard, Calpine continued to perform. So, the public interest standard saved California consumers $1 billion. The Supreme Court is presumed to be competent to read a statute. They read the Federal Power Act and came up with the *Mobile Sierra* doctrine and the public interest standard. What is your view of the *Mobile Sierra* doctrine? Is it good law? Do you agree with the Supreme Court?

Answer. The *Mobile-Sierra* Supreme Court decisions and their progeny are, of course, judicial decisions based upon specific facts and were intended to balance the competing interests of certainty of contract with the obligation to ensure just and reasonable rates. It is my experience that it is difficult to apply a judicial doctrine to a rulemaking. The applicability of the *Mobile-Sierra* doctrine to electric and gas contracts where the parties did not clearly agree upon a standard of review is at issue in a pending rulemaking at FERC, so it would not be appropriate for me to address the merits of the argument further. Whatever final action the Commission takes should be consistent with the Federal Power Act, the Natural Gas Act and U.S. Supreme Court decisions.

Question 16. I want your views on FERC authority over buyer market power. FERC has been encouraged to regulate buyer market power, by forcing utilities to buy available lower cost power rather than self generate. I am not convinced FERC has legal authority in this area. Also, there is serious potential for conflict with the states, since a FERC order to a utility to buy power instead of self generating would undercut state decisions on ratebasing generation. Do you think FERC has this kind of legal authority and do you think it is good policy?

Answer. I have not exhaustively researched this issue, but I agree FERC's legal authority over the "monopsony buyer market" is questionable. At the Arizona Commission we ordered a competitive solicitation for wholesale power for Arizona Public Service and limitations on the utility's ability to "self build". I recognize that state commissions and legislatures would not desire conflicting Federal actions with respect to these types of determinations. On the other hand, the FERC does have authority to preserve competitive wholesale markets.

Question 17. Under current law, the only way a licensee can challenge an arbitrary condition included in a FERC hydro license through exercise of mandatory conditioning authority is to seek judicial review of the FERC license. That is true even when FERC believes the mandatory condition is unsupported by the record or even contradicted by the record. The EPAct alternative condition provisions should reduce the prospect of arbitrary mandatory conditions, but they may still be proposed. For reasons of comity FERC sometimes does not highlight its disagreement with the federal or state agency when they propose an arbitrary condition. I think that approach is fundamentally unfair to licensees, since it deprives them of any prospect of overturning an arbitrary condition through judicial review. I believe FERC should make any disagreement with a conditioning agency plain in its orders. Do you agree?

Answer. Yes.

Question 18. As a member of the Arizona Corporation Commission, you supported a state RPS—15% by 2025. Do you support a national renewable mandate?

Answer. The question of a Federal RPS mandate is of course up to the Congress and, if confirmed as FERC Commissioner, I would defer to any Congressional action. It is my personal view that RPS determinations are best left to the individual states.

Question 19. There are many studies required to be completed by the Department of Energy and in the Energy Policy Act. One of them is the Section 1813 Study. Section 1813 of the Energy Policy Act is an effort to address a vexing problem in the West: protracted negotiations regarding rights of way for existing energy infrastructure across Indian lands.

I wrote to the Deputy Secretary of Energy last November about that study and in it I requested that the Department work closely with the FERC, since under the Natural Gas Act FERC has exclusive jurisdiction and authority to authorize the construction, operation and abandonment of most interstate natural gas pipelines.

Mr. Spitzer, I bring this study to your attention because I wanted you to be aware that I consider it important that FERC participate in the preparation of the study so that it can bring to bear its expertise on the issues involved in ensuring that there is appropriate energy infrastructure development in this country.

Answer. I agree. As a Commissioner from a state with many Tribal nations, I am acutely aware of the balancing of interests to secure reliable and affordable energy for ratepayers while appropriately compensating the owners of rights of way, includ-

ing those located within Tribal nations. I would cooperate with Department of Energy and other stakeholders, including the Tribes, to ensure adequate energy infrastructure development and retention.

RESPONSES TO QUESTIONS FROM SENATOR THOMAS

Question 1. Based on your experience at the Arizona Commission, can you describe the role that fiscal certainty plays in whether or not the private sector invests in large electric transmission and gas pipeline projects?

