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4 DISCUSSION DRAFT ON ACCOUNTABILITY AND DEPARTMENT OF ENERGY

5 PERSPECTIVES ON TITLE IV: ENERGY EFFICIENCY

6 THURSDAY, JUNE 4, 2015

7 House of Representatives,

8 Subcommittee on Energy and Power

9 Committee on Energy and Commerce

10 Washington, D.C.

11 The subcommittee met, pursuant to call, at 10:16 a.m.,
12 in Room 2322 of the Rayburn House Office Building, Hon. Ed
13 Whitfield [Chairman of the Subcommittee] presiding.

14 Members present: Representatives Whitfield, Shimkus,
15 Griffith, Rush, McNerney, Tonko, Castor, and Pallone (ex
16 officio).

17 Staff present: Nick Abraham, Legislative Associate,

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18 Energy and Power; Will Batson, Legislative Clerk; Leighton
19 Brown, Press Assistant; Allison Busbee, Policy Coordinator,
20 Energy and Power; Patrick Currier, Counsel, Energy and Power;
21 Tom Hassenboehler, Chief Counsel, Energy and Power; Brandon
22 Mooney, Professional Staff Member, Energy and Power; Dan
23 Schneider, Press Secretary; A. T. Johnson, Senior Policy
24 Advisor; Caitlin Haberman, Democratic Professional Staff
25 Member; Rick Kessler, Democratic Senior Advisor and Staff
26 Director, Energy and Environment; and John Marshall,
27 Democratic Policy Coordinator.

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28 Mr. {Whitfield.} I would like to call to order our
29 recessed hearing from yesterday, and continue with our panel
30 of witnesses. And we appreciate very much this second panel
31 joining us as we continue our discussion on our discussion
32 draft relating to energy. And we have a great panel of
33 witnesses today. I am going to call on each one of you for 5
34 minutes to discuss the draft and your perceptions and
35 thoughts about it, and then we will open it up for questions.

36 And I am just going to introduce you as I recognize you
37 for the 5-minute opening statement. So our first witness is
38 Ms. Sue Kelly, who is the President and CEO of American
39 Public Power Association. Ms. Kelly, thanks for being with
40 us, and you are recognized for 5 minutes. And I would just
41 ask all of you just make sure the microphone is turned on.
42 And, of course, when the red light goes on, that means your
43 time is up. But--so, Ms. Kelly, you are recognized for 5
44 minutes.

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|

45 ^STATEMENTS OF SUE KELLY, PRESIDENT AND CEO, AMERICAN PUBLIC
46 POWER ASSOCIATION; JOHN E. SHELK, PRESIDENT AND CEO, ELECTRIC
47 POWER SUPPLY ASSOCIATION; PETER GAIBRAITH KELLY, JR., SENIOR
48 VICE PRESIDENT, EXTERNAL AFFAIRS, COMPETITIVE POWER VENTURES;
49 CHRISTOPHER COOK, PRESIDENT AND GENERAL COUNSEL, SOLAR GRID
50 STORAGE LLC; JONATHAN M. WEISGALL, VICE PRESIDENT,
51 LEGISLATIVE AND REGULATORY AFFAIRS, BERKSHIRE HATHAWAY
52 ENERGY; AND WILLIAM S. SCHERMAN, PARTNER, GIBSON, DUNN AND
53 CRUTCHER LLP

|

54 ^STATEMENT OF SUE KELLY

55 } Ms. {Kelly.} Good morning, Chairman Whitfield, Ranking
56 Member Rush, although you are not here yet, and other members
57 of the subcommittee. Thank you for inviting me to testify.
58 APPA commends your hard work putting together the first
59 comprehensive energy package since 2005. We stand ready to
60 work with you to improve America's access to affordable,
61 reliable, and environmentally responsible electric power.

62 Today, I am going to discuss APPA's views on Title IV,
63 Subtitle B, of your discussion draft. I will address the

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64 subtitle sections in the order they appear.

65 APPA certainly supports increased compliance by
66 regulated energy subject to FERC's regulations, but APPA is
67 not convinced that proposed Section 4211 is the best way to
68 do this. It might make more sense for FERC to review its
69 current procedures and policies, and revamp them as needed to
70 make sure that regulated entities get meaningful and timely
71 guidance. I do note that it would be easier for market
72 participants to comply with FERC-approved tariffs if the
73 applicable market rules were simpler and clearer, and I will
74 speak to that issue later.

75 Moving to Section 4212, APPA believes that unless there
76 are compelling reasons for Congress to step in, FERC should
77 set the procedures for its own investigations. The public
78 has to rely on the commission's enforcement staff to protect
79 its interests as electric consumers in these investigations.
80 This is because third parties have no right to participate in
81 these cases at all. If Congress, does subject--or give the
82 subjects of FERC investigations additional protections,
83 Congress must make sure that these new protections do not
84 adversely impact enforcement staffs' ability to protect the
85 public from market manipulation.

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86 Turning to proposed Section 4221, APPA very much
87 appreciates the interest the subcommittee has shown in the
88 problems with wholesale electricity markets. In my written
89 testimonies, I provide detailed comments on the provisions of
90 that section. Some of them would be helpful, in our view,
91 but others would not. APPA has been concerned over the past
92 10 years about the restructured wholesale electric markets
93 that regional transmission organizations and independent
94 system operators, which we call RTOs, operate. Public power
95 utilities must deal with RTOs and their markets because they
96 are located inside the boundaries of their RTO's footprints.
97 They are often geographically and electrically embedded in
98 the transmission systems of larger investor-owned utilities
99 that decided to participate in that RTO. So while our
100 participation in these RTOs and their markets may, in theory,
101 be voluntary, in fact, they are not because of the
102 interconnected nature of the grid.

103 These APPA members deal with the day-to-day complexity
104 and costs of operating in these markets. They must
105 participate as best they can in time-consuming and resource-
106 intensive RTO stakeholder processes. These processes in most
107 regions are heavily skewed towards the interest of large

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108 transmission and generator asset owners, and the governance
109 processes of some of the RTOs is less than transparent. So
110 many public power utilities' only choice is to work with
111 Congress and with FERC to seek needed reforms.

112 Many of the wholesale electric markets that FERC has
113 authorized are not, in fact, markets as you or I would
114 normally think of that term. They are highly complex
115 administrative constructs with a maze of complicated rules.
116 APPA's concerns about RTO-operated markets include extensive
117 and frequent rule changes, volatile pricing, which can
118 sometimes rise to very high levels with very little warning,
119 and limited data transparency. The most troublesome RTO
120 markets are the mandatory capacity markets that three eastern
121 RTOs, ISO New England, PJM, and the New York ISO, operate.
122 These administrative constructs account for a substantial
123 share of total electric bills that consumers and businesses
124 in those regions have to pay, but they haven't shown that
125 they can support a reliable and diverse supply of power, or
126 incent the building of new generation resources where they
127 are most needed. Consumers have paid billions of dollars in
128 charges for these markets, but don't see corresponding
129 benefits.

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130 APPA has recommended that FERC phase-out these eastern
131 capacity markets over time. They should be replaced with
132 voluntary residual capacity markets that better support state
133 and local resource decisions and policies. But short of
134 that, APPA proposes the following steps. First, RTOs that
135 have not yet implemented a mandatory capacity market should
136 not do so without the unanimous support of all the states in
137 that region. And second, RTOs that already have a mandatory
138 capacity market should not keep utilities and states from
139 meeting their own capacity obligations through resources that
140 they build, owned, control, or contractor for.

141 Finally, APPA supports the goals of Section 4231,
142 dealing with purpose mandatory purchase obligations, but we
143 can't support that section in its current form. As drafted,
144 the section would preclude public power utilities from
145 getting any relief from their obligations to purchase power
146 from QFs under the provision. This could leave them at a
147 competitive disadvantage compared to neighboring utilities
148 that do qualify for that relief.

149 So again, thank you for the opportunity to appear today,
150 and I am happy to answer any questions. Thank you.

151 [The prepared statement of Ms. Kelly follows:]

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152 ***** INSERT A *****

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|

153 Mr. {Whitfield.} Thank you, Ms. Kelly.

154 And our next witness is John Shelk, who is the President

155 and CEO of the Electric Power Supply Association. Mr. Shelk,

156 thanks for being with us, and you are recognized for 5

157 minutes.

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|

158 ^STATEMENT OF JOHN E. SHELK

159 } Mr. {Shelk.} Well, thank you, Mr. Chairman, Ranking
160 Member Rush, and the other members of the subcommittee. I
161 appreciate the invitation to participate in the hearing
162 today.

163 EPSA is the national trade association for leading
164 competitive wholesale suppliers. EPSA members together have
165 over 200,000 megawatts; fuel-diverse megawatts, essential to
166 reliability. Over 95 percent of these assets are in the
167 Independent System Operator and Regional Transmission
168 Organization territories that are the subject of the
169 discussion draft. Reliability in these and other markets
170 requires generation from a network of power plants, operating
171 simultaneously with base load, mid-merit and peaking
172 capabilities, deploying a range of fuels and technologies,
173 because electricity demand fluctuates during the day and
174 seasonally.