Answer. I have observed the investment community increasingly expressing concerns over the timing of construction of energy infrastructure (high voltage transmission, gas storage, LNG terminals, and gas pipelines). In some cases there is doubt whether a project will be built at all, particularly with respect to electricity transmission. Such concerns often eclipse traditional regulatory and financial matters such as return on equity.

The Arizona Commission changed the rules governing natural gas infrastructure by allowing pre-approval of participation by Arizona gas LDCs and electric utilities in gas storage and pipeline projects. This was an effort to facilitate infrastructure by affording regulatory certainty to cost recovery.

I believe Federal and state regulators should be, and in fact are, willing to take a fresh look at working with the public and all segments of the industry to put steel in the ground, including the financial sector.

Question 2. I'm concerned that some recent decisions at FERC indicate the Commission is moving to substantially reduce allowable rates of return on equity for energy infrastructure investments. I believe doing so would discourage new infrastructure investment. Do you share that concern?

Answer. Return on equity is a balancing of the interests of wholesale and retail ratepayers and applicants seeking a fair rate of return on their investments. The FERC applies the principle of just and reasonable rates on a case-by-case basis, and just and reasonable applies to all parties.

In deciding specific cases, if confirmed, I would be mindful of the Congress' mandate that FERC oversee reliability of the bulk transmission system, a task which in my judgment requires vigilance to ensure adequate investment in infrastructure.

Question 3. Mr. Spitzer, I assume you're aware of the proposal by the Arizona Public Service Company to build the TransWest Express transmission line from Wyoming to Arizona. Do you believe the Public Service Commission will approve this project and the rate-based coal-fired plants that have been proposed?

Answer. As a sitting member of the Arizona Corporation Commission, it would not be appropriate for me to comment on the Arizona Commission's consideration of the TransWest Express project nor the rate-basing of power plants. However, I am aware of a number of transmission proposals for the West designed to meet the demands of dramatic population growth and to transmit low-cost coal and renewable generation to distant load pockets. I look forward to working with stakeholder groups to ensure reliable and affordable energy for the West and for all regions of the country.

Question 4. Are there adequate financial signals to build new transmission lines in the West? If not, what more do you think?

Answer. I am not sure the gravest concern is financial signals, as much as certainty of construction and ultimate cost-recovery. Some of the proposals for the West are vast undertakings requiring planning, permitting and construction periods of up to ten years, a very long time for an applicant to await cost recovery. And as you know, much of the path of construction requires Federal and state permits and environmental approvals.

Question 5. Do you believe Arizona and other states need to diversify their fuel-base away from natural gas?

Answer. Even though our Commission sited a coal-fired plant in 2002, I do believe Arizona has become too dependent upon natural gas for new generation of electricity, and I suggest the same may be the case in many other jurisdictions and regions.

RESPONSES TO QUESTIONS FROM SENATOR ALLEN

Question 1. Virginia both produces electricity through coal, nuclear and natural gas resources and also, at times, imports power from the Midwest when the costs to generate electricity in that region are lower than the costs to generate in Virginia. I have been approached by constituents who are interested to know what assurance you can provide the Committee that the region will not end up with "least common denominator" solutions that might work for other regions of the country

but work contrary to the wholesale competitive market model that is in place in Virginia?

Answer. Resource adequacy is a prime and appropriate concern of State Commissions. I believe it is the role of FERC to ensure the bulk transmission system is capable of sustaining resource adequacy decisions made at the state and regional levels. The states and the Federal government should work cooperatively to ensure that wholesale markets are robust.

Question 2. Do you believe that a competitive market model for wholesale markets can stimulate new investment in transmission, renewable resources and energy efficiency? If so, what can be done to support development of such models? If not, why not?

Answer. I absolutely agree. In fact, I believe interstate transmission, renewable resources and energy efficiency will thrive in competitive wholesale markets.

Question 3. The Regional Transmission Organization that operates the transmission grid in Virginia presently undertakes an independent regional planning process to determine needed new transmission infrastructure. All of the instate electricity producers, Dominion, AEP, Allegheny and the municipal and cooperative utilities, participate in that process which is open to the public. On the other hand, Virginia borders other States that do not have similar processes. What is the best way for the Commission to address the "seam" that is created along the borders where regional planning is undertaken in some regions and not others?