175 As you all know, and as your hearings have demonstrated,
176 the electric sector is in the early stages of what will
177 likely be a multiyear, even multi-decade, series of profound

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178 changes, fundamentally altering the way electricity is
179 generated and consumed. Well designed and properly regulated
180 competitive wholesale markets, in our views, remain the best
181 model to manage these many changes because markets, properly
182 regulated, are inherently more flexible, adaptable, and place
183 more risks on investors than consumers.

184 EPSA appreciates the inclusion in the discussion draft
185 of energy price formation principles in Section 4421 of the
186 draft for required wholesale power market improvements.
187 Importantly, it is important to point out that EPSA is joined
188 in urging FERC to act on this issue by the Edison Electric
189 Institute, the Nuclear Energy Institute, the Natural Gas
190 Supply Association, and American's Natural Gas Alliance, in a
191 joint letter to the commission back on March the 9th of this
192 year.

193 Energy price formation refers to how these ISOs and RTOs
194 determine the granular locational marginal prices for
195 electric energy sold in their markets. For most power
196 plants, energy sales are the prime resource of revenue. As
197 Sue indicated, LMPs, associated revenues, and other aspects
198 of these markets are tightly bounded by FERC-approved market
199 designs, tariff rules, and grid operator actions. Absent

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200 accurate prices in these markets, energy markets will send
201 distorted information about when, where, and how to invest
202 efficiently to meet future electricity infrastructure needs.
203 There are unique characteristics of electricity that make it
204 a challenge to arrive at prices truly reflective of total
205 costs of providing reliable service, and we can discuss those
206 later if you wish.

207 Importantly, through this issue, the grid operators,
208 independent of generators, ultimately determine the dispatch
209 of specific power plants in their regions. This generally
210 works well to produce competitive pricing outcomes, as
211 documented through regular quarterly and annual data-driven,
212 state-of-the-market assessments from the independent market
213 monitors in each of these regions. However, when the grid
214 operator takes out-of-market actions, the effect is to call
215 on plants out of merit order, and others have to stand by in
216 reserve, or do not run at all, even if they would otherwise
217 be operated on a purely least cost basis. These out-of-
218 market plants, when they are called in that manner, are paid
219 what is called uplift, not the market price. Uplift, like an
220 elevated body temperature, can be a sign of potentially
221 unhealthy conditions, which is why the provisions of the

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222 discussion draft are so important.

223 To its credit, the Federal Energy Regulatory Commission
224 has been working on these issues since 2013, including 3
225 daylong technical conferences, preceded by 4 detailed staff
226 reports, from September through December of 2014. Earlier
227 this year, FERC posed a series of thoughtful questions for
228 public comment, on which numerous submissions from a variety
229 of points of view have been received, and we think that
230 docket now stands as compelling evidence that action needs to
231 occur.

232 While we assume that FERC is presently considering its
233 options for next steps, we and the others in our group cannot
234 overstate the importance of public FERC follow-up in the next
235 several months. Decisions as to whether to retire, replace,
236 or repower large amounts of existing megawatts throughout
237 each of the RTOs will be made this year, impacting
238 reliability for decades. Competitive suppliers have proven
239 that they will respond with timely investments in these
240 markets, without preferential stamping of the contracts, when
241 accurate price signals show the need and the results from
242 recent capacity auctions demonstrate that that is the case.

243 So we commend you for including this provision in the

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244 draft. We think it is important to draw attention to the
245 issue. And we think, frankly, FERC hopefully will act prior
246 to the enactment of legislation because, again, decisions are
247 being made now, and investment signals are distorted, and the
248 ISO RTO Council, which is the group of all of them, just last
249 week put out a report based on a third-party assessment of
250 investor sentiment, and this issue of out-of-market actions
251 that the subcommittee draft would address is one of the
252 impediments to investment noted in that report. So we
253 appreciate the inclusion of the language that you have put in
254 the draft.

255 Thank you.

256 [The prepared statement of Mr. Shelk follows:]

257 ***** INSERT B *****

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|

258 Mr. {Whitfield.} Thank you, Mr. Shelk.

259 Our next witness is Mr. Peter Kelly, who is Senior Vice
260 President, External Affairs, for the Competitive Power
261 Ventures, Inc. Thanks for joining us, and you are recognized
262 for 5 minutes.

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263 ^STATEMENT OF PETER GAIBRAITH KELLY, JR.

264 } Mr. {Kelly.} Mr. Chairman, members of the committee,
265 thank you for the time and the opportunity to address these
266 what are very critical issues to us and to ratepayers.

267 We are developers of power plants. We develop natural
268 gas-fired and wind generation all across North America. We,
269 in that process of development, identify a need, expend tens
270 of millions of dollars in development, and then seek to
271 commercialize those projects. This is over the course of 2
272 to 3 years. In some cases, projects have taken as long as 11
273 years to fully permit and go to commercialization.

274 When we get to the point of commercialization, there are
275 two paths; either merchant in the market where, depending on
276 the market you are working in, you have either a 1-month to
277 6-month, or a 3-year price commitment, 1-year guarantee--that
278 you know your price for 1 year. Makes it, at times,
279 extraordinarily difficult to finance a project efficiently.

280 Under a contracting model, you have a commitment of 10,
281 15, or as many as 20 years. That commitment allows you to
282 finance a project at anywhere from 22 to 30 percent lower

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283 cost of capital; all inuring to the benefit ultimately of
284 ratepayers.

285 The--there have been recent challenges to state
286 contracting, and--on a--three plants in the mid-Atlantic. We
287 expect continued activity in this litigation throughout New
288 England, as New England moves on in complying with the Clean
289 Power Plan. There has been raised concern that these
290 projects that are under contract cause--you know, could be
291 referred to as market manipulation, impacting the market
292 rates for all of the other generators. There are protections
293 in place that are crystal clear in all of these eastern
294 markets. There is mitigation or a minimum offer price rule
295 where, if the project is determined to be economic or not
296 economic. If it is not economic, do you not pass the
297 mitigation, you cannot enter the market. If you do, clear
298 mitigation. You are economic, you are determined to be
299 needed by the market, and your contract at that point is
300 valid. And that was the theory we were operating under.

301 As we move on with development across North America,
302 there is an enormous need for new infrastructure. We have an
303 aging fleet of generation, we have a Clean Power Plan that is
304 going to make significant changes, and we have an abundant

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305 supply of natural gas that has had a fundamental change in
306 the energy markets. And we are looking at states such as
307 Ohio and Illinois and Connecticut and New York that are all
308 seeking to retain generation, such as nuclear power in one
309 instance, some coal, and natural gas and renewables. Whether
310 they have the ability to do that or not will be predicated--
311 dictated by the authority in the--what we see as a change in
312 the authority, moving states' current authority to FERC and
313 to the RTOs, to take on and undertake what is ultimately
314 historical province of the states. The criteria in some
315 cases as they are listed under 4221(b), many of those are
316 within the province of what the states have traditionally
317 done, and I am not convinced that the transfer of that
318 authority will serve, ultimately, the goals.

319 [The prepared statement of Mr. Kelly follows:]

320 ***** INSERT C *****

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|

321 Mr. {Whitfield.} All right, thank you, Mr. Kelly, very
322 much.

323 And our next witness is Mr. Christopher Cook, who is
324 President and General Counsel, Solar Grid Storage Company.
325 Thanks for being with us, Mr. Cook, and you are recognized
326 for 5 minutes.

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327 ^STATEMENT OF CHRISTOPHER COOK

328 } Mr. {Cook.} Thank you, Mr. Chairman, Ranking Member
329 Rush, fellow members of the committee. Thank you for the
330 opportunity for us to testify here before the committee today
331 on the discussion draft.

332 I am president and also cofounder of Solar Grid Storage.
333 It is a new company. Quite small in the energy business. We
334 provide a financed battery storage solution to commercial,
335 solar, and wind installations, and we developed a product we
336 call the power factor, which provides back-up power to those
337 customers with a collocated solar or wind system at their
338 site during grid outages.

339 In addition, and key to our business proposition, was
340 FERC's issuance of Order 755, which opened ancillary services
341 markets to new and fast responding technologies like ours.

342 Solar project developers are our key customers. We are
343 focused on providing a finance battery solution to this
344 market segment, as it is the fastest growing market segment
345 in the energy business.

346 As I reference in my written testimony, not only is the

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347 industry growing rapidly, solar costs are declining. So
348 pardon the pun, it has a very bright future.

349 We are--we currently operate four systems in the PJM ISO
350 totaling 1.1 megawatts. So we are a very small company, but
351 we are innovators in the energy space; a space where it is
352 very difficult to innovate.

353 I would like to focus my comments on the discussion
354 draft, Section 4221, particularly Section B, and 4231. We
355 see for our business many valuable provisions in Subsection
356 B. First though, I would point out that the title of the
357 section discusses properly evaluating generating assets. As
358 a storage asset, we are not either generation, we are also
359 load, and it is difficult often for the utility industry and
360 the ISOs to classify us. They try to put us in one category
361 or the other. Storage is not generation. We can only take
362 into our storage facilities in equivalent amounts of kilowatt
363 hours what we put out. If we are storing solar energy, all
364 we do is delay in time when that solar energy goes to the
365 grid or to the customer.

366 The--excuse me. In Subpart B, the operational
367 characteristics of generation of electric energy during
368 emergency and severe weather conditions. That is principally

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369 one of the things that we offer to our customers. For
370 typical commercial customers who install a solar system, when
371 the grid goes down, that solar system no longer functions.
372 When they add storage to that solar installation, that
373 installation can function throughout the grid outage in
374 combination with the onsite solar. It is very valuable. We
375 are seeing very strong interest in the areas of the country
376 where they have suffered natural and other disasters that
377 have taken down the power grid.

378 One of the key sections in Subsection 4 directs FERC to
379 promote advanced grid technologies. We are certainly one of
380 the most advanced grid technologies. We dispatch our systems
381 into the PJM ISO every 2 seconds. We monitor our systems on
382 a continuous basis. We are an incredible, fast-responding
383 technology based on traditional grid resources.

384 In Section 5, and this is one of the keys for us, having
385 FERC address regulatory barriers to entry. As a small
386 company, and I would reflect the testimony of my co-panelist
387 from APPA, it is very difficult for us to participate in
388 these work groups and the other kinds of arcane procedures
389 that both FERC and ISOs have implemented. We simply do not
390 have the staff or the resources to adequately participate.

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391 So that--I mean, goes on as a continuous regulatory barrier
392 to entry of our technologies.

393 Turning to Section 4231, the changes to PURPA. We would
394 not support those changes. We feel that FERC had the
395 appropriate balance in its Order 688, distinguishing between
396 large generation systems above 20 megawatts that had open
397 access to the grid, and those below 20 megawatts that did--on
398 a rebuttable basis, did not have nondiscriminatory access to
399 the grid. We feel that FERC struck the proper balance there,
400 allowing a rebuttable presumption such that if there was an
401 open access transmission tower for those small generators,
402 the entity that was suggesting the small generation did not
403 have open access could go to FERC and rebut that presumption.
404 They have the resources. They have fast superior resources
405 in the small generators in almost all cases, and are able to
406 support that. In addition, the breakpoint of 20 megawatts is
407 a good one. Typically, above 20 megawatts, those systems are
408 all interconnecting at the transmission grid. Much more
409 expensive projects, much more complex projects. Below 20
410 megawatts includes, under some of the FERC orders, systems
411 down to the residential size. And can you imagine a
412 residential customer who is installing solar on their house

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413 and perhaps a battery, with the potential opportunity to earn
414 revenues from those systems in those grid markets, having to
415 present their case at FERC that they are entitled to those
416 PURPA qualifications?

417 Thank you.

418 [The prepared statement of Mr. Cook follows:]

419 ***** INSERT D *****

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420 Mr. {Whitfield.} Thank you, Mr. Cook.

421 Our next witness is Mr. Jonathan Weisgall, who is the
422 Vice President, Legislative and Regulatory Affairs, for
423 Berkshire Hathaway Energy.

424 Mr. {Weisgall.} Thank you, Mr. Chairman.

425 Mr. {Whitfield.} Thanks very much for being with us.

426 You are recognized for 5 minutes.

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427 ^STATEMENT OF JONATHAN M. WEISGALL

428 } Mr. {Weisgall.} I appreciate it. Thank you, members of
429 the subcommittee.

430 At Berkshire Hathaway Energy, we own three regulated
431 utilities that serve 5.3 million customers in 11 states.
432 Like Mr. Cook and Ms. Kelly, I do want--I also want to
433 address Section 4231 of your discussion draft on PURPA, the
434 Public Utility Regulatory Policies Act of 1978.

435 PURPA mandates utilities to buy renewable energy from
436 QFs, qualifying facilities. That law today is imposing
437 significant and unnecessary costs on utility customers. For
438 example, it requires a utility to buy electricity from a QF
439 regardless of whether the utility needs that power. PURPA
440 contracts are not subject to the same resource planning and
441 cost scrutinies of the utility decisions, and they can cause
442 operating inefficiencies and reliability issues because the
443 host utility has no control over where they are sited or
444 integrated into its system.

445 Let me give you a specific example. The long-range plan
446 for our PacifiCorp utility, approved by our state regulators,

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447 shows no need for additional generation until 2028. However,
448 over the next 10 years, PacifiCorp must purchase 39 million
449 megawatt hours under its PURPA obligations, at an average
450 price of \$66 per megawatt hour, although the average market
451 price today is \$38; 43 percent lower. That means that our
452 customers must pay \$1.1 billion above market prices for
453 PURPA-mandated power that they don't even need. And this is
454 not an isolated example. Many other utilities are facing
455 similar dilemmas.

456 Now, Congress amended PURPA in 2005 to relieve a utility
457 of its mandatory purchase obligation if it can show that the
458 QF can compete to sell its power, in other words, has access
459 to a competitive market run by an RTO or an ISO. That is
460 actually why many of you have not been hearing about this
461 issue from your constituents because your local utilities
462 belong to one of these competitive markets; PJM, ISO New
463 England, New--you know, New York ISO, MISO, and the like.
464 But PURPA and FERC's overly restrictive implementing
465 regulations have not kept pace with market changes in our
466 industry. Today, new energy in balanced markets, competitive
467 resource solicitations, and FERC's interconnection rules for
468 smaller facilities have effectively removed any remaining

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469 barriers for new entrants, including QFs, to supply energy to
470 markets where the host utility is an organized market or not.
471 PURPA needs to be modernized to recognize these changes.

472 My written testimony details the technical suggestions
473 that we and the Edison Electric Institute have for
474 modernizing PURPA. The first is to expand the definition of
475 comparable markets that are eligible for termination of the
476 mandatory purchase obligation to include voluntary, auction-
477 based energy imbalanced markets, and other sub-hourly
478 markets. The second is to eliminate the presumption in FERC
479 Order 688 that QFs under 20 megawatts lack nondiscriminatory
480 access to markets, provided that the QF is eligible for
481 service under FERC-approved tariffs and interconnection
482 rules, and can participate in utility competitive
483 solicitations. The third is to terminate the mandatory
484 purchase obligation upon a state regulatory agency
485 determination, if certain conditions are met. And the fourth
486 is to prevent larger QF projects from being divided into
487 smaller ones to essentially gain the so-called FERC 1-mile
488 rule.

489 Now, some say PURPA should be repealed outright. We
490 don't believe that is the right approach. Our proposals are

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491 not about removing the mandatory purchase obligation where
492 competition does not exist. Not all utilities operate in
493 states where there is an organized market. Not all state
494 regulators require competitive bidding when a utility is
495 looking to secure new or replacement power. In those states,
496 PURPA still serves a useful purpose, and our proposals would
497 not change that. Others have asked that if PURPA was passed
498 to promote renewable energy, aren't these suggestions
499 designed to inhibit renewable energy. My answer is an
500 unqualified no. After 37 years since PURPA was passed,
501 renewable energy is flourishing, and our company is among its
502 strongest proponents. Indeed, not including our original
503 geothermal assets, we have invested nearly \$18 billion in the
504 last decade alone in wind and solar projects in 10 different
505 states. But these projects have been driven by policies
506 other than PURPA. They have been driven by state renewable
507 portfolio standard mandates, federal tax incentives,
508 technological improvements, and stricter EPA air regulations.
509 Are these changes designed to inhibit expensive and gained
510 renewable energy? Yes. But regardless of your views on
511 renewable energy, everyone should be in favor of fair market
512 rules, as well as getting customers low-cost electricity, not

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513 high-cost electricity caused by what is now outdated
514 legislation.

515 Thank you for the opportunity to share our views. Look
516 forward to any questions you may have.

517 [The prepared statement of Mr. Weisgall follows:]

518 ***** INSERT E *****

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|

519 Mr. {Whitfield.} Thank you very much.

520 And our next witness is Mr. William Scherman, who is a
521 Partner at Gibson, Dunn and Crutcher. Thanks for being with
522 us, and you are recognized for 5 minutes.

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|

523 ^STATEMENT OF WILLIAM S. SCHERMAN

524 } Mr. {Scherman.} Thank you, Mr. Chairman, and Ranking
525 Member Rush. I appreciate being here. I have to say at the
526 outset, these are my own views and not the views of any of my
527 clients.

528 Let me start by saying there must be meaningful and
529 structural due process reform of the FERC enforcement
530 process, both substantively and procedurally today. Entities
531 subject to the FERC enforcement process do not receive due
532 process of law. It is not only important that they receive
533 due process of law, but without it, the very competitive
534 markets that this committee is trying to promote in other
535 sections of the bill will be harmed, as people and market
536 participants continue to flee from markets, and liquidity is
537 decreased and price discovery becomes nonexistent. It is
538 simple fairness to require FERC to give people exculpatory or
539 potentially exculpatory information. It is simple fairness
540 to allow access to transcripts. It is simple fairness to
541 allow subjects of investigation comparable access to the
542 adjudicator, the FERC commissioners who decide their case.