Answer. Arizona participates in a regional planning process in the desert Southwest, much as you describe for Virginia. The global issue of regional transmission planning is a component of a pending FERC rulemaking, so it would not be appropriate for me to comment any further on the merits.

RESPONSES TO QUESTIONS FROM SENATOR SMITH

Question 1. From your experience on the Arizona Corporation Commission, can you describe for me the role that fiscal certainty plays in determining whether or not private sector entities will be willing to invest in large electric transmission and gas pipeline projects?

Answer. I have observed the investment community increasingly expressing concerns over the timing of construction of energy infrastructure (high voltage transmission, gas storage, LNG terminals, and gas pipelines). In some cases there is doubt whether a project will be built at all, particularly with respect to electricity transmission. Such concerns often eclipse traditional regulatory and financial matters such as return on equity.

The Arizona Commission changed the rules governing natural gas infrastructure by allowing pre-approval of participation by Arizona gas LDCs and electric utilities in gas storage and pipeline projects. This was an effort to facilitate infrastructure by affording regulatory certainty to cost recovery.

I believe Federal and state regulators should be, and in fact are, willing to take a fresh look at working with the public and all segments of the industry to put steel in the ground, including the financial sector.

Question 2. Do you believe that such projects will be needed to meet the nation's future energy supply needs?

Answer. Yes.

Question 3. I've heard concerns that some recent decisions at the Federal Energy Regulatory Commission (FERC) could indicate that the Commission is moving to substantially reduce allowable rates of return on equity (ROEs) for energy infrastructure investments. Some say that would discourage investment in new infrastructure projects. What are your views on this issue?

Answer. Return on equity is a balancing of the interests of wholesale and retail ratepayers and applicants seeking a fair rate of return on their investments. The FERC applies the principle of just and reasonable rates on a case-by-case basis, and just and reasonable applies to all parties.

In deciding specific cases, if confirmed, I would be mindful of the Congress' mandate that FERC oversee reliability of the bulk transmission system, a task which in my judgment requires vigilance to ensure adequate investment in infrastructure.

Question 4. As you know, FERC has a statutory responsibility in reviewing rates filed for approval by the Bonneville Power Administration, to ensure that the proposed rate is sufficient to cover its Treasury obligation. Do you agree that FERC would have to reject any rate that "walled off" revenues from BPA secondary sales and required such funds be used to pre-pay debt, rather than being used consistent with established precedent?

Answer. I have not had previous occasion to review these statutory requirements but, if confirmed, I look forward to delving into BPA matters. I would follow Con-

gressional mandates with regard to BPA rates, and apply the law to the factual record, including applicable judicial decisions, to determine just and reasonable rates.

Question 5. Do you agree that the Federal Columbia River Transmission System Act (P.L. 93-454) requires the BPA Administrator to consider all revenue sources "in the aggregate" when setting rates?

Answer. I would certainly adhere to Federal law in considering BPA and all other matters before the Commission.

Question 6. Are you aware that the California ISO has filed a Market Redesign proposal (MRTU) with FERC and that a number of entities, including other control areas, in the Western Interconnection have objected to that filing? After seeing the impact on the Western markets of the 2000-2001 California energy crisis, are you concerned about this? Do you plan to insist that no decision be made on this filing until you are confirmed? Do you think the FERC has the obligation to resolve the specific seams issues articulated by the other western utilities before implementing such a dramatic market rule change?

Answer. I am familiar with this MRTU matter. Because it is likely to come before me for a vote, if I am confirmed, it is not appropriate for me to comment on the merits. If confirmed I will take my experiences as state legislator and state commissioner from 2001-2006 with me to FERC. Based on that experience I am keenly aware of the circumstances creating the California energy crisis (which was a western crisis) and will, if confirmed, use every tool in FERC's arsenal to prevent a repeat performance.