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543 What you heard yesterday was none of these reforms are
544 needed because, at the end of the day, many participants have
545 the right to go to federal court to seek review of FERC
546 enforcement matters. If only that were true. What occurs
547 today is that, in those instances where you have to go
548 through a FERC administrative process, the federal rules of
549 evidence do not apply, the federal rules of civil procedure
550 do not apply, and when the case gets to the Court of Appeals,
551 the record that the FERC has developed under flawed
552 procedures is given deference. And even when you can get the
553 Federal District Court under de novo review, the FERC today,
554 in two pending cases, is doing everything possible to
555 restrict having the ability to have a full trial in federal
556 court, with the full rights of discovery, and the full rights
557 to have meaningful opportunity to test FERC's cases. That is
558 the process that FERC is trying to tell you is occurring--is
559 not occurring today, and why we badly need procedural
560 reforms.

561 I also strongly support the section of the bill that
562 would require FERC to address the existing RTO and ISO
563 markets. There is strong evidence to suggest that the
564 existing ISO and RTO markets are no longer producing

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565 competitive results. There is strong evidence to suggest
566 that they are no longer balancing supply and demand. It has
567 not been since the Federal Power Act was first enacted, and
568 the just and reasonable standard was adopted, that the
569 Congress has helped to define what constitutes just and
570 reasonable markets, even though these markets have become, as
571 Ms. Kelly said, incredibly complicated and very much
572 complicated to participate in. It is time the Congress help
573 define what constitutes just and reasonable markets in this
574 current market environment.

575 What you heard yesterday in response to a question from
576 Mr. Shimkus was that the FERC is working on these matters.
577 Mr. Shelk talked about that this morning. The FERC has been
578 working hard on these matters, but without the Congress
579 spurring the FERC to act, either through legislation or
580 through a letter from the committee asking them to act by a
581 date certain, many of us are concerned that the FERC is
582 hopelessly deadlocked and cannot achieve a consensus on these
583 important initiatives. That section of the bill might very
584 well spur action, and I support it completely.

585 I agree with the PURPA reforms that have been put in the
586 bill. I won't spend a lot of time on that, but I want to

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587 talk about three parts of the investigation process in a
588 little bit more detail in the few minutes I have left.

589 Yesterday, you heard that there is a difference between
590 the adjudicative phase and the investigatory phase of FERC
591 investigations. That is an illusion. It does not exist.
592 How do we know that? Because in April of 2013, the FERC
593 ruled that a show cause order is not part of an adjudication;
594 it is part of the investigatory process. That is a FERC
595 order. The reason why FERC wants to give you this illusion
596 that there is an adjudication at FERC is because they
597 understand and have admitted, in the law review article that
598 was cited in their testimony, that in the investigation stage
599 at FERC, witnesses and subjects of investigations do not
600 receive due process. That is in the law review article that
601 they cited to you yesterday. So in order to get around this
602 admission, they have to try to convince the Congress that
603 there is a real adjudication phase at FERC. There isn't. It
604 is not an adjudication phase when a witness gets--a subject
605 gets no rights of discovery, gets no ability to test the
606 other side's case, gets no access to the decision-maker.
607 That is not an adjudicatory process.

608 You heard yesterday that the Brady reforms in the bill

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609 are not necessary, and they would be unparalleled. That is
610 shocking. The language in the bill comes straight out of
611 district court cases on Brady, and if, in fact--and, in fact,
612 those cases have been cited to the commission in a number of
613 key cases. That is absolutely not true. But there is a
614 simple fix. Take out the word helpful that Mr. Parkinson
615 objected to yesterday, and put the word favorable in. In two
616 places, delete the word favorable, put the word--delete the
617 word helpful, put the word favorable in. There is no
618 possible way at that point that they could object to that.

619 Finally, the staff has now admitted--the FERC
620 enforcement staff has now admitted to this committee that
621 they have violated their own regulations and the
622 Administrative Procedures Act at least 12 times in denying
623 access of a witness to their transcripts. That is now on the
624 record in this committee. So if there any doubt that these
625 reforms are needed, I would suggest look at the record.

626 Thank you.

627 [The prepared statement of Mr. Scherman follows:]

628 ***** INSERT F *****

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|

629 Mr. {Whitfield.} Thank you very much, Mr. Scherman.
630 And thank all of you for your time.

631 I will recognize myself for 5 minutes of questions.

632 And I would like initially to just focus on 4231,
633 relating to so-called PURPA reform. Ms. Kelly, you had
634 indicated that you felt like there should be some reform
635 perhaps, but our language you did not particularly agree
636 with. Would you explain more detail what you would
637 recommend?

638 Ms. {Kelly.} Well, can you hear me?

639 Mr. {Whitfield.} Your--

640 Ms. {Kelly.} Okay.

641 Mr. {Whitfield.} Yeah.

642 Ms. {Kelly.} The situation is this. The way the
643 provisions that you have drafted are written is--applies to,
644 in effect, to state-regulated facilities, or FERC-regulated
645 utilities. My members are units of state and local
646 government, and by and large are regulated at the local level
647 by their governing boards. So the way the language is
648 written, and this may well have been an oversight, was just
649 in a way that--

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650 Mr. {Whitfield.} You are left out.

651 Ms. {Kelly.} --we don't qualify.

652 Mr. {Whitfield.} You are left out.

653 Ms. {Kelly.} Yes, we are left out. Thank you.

654 Mr. {Whitfield.} Okay.

655 Ms. {Kelley.} That is the long and the short of it.

656 Mr. {Whitfield.} Okay. What is that? Okay. And, Mr.
657 Weisgall, now, you had mentioned that you are paying
658 something like \$68 a megawatt for power, and the actual cost
659 is \$30-some, and parts of your operation, I guess, was in
660 California or Portland, or--

661 Mr. {Weisgall.} Northwest, yeah. Um-hum.

662 Mr. {Whitfield.} Yeah. Now, is that a result of the
663 calculation of the avoided cost, or what--is--

664 Mr. {Weisgall.} Yes. I mean the avoided cost
665 calculations are made by state regulatory agencies. PURPA
666 contracts have lengthy duration. So we are looking at
667 contracts with fixed price costs for a long period of time.
668 Markets fluctuate, that is why we prefer the competitive
669 process in the market, but when you are stuck with a PURPA
670 contract, historically, those have tended to be way above
671 market. Now, that is not a congressional problem; that is

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672 more a result of state regulatory agencies in that avoided
673 cost proceeding. And figuring out avoided cost is really a
674 full employment job for lawyers, and has been for many, many
675 years under PURPA. It has been very complicated, but the
676 tendency has been way above market cost.

677 Mr. {Whitfield.} Yeah. So, Ms. Kelly is avoiding costs
678 and the issue from your perspective, or--your--go ahead.

679 Ms. {Kelly.} It is less of an issue for us, the actual
680 calculation that was referred to, because in the case of
681 state-regulated utilities, they are developed by the state
682 PUC--

683 Mr. {Whitfield.} Um-hum.

684 Ms. {Kelly.} --and they can be very administratively
685 determined.

686 Mr. {Whitfield.} Um-hum.

687 Ms. {Kelly.} At the local level, you know, we have a
688 better read on what our potential options are, so we have a
689 little more leeway in setting avoided costs.

690 Mr. {Whitfield.} Um-hum.

691 Ms. {Kelly.} So it is not--that part is not as big a
692 problem for us as the fact that we may be--in effect, it is a
693 put at a certain price, and we have to take it--

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694 Mr. {Whitfield.} Right.

695 Ms. {Kelly.} --whether we need the power or not.

696 Mr. {Whitfield.} In 1978, when PURPA was adopted, I
697 don't think that many people thought the investor-owned
698 utilities would also be qualifying facilities, at least
699 initially. What percent of qualifying facilities today would
700 you say are owned by investor-owned utilities? Do any of you
701 have any idea on that at all?

702 Mr. {Shelk.} I would think it is pretty low to almost
703 nonexistent, given the size. If I could just add the issue--
704 as I indicated earlier, 95 percent of our member assets are
705 in the RTOs, so this is not an issue for our members, but I
706 can see it is an issue for the independent power producers
707 outside of the RTOs--

708 Mr. {Whitfield.} Um-hum.

709 Mr. {Shelk.} --and the reason is, notwithstanding what
710 Mr. Weisgall said from their perspective, and I would urge
711 you to talk to them, if you don't at least address what it
712 means to have a competitive solicitation, I think the bill
713 has the right directional idea. I was very much involved in
714 the compromise negotiation in 2005. The issue, however, is
715 just because a state has a competitive solicitation on the

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716 books doesn't mean it is a fair one. So you may want to
717 think about at least expanding what type of competitive
718 solicitation you think would qualify, because right now, the
719 utilities, like Berkshire Hathaway, outside the RTOs, they
720 get to run the solicitation, they get to put their own
721 projects up, and miraculously, they pick themselves, you
722 know, well over, you know, 95 percent of the time. So I
723 think you would want to be clear that--in the draft what type
724 of competitive solicitation--

725 Mr. {Whitfield.} Yeah.

726 Mr. {Shelk.} --with a third-party--

727 Mr. {Whitfield.} Yeah.

728 Mr. {Shelk.} --evaluator would qualify for the
729 exemption.

730 Mr. {Whitfield.} Yeah.

731 Mr. {Shelk.} Otherwise you risk--

732 Mr. {Whitfield.} Yeah.

733 Mr. {Shelk.} --reducing competition--

734 Mr. {Whitfield.} Yeah.

735 Mr. {Shelk.} --in those regions.

736 Mr. {Whitfield.} And would one of you make just some
737 brief comments on the transparency issue at the RTOs relating

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738 to price? I think you and Ms. Kelly had indicated that was
739 an issue from your perspective.

740 Ms. {Kelly.} Yes, that is an issue, and thank you for
741 the question. I think one of the things that strikes us with
742 some regularity is the volatility in the prices. For
743 example, in capacity auctions, prices can vary very
744 substantially from auction to auction, both up and down. It
745 is unclear why that happens. The data that goes into those
746 prices is closely held. We have talked about increased
747 transparency of bids and offers in the past. A lot of other
748 people have opposed that, so that has not yet happened. We--
749 actually, it was considered in the stakeholder process back
750 in 2008, 2009, at our request, but shockingly, by the time it
751 got done with the stakeholder process, the consensus was that
752 that wasn't required.

753 Mr. {Whitfield.} Um-hum.

754 Ms. {Kelly.} So there have been issues with that in the
755 past.

756 Mr. {Whitfield.} And I would at some point like to
757 discuss in more detail the phasing-out of capacity markets in
758 the east, and I think you made reference to that as well.

759 Ms. {Kelly.} I would be happy to do that.

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760 Mr. {Whitfield.} Okay.

761 Ms. {Kelly.} I would note that that is a longer-run
762 prescription. These markets are very complex, and they do
763 operate on a 3-year forward basis.

764 Mr. {Whitfield.} Yeah.

765 Ms. {Kelly.} So we are not saying that that is
766 something that, you know, can be done in a flash cut. We
767 understand it is--

768 Mr. {Whitfield.} Yeah.

769 Ms. {Kelly.} --a complicated--

770 Mr. {Whitfield.} Mr. Scherman, do you want to make a
771 comment?

772 Mr. {Scherman.} Yeah. I just think it is important for
773 the committee to understand that when a competitive
774 solicitation is run by a utility, if that utility would like
775 an affiliate to participate, the FERC has very stringent
776 rules called the Edgar Allegheny Rules. I won't bore the
777 committee with the details.

778 Mr. {Whitfield.} The Edgar Allegheny Rules?

779 Mr. {Scherman.} They are based on two cases.

780 Everything has to have a name, Mr. Chairman.

781 Mr. {Whitfield.} Yeah.

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782 Mr. {Scherman.} There is an Edgar case and an Allegheny
783 case, and so it has become known as the Edgar Allegheny
784 Rules.

785 Mr. {Whitfield.} Right.

786 Mr. {Scherman.} They are very prescriptive as to how
787 the evaluation has to be done by an independent evaluator,
788 what has to go into competitive solicitation, and how that
789 record has to be developed before a utility can pick an
790 affiliate. Those rules are very robust, so it is not as easy
791 as the utility just picks its affiliate.

792 Mr. {Whitfield.} Yeah.

793 Mr. {Weisgall.} And, therefore, Berkshire Hathaway
794 Energy sometimes loses.

795 Mr. {Whitfield.} Okay. I want to just--

796 Mr. {Shelk.} But they only apply in the FERC context,
797 they don't apply at the state level when the decisions are
798 made to select which projects--

799 Mr. {Whitfield.} Yeah. Yeah.

800 Mr. {Shelk.} --so it is sort of comparing apples and
801 oranges.

802 Mr. {Whitfield.} Do you know if Exelon and the Exelon
803 Nelson case in Texas appealed that Fifth Circuit Court of

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804 Appeals ruling?

805 Mr. {Scherman.} I do, and I believe they were not
806 successful.

807 Mr. {Whitfield.} Okay, thanks.

808 At this time, recognize the gentleman from Illinois, Mr.
809 Rush, for 5 minutes.

810 Mr. {Rush.} Thank you, Mr. Chairman.

811 Mr. Kelly, in your written testimony you argue that
812 Section 4221 as currently drafted may result in an unintended
813 consequence of putting FERC and the RTOs into an unnecessary
814 and potentially divisive debate, and result in states having
815 to rely increasingly on the volatile short-term markets.

816 My question to you is what recommendations, if you have
817 any, that you would suggest to this committee to put
818 improving the language in Section 4221, or do you believe
819 this entire section is of no use and may even be
820 counterproductive?

821 Mr. {Kelly.} No, there are certain sections--certain
822 parts of the section that I think have value, but I think we
823 look at traditional function and role of the states and their
824 public service commissions and legislature in determining,
825 you know, such as I believe it is 2(a), operational

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826 characteristics, the generation of electric energy on a
827 continuous basis. That is a state--ultimately a state issue.
828 Whether or not the state is going to site, for instance, dual
829 fuel generation for us in the natural gas generation, they
830 request or require at times that you have oil available so
831 that you can run for a minimum period of time. The ISOs and
832 RTOs have rules as well, and there are some payment
833 structures in place that ultimately you--force you to have
834 that ability, or penalize you if you don't.

835 Mr. {Shelk.} Mr. Rush--

836 Mr. {Rush.} Yes.

837 Mr. {Shelk.} --if I could just add briefly--

838 Mr. {Rush.} Yes.

839 Mr. {Shelk.} --we don't view the section or read the
840 section the same way Mr. Kelly does. It is not changing what
841 is a bedrock principle of the Federal Power Act, which is
842 that the Federal Government, through FERC, has jurisdiction
843 over the sales of electric energy, interstate commerce, and
844 transmission. That has not changed at all. What the section
845 says is to the extent FERC does things, and FERC does
846 important things, we may disagree about how they do them but
847 the wholesale markets that FERC administers for energy and

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848 capacity are what supply the power in Illinois and other
849 states in the committee where the RTOs exist. And so FERC
850 does decide the market rules. Sue and I may disagree on how
851 they do it, but FERC is the agency that decides how wholesale
852 markets operate. That has been upheld by the courts. So I
853 think the section, at least the way we read it, is directing
854 the commission to consider a range of issues; some we like,
855 some we don't, but I think it is a pretty good balanced list
856 directed at FERC. It would not upset the federal state
857 balance.

858 Mr. {Rush.} Are there any other witnesses who might
859 want to weigh-in on this?

860 Ms. {Kelly.} Yes.

861 Mr. {Rush.} Ms. Kelly?

862 Ms. {Kelly.} I--first of all, I would note that the way
863 the set--the section is set up, and I noted this in my
864 written testimony, is it directs each RTO to develop in
865 consultation with the stakeholders. So at the very get-go
866 you are sending it off to the stakeholder process. And that
867 is an endless frustration loop for my members for the last 10
868 years because those processes, especially in the RTOs where
869 the market, you know, problems are the most acute for them,

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870 the large generation and transmission asset owners have a--
871 hold a great amount of sway, for the reasons in my testimony.
872 So that right there is a problem.

873 Some of the provisions of the things that they are
874 supposed to consider, I think, are very salutary. Others I
875 think are less salutary. But to me, the immediate problem is
876 it goes off to the stakeholder process and, you know, that is
877 something you all probably need to look at more carefully.
878 Thank you.

879 Mr. {Rush.} Mr.--

880 Mr. {Scherman.} I think the simplest way to fix that
881 problem is to make it clear that when the commission is
882 exercising the authority in the section, that it is being
883 done pursuant to Federal Power Act, Section 206. And,
884 therefore, when the RTOs and ISOs have to respond, they have
885 to make a filing under the Federal Power Act to comply with
886 those specific criteria. And at that point, there will be no
887 doubt that it is wholesale only and not trying to affect the
888 retail market.

889 The second point is absolutely what Ms. Kelly--is
890 absolutely true, the current stakeholder and governance
891 process of the RTOs is so cumbersome and so complex that it

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892 leads to least cost, least common denominator decision-making
893 that is frustrating innovation and stifling competition. The
894 Congress really does need to address that if the FERC can't.

895 Mr. {Rush.} Mr. Cook?

896 Mr. {Cook.} Thank you. I think the concept behind
897 Section 4221 is good, particularly the things that direct
898 FERC and the ISOs to look at advanced grid technologies, and
899 to look at the kinds of regulatory barriers that exist in
900 incorporating those technologies into the grid. Our
901 technology is a customer-sided technology, and it really
902 makes some of the ISO leaders' heads spin that customer-sided
903 technology--

904 Mr. {Rush.} Um-hum.

905 Mr. {Cook.} --could provide transmission grid services,
906 but yet, in fact, we do that. We dispatch our systems as a
907 virtual power plant.

908 Mr. {Rush.} Um-hum.

909 Mr. {Cook.} I would agree, however, with my fellow
910 panelist, Ms. Kelly, that the stakeholder process is
911 extremely cumbersome for small companies like ours. Being
912 able to dedicate the kinds of resources that are necessary to
913 them for daylong meetings that occur every other week, that

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914 could go on for 6 to 18 months, is virtually impossible. So
915 our voice does not share the same weight as the voice of the
916 traditional transmission owners, the big utilities that are
917 involved in those processes.