RESPONSES TO QUESTIONS FROM SENATOR BUNNING

Question 1. A number of Kentucky electric distribution companies (and other customers) signed new service agreements with the Tennessee Valley Authority (TVA) in 1997. The agreements included provisions under which the Kentucky distributors agreed to remain TVA customers for another 10 years. However, the agreements also stated that the Kentucky customers could provide TVA Notice of their intent to leave TVA after five years and would then be allowed to leave TVA after an additional 5 years. The contracts also specifically stated that any departing customers would not be liable for any exit fees or stranded costs. The agreements further contained language concerning services (eg transmission) TVA would provide departing customers. Several Kentucky customers (and a Tennessee customer) of TVA have exercised the rights they have under these contracts and given Notice of their intent to leave TVA. The Kentucky customers provided this Notice for, among other reasons, their ability to secure much less expensive power for their customers from sources other than TVA. Since giving Notice, these Kentucky customers have attempted to negotiate with TVA on the rates and terms and conditions of the requested transmission and/or interconnection service they requested. TVA has been entirely unwilling to even discuss the services the departing customers are requesting.

Please provide your views on whether the FERC, as a matter of public policy, should facilitate access to the interstate transmission grid and encourage competition in the electric generation market by ordering the wheeling of power for electric distribution companies that wish to secure transmission service on the interstate transmission grid. For purposes of this question, please assume that the FERC has the legal authority to compel transmission on behalf of customers on the TVA system (ie "inside the fence").

Answer. My record on the Arizona Commission was supportive of ensuring adequate transmission for our rural distribution cooperatives. These cooperatives and their suppliers were clearly subject to the jurisdiction of the Arizona Commission. Where the FERC has been granted jurisdiction by the Congress, I would, if confirmed, be zealous in ensuring wholesale customers have access to reliable and reasonably priced electricity.

Question 2. Kentucky has the least expensive electric rates in America. This is in large part due to the abundance of coal in Kentucky and the use of this coal to generate power. The railroads play an integral part in moving coal from the mine locations to the power generating facilities. Recently, problems with the reliability of coal deliveries and the rates railroads are charging for transporting coal have begun to develop. These problems have the potential to impact the ability of Kentucky to use its coal to generate reasonably priced power in Kentucky and to send its coal to other markets.

I understand the FERC recently convened a conference on these coal issues. Please provide your views on what role the FERC's should play in assuring an adequate, reliable supply of coal for our nation's generating facilities.

Answer. The Arizona Commission supported Arizona's rural cooperatives (the litigant was AEPCO, the genco cooperative) in a proceeding against a rail carrier before the Federal Surface Transportation Board. I have not yet read the record of the June 15th FERC conference. I believe the matter of coal transport is of the utmost importance. FERC has a clear role with regard to system reliability, and inadequate coal supply poses a concern. If confirmed, I look forward to reviewing the record of the FERC technical conference and then considering whether additional Commission action is necessary.

Question 3. As I noted above, Kentucky has the least expensive power in the nation. Kentucky is anxious to make sure its citizens and businesses continue to enjoy this reasonably priced power. Please explain your views on the importance of the FERC recognizing and respecting differences in regional energy markets as it makes decisions on the structure of the interstate energy markets.

Answer. I believe FERC has the responsibility to both recognize and respect state and regional concerns in fostering reliable, competitive and efficient wholesale markets.

Question 4. The Energy Policy Act of 2005 (EPAct) gave the Department of Energy authority to establish National Interest Electric Transmission Corridors. EPAct further gave the FERC the authority to authorize the construction of transmission lines in these corridors. Please provide your views on the responsibility of the FERC to consult and collaborate with states that may be impacted by the construction of electric transmission lines in these corridors.

Answer. The Arizona Commission had the responsibility to site electricity power plants and transmission lines. During my tenure on the Commission, no application for construction of a transmission line was denied. While I believe states generally do a good job siting infrastructure, I did not oppose the EPAct "backstop" provision, nor Federal line-siting authority where necessary. I believe FERC should at a minimum consult with state and regional authorities and cooperate with them as appropriate.

Question 5. Concerns have recently been raised that the operating costs charged by Regional Transmission Organizations are excessive. These costs can eventually be absorbed by residential and industrial electricity consumers in states like Kentucky. Please provide your views on the responsibility of the FERC to oversee and review these types of RTO costs.