918 Mr. {Rush.} Um-hum. I want to thank you. Mr. Cook, I
919 have a few more minutes, and in your testimony, you state
920 that you believe that FERC struck a proper balance in Order
921 688. With this presumption, the larger generators had open
922 access to transmission markets, but also a rebuttable
923 presumption that smaller systems do not. What changes do you
924 think are necessary in the discussion draft in order to
925 maintain the balance of FERC Order 688, and to maintain the
926 rebuttable presumptions regarding access to open transmission
927 markets?

928 Mr. {Cook.} Well, the simple response would be no
929 changes are necessary. I believe that that is the proper
930 balance. The new language in Section 4231 would change that
931 presumption, and says specifically that generators of any
932 size are presumed to have open access. I don't believe that
933 is factually correct. The small generators typically have
934 barriers. If you are a 100 kilowatt generator, for example,
935 in many ISOs you can't participate in any of their markets

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936 simply because of your size. They arbitrarily set the
937 threshold of participation at 1 megawatt. So there are
938 numerous different barriers that small generators face.

939 I believe that what FERC did was to say, well, if you
940 have access to an open access market, there is a presumption
941 for the big generators that you don't have--need any of those
942 protections. But there is a different presumption than on
943 the small generator side, you do need those. It is a
944 rebuttable presumption, so it is not guaranteed that you are
945 going to get those protections. In addition, I think on the
946 avoided cost question, the issue of the proper setting of
947 avoided cost is done by the utilities and the state
948 regulators. The small generators that avail themselves of
949 that avoided cost typically, again, do not have the same
950 representation in those proceedings. So if there is an error
951 in the avoided cost calculation, I think it is incumbent upon
952 the participants in that proceeding to properly set that so
953 the avoided cost is truly reflective of a utility's cost, and
954 there isn't an overpayment of the small generators.

955 Mr. {Rush.} Thank you, Mr. Chairman--

956 Mr. {Whitfield.} Yeah.

957 Mr. {Rush.} --for your generosity.

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958 Mr. {Whitfield.} Yeah. Well, you know, these issues
959 are so simple and not very complicated, that we don't need a
960 lot of time to talk about them.

961 Ms. {Kelly.} Might I just say one thing to your--

962 Mr. {Rush.} Yes, please.

963 Ms. {Kelly.} --question, Congressman Rush? I would
964 just note that there are also small utilities in addition to
965 small generators, and for some of them, the 20 megawatt
966 cutoff is a lot bigger than they are. So--and I actually,
967 back in private law practice, had an--a rural electric co-op
968 client who was asked, in effect, to purchase the output of a
969 small generator, much larger than it was, or to wheel that
970 out when that was, you know, bigger than its entire system.
971 So you need to be--

972 Mr. {Whitfield.} Yeah.

973 Ms. {Kelly.} --sensitive to it on both sides.

974 Mr. {Whitfield.} Yeah.

975 At this time, recognize the gentleman from Virginia, Mr.
976 Griffith, who understands all of this completely, for 5
977 minutes.

978 Mr. {Griffith.} Well, thank you, Mr. Chairman. And,
979 you know, I am just a simple country, small town lawyer. But

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980 listening to Mr. Parkinson's testimony yesterday, I came away
981 clearly, from his initial testimony, he backed away from it a
982 little bit, in fairness, but came away from it initially
983 believing that our system does not allow due process, and
984 that it is not fair to those people who are being accused of
985 having manipulated electric rates or--et cetera.

986 Mr. Scherman, I gathered from your testimony that I
987 might have had the right sense.

988 Mr. {Scherman.} Yes, sir, I fully agree. I have great-
989 -and let me just state, none of this is personal. Mr.
990 Parkinson is a fine fellow, Chairman Bay is a fine fellow,
991 but the due process people receive at FERC today is in name
992 only. The FERC is doing everything possible to frustrate
993 constitutional due process requirements. And all you have to
994 look at, Mr. Griffith, is the disproportionality between--in
995 the most--in the current pending cases, between what the FERC
996 is alleging as the market harm and the size of the penalties.
997 And if I could just enter a couple of those into the record.

998 Mr. {Griffith.} Please do.

999 Mr. {Scherman.} In the current Maxim Power case, the
1000 FERC has alleged a \$5 million civil penalty with zero unjust
1001 enrichment, zero disgorgement of alleged unjust profits. In

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1002 the current, Powhatan case, the disproportionality between
1003 the alleged disgorgement and civil penalty is 634 percent.
1004 In the current BP case pending before the commission, the
1005 disproportionality between the civil penalty that is being
1006 sought and the alleged unjust enrichment is 3,500 percent.
1007 In the Barclays case, the disproportionality between the
1008 alleged unjust enrichment and the civil penalty is 1,300
1009 percent. In the Lincoln case, the disproportionality is
1010 1,300 percent.

1011 So if you just look at whether the proportionality
1012 between the alleged unjust enrichment, the alleged amount
1013 that they shouldn't have earned, and the civil penalties, it
1014 is clear there is no proportionality in the way the FERC is
1015 administering the enforcement process.

1016 Mr. {Griffith.} Well, and I appreciate that testimony.
1017 I was struck with just the basic principles of due process
1018 that have evolved over the years in the Anglo-American system
1019 when, you know, I heard things like, you know, we don't
1020 really want third parties to have to worry about Brady, in
1021 other words, information that might say the person or the
1022 accused didn't do what they have been accused of. Well, a
1023 third party shouldn't be burdened with that. That bothered

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1024 me. And then the whopper of all, and the defense was, well,
1025 other people do it. I don't accept that for my children, and
1026 I am not going to accept it from the Federal Government, of
1027 which I am a representative of the people, was, well, you
1028 can't really talk about settlement with the commissioners
1029 because they are part of the prosecution team, because we
1030 have an attorney-client privilege with them and we don't want
1031 that to be violated in any way. Say what? There is an
1032 attorney-client privilege between the trier of fact and the
1033 investigators who bring the case? That just struck me as
1034 abhorrent to the American legal system. Do you agree or
1035 disagree, and what are your comments?

1036 Mr. {Scherman.} I fully agree. The commission is
1037 applying the wrong Brady standard. It is clear from the
1038 testimony that they are applying the post-trial Brady
1039 standard, not the pre-trial Brady standard.

1040 Other regulatory agencies, including the CFTC, rejected
1041 as part of their process the post-trial Brady standard over
1042 20 years ago. This is not a new concept.

1043 On the settlement process, it is like--it is the classic
1044 case of trying to negotiate for a car. You negotiate with
1045 the enforcement staff, only to be told, oh, I have to go talk

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1046 to my manager. Well, we know what happens every time you go
1047 talk to your manager. And in a recent case where I asked
1048 directly to negotiate with the commissioners on the
1049 settlement, and I said I would be more than happy to have the
1050 enforcement staff in the room at the time, I was told it was
1051 against policy to talk directly to the commissioners, even
1052 though I said I would be happy to have the enforcement staff
1053 in the room at the time.

1054 Mr. {Griffith.} Sure. And I can understand that while
1055 they might want to have ex parte communications with the
1056 commissioners, but if they are part of the prosecution team,
1057 it does seem kind of strange.

1058 Do you think we would be better off allowing the
1059 commissioners to continue to have the settlement power, but
1060 just move any disputes directly to the district court where
1061 you can have a legitimate due process-filled trial?

1062 Mr. {Scherman.} I think that would be a very good
1063 suggestion, if the commission itself would recognize the
1064 words de novo review in the statute mean a trial. What is
1065 happening in the Lincoln case and the Barclays case now is
1066 the commission is taking the absurd position that the words
1067 de novo review does not lead to a full trial, does not lead

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1068 to discovery, does not lead to the right to confront
1069 witnesses. They are taking the position that a de novo
1070 review is essentially no different than a court review, where
1071 the commission gets deference on the record that they have
1072 built in a flawed process.

1073 Mr. {Griffith.} Yeah.

1074 Mr. {Scherman.} So if the Congress would clarify and
1075 confirm the existing language means what it means, and it
1076 should apply to the Gas Act, the Power Act, the NGPA, that
1077 would help a lot.

1078 Mr. {Griffith.} Well, and even a simple small town
1079 lawyer knows that de novo means you get a new one. That is
1080 what novo means, new. And that if--that was their defense
1081 yesterday, in part, was that, well, you can always go to the
1082 district court. I would think that would be a big fix if you
1083 could actually get a new hearing with all of the discovery
1084 rights that you get in--

1085 Mr. {Scherman.} Absolutely.

1086 Mr. {Griffith.} --the normal court system.

1087 Mr. {Scherman.} The Power Act supposedly provides for
1088 that, but apparently, the commission doesn't agree with that.

1089 Mr. {Griffith.} Well, I appreciate it.

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1090 My time is up. I yield back. Thank you, Mr. Chairman,
1091 for this important hearing.