Answer. The FERC has the obligation to ensure RTO costs are not excessive. It is critical that the stakeholders in organized markets have faith and confidence in their RTO. To date the FERC has worked hard to ensure that wholesale customers and retail ratepayers enjoy benefits from the RTOs. I suggest that traditional regulatory models of prudency of incurred costs are applicable.

Question 6. Transparency of energy markets and the availability of timely information about costs and capacity in energy markets are crucial for state commission to perform their duties. Please provide your views on the FERC's responsibility and legal authority to provide for transparency in energy markets and the timely availability of information about conditions in the energy markets.

Answer. EPAct 2005 granted FERC substantial new legal authority to ensure transparency in energy markets. This is particularly critical in a time of escalating wholesale commodity prices. If confirmed, I would consider transparency of wholesale energy markets a priority.

RESPONSES TO QUESTIONS FROM SENATOR WYDEN

PROMOTING GREEN POWER

Question 1. Recently, the Federal Energy Regulatory Commission certified an incremental hydroelectric upgrade for the first time under provisions of the Energy Policy Act of 2005, allowing PacificCorp, an Oregon energy company, to qualify for a renewable energy tax credit. Are there other FERC policies and programs that can boost the production, use and sales of renewable energy? What will you do as a commissioner to encourage FERC to promote green power?

Answer. The Congress amended the tax code to increase tax credits for renewable energy projects. The FERC can advance Federal, state and regional policies supporting renewable energy. For example, constraints in interstate transmission impaired delivery of two potential projects in the renewable energy solicitation of Arizona Public Service. Particularly in the West, a robust transmission grid will enable renewable energy developers to bring projects to market.

The FERC can also assist state commissions with best practices in distributed generation, demand side management and energy efficiency, all of which in my judg-

ment are components of resource adequacy as well an efficient and reliable transmission grid.

CONSUMER ADVOCATE

Question 2. Chairman Kelliher and Commissioner Kelly both support my proposal to create a Federal consumer advocate at FERC similar to what more than 40 states currently have. My proposal to create this position was unanimously agreed to during consideration of the Senate Energy Bill? Will you support creating a Federal ratepayer advocate at FERC?

Answer. I have reflected on this question and in fact spoken with the Director of Arizona's Residential Utility Consumer Office, a state agency independent of the Arizona Commission. Most state consumer advocates are members of the National Association of State Utility Consumer Advocates ("NASUCA"). NASUCA is effective in advancing the interests of retail ratepayers on a national level. NASUCA has intervened in FERC proceedings, but perhaps the role of NASUCA at FERC could be formalized. One benefit of NASUCA intervention, as opposed to that of a new Federal entity, is that disagreements among and between states are better managed within a state rather than Federal organization.

RESPECT FOR STATE/LOCAL VIEWS IN LNG LICENSING

Question 3. As you know, the Energy Bill gave FERC exclusive authority over siting, construction and operation of liquefied natural gas (LNG) import facilities. The role of states and local communities is limited to making suggestions to FERC during the licensing process. What will you do to ensure that the views of states and local communities are not only considered but given deference in the licensing process? Will you support licensing of facilities over the strong objections of the state and local community?

Answer. EPAct indeed strengthened Federal siting authority for LNG facilities, but such authority is by no means absolute. My view is that the safe operation of LNG facilities is a paramount concern. The views of state and local officials must be taken into account, particularly with respect to issues of public safety. Prudence and good governance suggest FERC dialogue and then engage with these officials consistent with Federal law.

HYDRO RELICENSING SETTLEMENTS

Question 4. I understand the Commission's practice has generally been to encourage hydro relicensing settlement agreements, but that the Commission has never addressed in a comprehensive manner the question of what kinds of settlement provisions may be incorporated into license conditions. As a result, similar proposed conditions have been accepted in some cases and rejected in others. This has caused confusion among parties to these settlements as to how FERC draws these distinctions. There appears to be a growing recognition within the Commission that additional guidance is needed and that prompt agency action is necessary to provide negotiating parties the regulatory certainty and clarity they've been lacking. Do you share that view, and if so, would you agree that the Commission's treatment of proposed hydro licensing conditions ought to be consistent and predictable for all parties involved?

Answer. I look forward to delving in to matters relating to hydropower. I agree that uncertainty and confusion are antithetical to fair and effective settlement agreements. I look forward to becoming more familiar with and working on hydro issues.

RESPONSES TO QUESTIONS FROM SENATOR CANTWELL

Question 1. Under the Northwest Power Act, FERC has the final say in approving the Bonneville Power Administration's rates provided that the proposed rates are "sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System over a reasonable number of years after first meeting the Administrator's other costs . . . and are based upon the Administrator's total system costs."

When determining the definition of terms like "reasonable number of years" and other terms in BPA's various organic statutes what deference would you give to years of agency precedent and practice in defining those terms?

Answer. Due deference to agency practice and precedent is appropriate.

Question 2. What deference would you give to federal statues that define certain provisions in BPA's organic statutes?

Answer. Federal statutes are of course entitled to deference by FERC.

Question 3. As a FERC Commissioner, would you rely on relevant judicial precedent in order to define terms in BPA's organic statutes?

Answer. I appreciate the importance of Federal judicial precedent. My law practice has focused on Federal law for over 24 years. If confirmed by the Senate as a FERC Commissioner, I would rely on judicial precedent in BPA and other matters.

Question 4. As you probably know, you will have a number of applications for renewal of hydroelectric licenses before you in the next few years. The Northwest is heavily reliant on hydroelectric generating resources. In WA State alone some 13 projects representing 5,863 MW of generating capacity will be in various stages of the relicensing process between now and 2015.

Can you provide the Committee with your perspective on hydroelectric power and your thoughts on the relicensing process under EPACT '05 and the Interim Final Rule published last year?

Answer. Hydropower is important nationally and particularly in the Northwest, and I look forward to delving into hydro cases. I would use all Federal statutes and regulations, including EPAct 2005 and the Interim Final Rule, to encourage a streamlined and efficient relicensing process, consistent with due process for all affected parties.

Question 5. The Northwest has spent more than a decade locked in contentious debate over various forms of regional transmission management. The region is currently looking at an option—known as ColumbiaGrid—that appears very promising, both in its substance and broad base of support. I will note, however, that it does not meet the RTO standards of FERC Order 2000.

Do you think FERC should nonetheless encourage the development of this region-specific development as it moves forward?

Answer. I support regional collaboration and similar collaborative efforts between FERC and regional bodies, both in RTO and non-RTO markets.

Question 6. As you know, western energy markets and ratepayers in WA State are still suffering negative effects of deregulation and related market manipulation during the 2000-2001 energy crisis. Ratepayers in the Northwest and the larger regional economy continue to suffer the ill effects of related energy hikes—some as high as 50%. The GAO noted in a report last November that ". . . consumers in California and across other parts of the West will attest, there have been many negative effects [related to restructuring], including higher prices and market manipulation."

Has energy market restructuring been successful?

Answer. I am convinced that Congress' restructuring of wholesale natural gas markets in 1982 has saved consumer billions of dollars. I further believe competitive wholesale energy markets have benefited ratepayers. The Arizona Public Service competitive solicitation has saved Arizona consumers over $150,000,000 through reduced wholesale power costs.

The crisis of 2000-2001 that began in California and engulfed the West had many and varied causes. Hard lessons were learned from flawed market design, generation and transmission inadequacies and market misconduct.

The FERC has many new tools granted by Congress to protect consumers from fraud and misconduct. If confirmed, I look forward to insisting upon transparency and to protecting the interests of wholesale (and ultimately retail) consumers.

I believe in the rights of states to choose their own paradigms for resource adequacy and in their prerogatives with regard to siting energy infrastructure. Nevertheless, it is a fact that improvident decisions by one jurisdiction may negatively affect neighboring states that have done nothing wrong. If confirmed as a FERC Commissioner, I would strive to work with regional stakeholders and, if necessary, intervene early to ensure disastrous scenarios are not repeated.

Question 7. Of those areas of the country that have not restructured and have not deregulated retail rates, like the Pacific Northwest, do you believe those regions should largely be left alone to address the needs of their specific industry structure as they see fit? If not, how far should FERC go in changing them?

Answer. As a former state legislator, I respect state authority and as a sitting state commissioner I believe retail utility rates, and rate mechanisms, should be determined by state commissions. I believe FERC should work to foster competitive and transparent wholesale markets that permit states to choose their own paths without fear or regret.