1092 Mr. {Whitfield.} You know, I had about 7 minutes. Mr.
1093 Rush had 7 minutes. Do you want to take another couple of
1094 minutes, and then we will give everybody 7 minutes, because
1095 this is a complicated issue and we want to give everybody an
1096 opportunity. So if you want to go for another minute and a
1097 half.

1098 Mr. {Griffith.} Well, and I will say that I was a
1099 little concerned that the commissioners are part of the
1100 prosecution team, as we have previously discussed. And do
1101 you think that that is a new development, or is that
1102 something that has been evolving over the years?

1103 Mr. {Scherman.} It is both. It is certainly something
1104 that is not a new development, but it has evolved over the
1105 years in a much greater sense. And part of the problem is,
1106 when I was general counsel of FERC, the enforcement process
1107 reported to the general counsel. There was a layer between
1108 the enforcement process and how that was administered on a
1109 day-to-day basis, and the commission. What you heard in Mr.
1110 Parkinson's testimony was that there is free regular
1111 communication between the investigators, the prosecutors, and

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1112 the ultimate decision-makers. And that because--and just
1113 human nature would suggest that that cannot be a fair
1114 adjudication. It has nothing to do with the integrity of the
1115 commissioners personally, but if you are told for 5 years
1116 that somebody is guilty of fraud, if you are told for 5 years
1117 that somebody has manipulated the market, if you are told for
1118 5 years that somebody has unjustly enriched themselves at the
1119 detriment of consumers, and then all of a sudden at the very
1120 last part you get--you then have to sit where only 1 party
1121 has had access to you, where only 1 party knows what you are
1122 thinking, where only 1 party has had a free exchange, that is
1123 a problem. It--may I give you an analogy?

1124 Mr. {Griffith.} Sure, because I agree with you
1125 completely.

1126 Mr. {Scherman.} Suppose--may I have 1 minute to give an
1127 analogy, Mr. Chairman?

1128 Mr. {Whitfield.} You have 30 seconds.

1129 Mr. {Scherman.} Okay. Suppose there is an FBI agent
1130 who investigates a case for a number of years. That agent is
1131 also a lawyer, as many of them are. That FBI agent then
1132 decides I am going to go be a lawyer and goes clerking for a
1133 federal judge. And suppose that same lawyer that--who is now

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1134 a clerk ends up--the judge that he is working for ends up
1135 being the person who hears the case that he was
1136 investigating, and he gives him advice for a couple of years
1137 about what the cases he is investigating. And then he
1138 supposes after a couple of years of clerking, he wants to go
1139 be a prosecutor. So he is assigned as a prosecutor, and low
1140 and behold, he gets the case that he investigated, and then
1141 he advised the judge on how to decide the case, and then he
1142 is the prosecutor.

1143 Mr. {Griffith.} Well, I think--

1144 Mr. {Scherman.} That is the FERC process.

1145 Mr. {Griffith.} And I thought--I think any time you
1146 have an attorney-client privilege with somebody, they ought
1147 to be disqualified. It creates interference.

1148 Mr. {Whitfield.} Okay. Recognize at this time Mr.
1149 McNerney for 5--7 minutes.

1150 Mr. {McNerney.} Seven second? Thank you, Mr. Chairman.
1151 Mr. Chairman, I just want to let you know I appreciate your
1152 devotion to fair play because that is what makes America
1153 great.

1154 I am--where I am coming from is a point of skittishness
1155 after being manipulated in California, having Enron take \$9

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1156 billion and living--leaving us with a lot of problems.

1157 So what I ask is, do you feel it makes sense for us to
1158 try and persuade FERC to improve their behavior, or do you
1159 think it makes sense for us to enact new legislation to force
1160 the issue?

1161 Mr. {Scherman.} I would certainly prefer the latter,
1162 but if there is some way to do the former, that would be
1163 great, but there is no evidence to suggest that would work.

1164 And let me just say about Enron. I understand the
1165 California energy crisis is still a hangover, if you will,
1166 over how we all think about this. What caused the California
1167 energy crisis, which harmed consumers, no doubt, was a myriad
1168 of factors. One of the most important one is what this
1169 commission is--what this committee is trying to do in other
1170 parts of the bill, which is to get efficient market design.
1171 One of the key problems in California was that it was an
1172 inefficient market. The market design was badly flawed. One
1173 of the key ways to prevent those kind of crises from
1174 recurring again is to make sure the RTO markets, the
1175 California ISO, is operating in an efficient way. That is an
1176 important reform that, along with the ex partes, would ensure
1177 that those kinds of problems don't happen again.

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1178 Mr. {McNerney.} Well, I have heard this morning that--
1179 from Mr. Shelk, about the importance of a properly regulated
1180 market, and we heard it from Southern Company last week as
1181 well, the importance of proper regulation. So is that what
1182 you are talking about is regulation, or are you talking about
1183 a free market where anything goes?

1184 Mr. {Scherman.} There is no such thing as a free market
1185 where anything goes.

1186 Mr. {McNerney.} Clearly.

1187 Mr. {Scherman.} These markets are heavily regulated.
1188 What we are trying to do is to get the market rules to
1189 simulate competitive outcomes because many of us believe
1190 competitive outcomes are in the best solution of the
1191 consumer. But the FERC and the state commissions have to
1192 always understand--have to always be vigilant to make sure
1193 that the markets are properly regulated. But you can
1194 regulate in a way that is designed to produce and simulate
1195 competitive outcomes, and that is what I advocate.

1196 Mr. {McNerney.} So do you think that this legislation
1197 gets us in that direction, or--

1198 Mr. {Scherman.} I think it is a very important step,
1199 yes, sir, I do.

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1200 Mr. {McNerney.} Okay. Mr. Weisgall?

1201 Mr. {Weisgall.} Well, let me take a crack at that from-
1202 -give you a concrete example. In Idaho, a developer came to
1203 our utility with a--on a competitive solicitation process,
1204 with a 150 megawatt wind project. They didn't win. Next
1205 couple of years, they disaggregated the project into several
1206 below-80-megawatt projects and turned it into a PURPA
1207 project, where our utility had no choice but to buy that
1208 power at an above-market price. There was a competitive
1209 process. They lost, so they used the hammer of PURPA's
1210 mandatory purchase obligation. What your--one aspect of your
1211 discussion draft is designed to enhance that competitive
1212 process, and in that case where there would be an open
1213 competitive process, that kind of result would not happen.
1214 Now, that is not necessarily Enron-like, but that, to go to
1215 the chairman's earlier question, is sticking our customers
1216 with higher costs, because the project had originally been
1217 rejected so it was simply disaggregated into smaller ones to
1218 make sure that it could fit into a PURPA mandate.

1219 Mr. {McNerney.} Well, I am sure there are plenty of
1220 examples like that--

1221 Mr. {Weisgall.} Yeah.

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1222 Mr. {McNerney.} --to go around.

1223 Ms. Kelly?

1224 Ms. {Kelly.} Thank you very much for recognizing me. I
1225 feel that since FERC is not on this panel, perhaps somebody
1226 needs to speak up for the interests of the other side. I
1227 would just note that what they are trying to do is protect
1228 consumers in these electric markets. And if you look at the
1229 orders that have come out, if you look at the entities who
1230 are being chastised, you look at the behavior in which they
1231 engaged, I think there--a case could be made that it is
1232 really important to have a strong enforcement at the FERC
1233 because consumers are otherwise going to be taken to the
1234 cleaners. The part we worry about is how much else is going
1235 on that has not been caught, especially in these centralized
1236 markets with their very complex rules.

1237 We feel like it would, frankly, be more useful to get
1238 the commission, or for this Congress themselves, to take a
1239 more holistic look at whether these markets are being
1240 systematically manipulated, and whether these are just kind
1241 of the icebergs that show above the surface. We are quite
1242 concerned about the operation of financial players in these
1243 markets. We have been for some time. Thank you.

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1244 Mr. {McNerney.} Well, I mean that kind of makes the
1245 point. It is--we need a strong regulatory arm, but it needs
1246 to be fair. So what my concern is that this Section 212 goes
1247 a little too far in neutering the FERC's investigatory
1248 ability.

1249 Mr. {Scherman.} I don't think it neuters it at all. I
1250 mean it simply levels the playing field to provide
1251 constitutional due process. And it is easy to say don't do
1252 this when your members are not subject to the very
1253 regulations that are violating due process. Ms. Kelly's
1254 members are not subject to these rules, they are not subject
1255 to this enforcement process.

1256 Mr. {McNerney.} Thank you, Mr. Chairman.

1257 Ms. {Kelly.} Not true.

1258 Mr. {Scherman.} Well, it is true, Sue. Other than
1259 NERC, what are you subject to?

1260 Ms. {Kelly.} I--there actually was one enforcement
1261 proceeding against one of my members in ISO New England.

1262 Mr. {Scherman.} One?

1263 Ms. {Kelly.} Yes.

1264 Mr. {Scherman.} Okay. Well, sorry, one.

1265 Ms. {Kelly.} Generally speaking, we don't engage in

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1266 behavior that would require that.