However, as noted in my answer to Question 6 above, circumstances may arise whereby one state's actions damage regional wholesale markets, making Federal intervention necessary and appropriate.

Question 8. In recent press reports, the head of the California Independent System Operator has suggested that the rest of the West will simply have to comply with California markets and that the seams created between California and other areas in the west is a failure of the neighboring states to adopt compatible models. My region has suffered once as a result of California's experiments, and stakeholders throughout the west are very concerned by these comments.

Do you believe that FERC has a responsibility, when reviewing filings for California's market redesign efforts, to assess the impact and consequences for neighboring states?

Answer. Without prejudging any matter that may come before me (including the MRTU filing), the answer is yes.

Question 9. Last year's comprehensive energy legislation included a broad ban on the market manipulation practices exercised by Enron. As you know, the Northwest continues to suffer from the ill-effects of Enron's market manipulation practices. I imagine you are acquainted with the smoking-gun Enron memos, in which the company laid out strategies such as 'Fat Boy,' 'Get Shorty,' 'Death Star' and the like, to drive up prices in the West.

I would like to know whether you believe there is any circumstance in which a transaction resulting from manipulative market practices can be "in the public interest," or "just and reasonable?"

Answer. A fraudulent transaction that damaged ratepayers would in my judgment fail both the "public interest" test as well as the standard of "just and reasonable" rates. I consider myself free-market, but my record on the Arizona Commission demonstrates I have a profound sense of right and wrong.

Question 10. Under FERC's Notice of Proposed Rulemaking RM-05-35-000, the Commission has proposed amending its regulations regarding the standard of review that must be met to justify proposed modifications to Commission jurisdictional agreements. Essentially, with the exception of transmission service agreements under the Open Access Transmission Tariff and certain natural gas transportation agreements, when proposed modifications to FERC jurisdictional agreements are not agreed to be dealt with by contract signatories under the 'just and reasonable' standard, the Commission will review such agreements under the 'public interest' standard, in accordance with the Mobile-Sierra doctrine. Most people believe that the "public interest' standard is practically insurmountable.

I know you can't tell me how you might vote as a Commissioner. I am concerned about any diminishment of consumers ability to find relief when they are exposed to rates, terms, and conditions of service that are not just and reasonable—the standard found in the Federal Power Act. However, can you tell me your views on the application of the "public interest" standard and how you think it should be applied in contracts where there is no standard of review specified?

Answer. The *Mobile-Sierra* Supreme Court decisions and their progeny are, of course, judicial decisions based upon specific facts and were intended to balance the competing interests of certainty of contract with the obligation to ensure just and reasonable rates. It is my experience that it is difficult to apply a judicial doctrine to a rulemaking. The applicability of the *Mobile-Sierra* doctrine to electric and gas contracts where the parties did not clearly agree upon a standard of review is at issue in a pending rulemaking at FERC, so it would not be appropriate for me to address the merits of the argument further. Whatever final action the Commission takes should be consistent with the Federal Power Act, the Natural Gas Act and U.S. Supreme Court decisions.

Question 11. Congress revised FERC's merger review authority in the 2005 Energy Policy Act. I am concerned that the Commission may not be giving sufficient attention to these proposed mergers and their potential affect. I'm not offering an opinion on the details of this specific merger, but I am concerned that FERC is giving inadequate attention to the potential market power implications of proposed mergers. I am told that the Arizona Corporation Commission carefully scrutinized, and then rejected, a proposed merger.

Do you agree that FERC needs to take a more careful review of proposed mergers and the expressed concerns of states and intervenors?

Answer. I agree the FERC should carefully review all merger applications to ensure the public interest is served. EPAct 2005 broadened FERC's authority over merger transactions beyond a wholesale generation market power analysis.

The case you referenced was considered by the Arizona Commission at the same time the Oregon Commission rejected a similar transaction. The Congress should take comfort from the thoughtful diligence the Oregon Commission displayed during the Texas Pacific proceeding. I believe that state commissions are well-suited to exercise jurisdiction and resolve asset impairment and cross-subsidization issues on a granular level. That being said, if confirmed I look forward to tackling the responsibilities assigned to FERC by Congress with respect to proposed mergers.

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