1267 Mr. {Scherman.} Okay. Of course not. I am sorry.

1268 Mr. {McNerney.} Mr. Shelk, what do you see as some of
1269 the dominant trends--you said you see profound changes, what
1270 are some of the dominant trends, and how would this
1271 legislation harm or enhance those trends?

1272 Mr. {Shelk.} Well, we are all confronting a number of
1273 things, regardless of business model, whether it is Ms.
1274 Kelly's members in public power, ours in merchant generation,
1275 and others at the table, everybody is up against what has
1276 been unhitching, if you will, of demand from economic growth,
1277 which is generally a good thing, so we don't need as much
1278 electricity as we used to, but--so it is flat demand at a
1279 time when most revenues are volumetric, is an issue. We
1280 obviously have a changing fuel mix, legislative requirements
1281 in California and elsewhere for renewables, all the
1282 environmental regulations, the technology. So it is safe to
1283 say while we are sitting here in 2015, in 5 or 10 years from
1284 now, it is going to be a dramatically different electricity
1285 system. It is just hard to predict exactly how different it
1286 is going to be. If grid storage comes on and the way it
1287 might, if different technologies come about, it is going to

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1288 be very, very different. So that is why we have to be
1289 careful. I think what the draft tries to do, instead of
1290 being prescriptive and writing in the statute for all time,
1291 like happened in '78 and other times, things that would be
1292 hard to change later, you are giving general direction to the
1293 commission on a range of issues. Like Ms. Kelly, some we
1294 like, some we don't. Our list might be a little bit
1295 different, but I think the intent of it is very, very good,
1296 which is to set out the goals, set out what you want to have
1297 the ultimate result be, and then let the commission--the
1298 experts at the commission work through this on a bipartisan
1299 basis. So I think it would be overall helpful--

1300 Mr. {McNerney.} Um-hum.

1301 Mr. {Shelk.} --to deal with the change you asked about.

1302 Mr. {McNerney.} Thank you.

1303 Mr. {Whitfield.} Gentleman's time has expired.

1304 At this time, recognize the gentleman from Illinois, Mr.
1305 Shimkus, for 7 minutes.

1306 Mr. {Shimkus.} Thank you, Mr. Chairman. It is great to
1307 have you--it is--this is a great hearing, and I love the
1308 back-and-forth and the trying to address it, but it is hard
1309 to argue against legitimate due process and equity and

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1310 fairness, regardless of the players. I mean--so I--Morgan is
1311 great to have on the committee because he has a good legal
1312 mind. And sometimes we back lawyers. They are good to have
1313 around when you need them, and when you have smart ones, they
1314 are great to listen to. So--and I missed his performance
1315 yesterday, so I guess I got the tail end of it in this one.

1316 I am going to get back to a simpler aspect. I talked
1317 about it before the hearing to some of you. So I put up--
1318 what I--got a--that is why I took a picture of it while it
1319 was--and we got it up there, and you can't see it but this
1320 is--I am in the MISO area, so--and this happened--I found out
1321 this has happened a couple of times after we have done some
1322 due diligence, and so it is the auction clearing price
1323 debate. We have just had an auction. We have a lot of zones
1324 in the MISO region. Most of the zones cleared at \$3.40--
1325 well, there is \$3.29, \$3.48, in that range, except for one
1326 zone which happens to be Illinois, that is why I know about
1327 it, and it cleared at \$150; a 300 percent increase. And in
1328 doing due diligence and visiting with FERC--this has happened
1329 before, I think it happened in the Cleveland area a couple of
1330 years ago. So I have a couple of questions. Obviously, I am
1331 trying to understand this. I mean it is a 300 percent

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1332 increase. That is--that gets your attention. It has got the
1333 attention of my individual consumers, it has got the
1334 attention of the business interests, the manufacturers who
1335 are going to be using power. And so the first question is--
1336 and MISO decided to have--do an annual auction versus some
1337 regions do 3 years. And I want to ask Ms. Kelly and Mr.
1338 Shelk first, do you think that one model is better than the
1339 other? MISO--in essence, MISO bet that they would have
1340 better auction results by doing it yearly. And, at least in
1341 my region, they really got bit this time somehow. So can
1342 you, you know, kind of understand how I laid out the
1343 question?

1344 Ms. {Kelly.} Yes, I think I can. It requires me to go
1345 a little bit in the weeds though, so I apologize in advance.
1346 This particular market in MISO was what is known as a
1347 residual market, in other words, you do not have to obtain
1348 your capacity from that market, as you do in the eastern
1349 RTOs. As a result, the time horizon is shorter; it is just a
1350 year ahead.

1351 Mr. {Shimkus.} But that is a MISO decision though.

1352 Ms. {Kelly.} Yeah.

1353 Mr. {Shimkus.} I mean they could have gone--they could

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1354 have a 3-year--

1355 Ms. {Kelly.} They could, but--

1356 Mr. {Shimkus.} Okay.

1357 Ms. {Kelly.} --because most capacity is procured

1358 outside that market, it makes less sense to go out in a

1359 longer term than it would in a mandatory market, as in the

1360 east.

1361 The other thing to note here is one of the reasons that

1362 that result happened is because of the size of the zone that

1363 the price was formed in. What happened was Dynegy bought a

1364 lot of assets in that region the year before, and as a

1365 result, I think they controlled over 60 percent of the

1366 generation in that zone. At one point, MISO had talked about

1367 lumping 2 zones together to mitigate that and make them less

1368 of a, you know, generation--what we call a pivotal supplier

1369 in that zone. That was discussed in the stakeholder process,

1370 but in the end that did not happen. One of the complaints

1371 that I have read about this alleges that one--a Dynegy

1372 employee was actually vice chair of the relevant committee in

1373 the stakeholder process that made, you know, that made that

1374 recommendation. And this gets to the point I made in my

1375 testimony about threatening to leave because the generation

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1376 in the southern part of Illinois, Dynegy has in the past made
1377 noises that they might take that over to PJM. So that is one
1378 of--I think one of the reasons why that is what this
1379 complaint alleges, let me just say, that that is one of the
1380 reasons why that change was not made and they were left as
1381 the dominant supplier in the zone. And sure enough, the next
1382 auction, the price spiked.

1383 So, you know, that is one of the things that gives us as
1384 consumers very strong concerns about how these market rules
1385 are set, how the zones are set, and how arbitrary and, you
1386 know, volatile the prices can be from auction to auction.

1387 Mr. {Shimkus.} John?

1388 Mr. {Shelk.} The--I think the question is--

1389 Mr. {Shimkus.} And I think you need to turn it on.

1390 Mr. {Shelk.} The question you asked is a good one about
1391 the market design. We have generally favored the multiyear
1392 approach in PJM and New England, and the reason is simply
1393 that you then get the forward price signal much earlier. So
1394 I think the Cleveland example you gave is a very good one.
1395 When the price went up in that--what is called the ATSI zone
1396 in the Cleveland area a few years ago, then the next auction,
1397 many, many developers came in, in fact, you are seeing

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1398 development around there not only because the price went up
1399 for that one year, but because of the Utica shale gas. So
1400 there is a gas basis differential, and these new gas plants
1401 can go in there.

1402 In terms of the conduct of this auction, I think it is
1403 important to point out that MISO does this rigorously in
1404 terms of overseeing the auction. There is an independent
1405 market monitor. The rules are strict about what can and
1406 can't be offered. Ms. Kelly mentioned Dynegy. They offered
1407 all the megawatts in that they have. And as you know, what
1408 separates Illinois from the rest of MISO from southern
1409 Illinois is the competitive generators there are only
1410 dependent on the revenue from that auction in the energy
1411 market. The other point--the other states, as Ms. Kelly
1412 indicated, are outside of it. So if you actually look at the
1413 southern Illinois price compared to the northern Illinois
1414 price, they are about the same, because that is the only
1415 source of revenue to signal new investment. And I would
1416 imagine if we had this conversation a year from now,
1417 particularly if MISO has a longer lead time, you will see
1418 people come on to invest in southern Illinois as they did in
1419 Cleveland, and they are doing in New England, when the price

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1420 went up in New England last--

1421 Mr. {Shimkus.} Well, that is what we hope, and that is
1422 kind of the expectation of people who are saying that--market
1423 signal and people are moving, and obviously people--short-
1424 term there will be some harm.

1425 I guess the other concern I have, and there--I have so
1426 much issues that I could talk about, but--is that--and which
1427 I am not going to, so, Chairman, don't worry about it, is
1428 that there is a different world now environmentally, and
1429 generation-wise and--than that--than the Cleveland example.
1430 So bringing on and planning, your only large megawatt is
1431 going to be natural gas. You can't--how do you bring--you
1432 can't bring it on. The environmental regs are too stringent
1433 for us to bring on new southern Illinois coal generation.
1434 And then I--on the--and the other thing is I am really having
1435 this debate about re-regulated markets, just because I am not
1436 sure with this environmental pressure that we can keep major
1437 base load generation alive in a lot of parts of our country.

1438 Mr. {Shelk.} Well, just a brief comment. If you look
1439 to the east from Illinois, you have a good example of what if
1440 go completely back to the old model, what the risk is there,
1441 because there you have a plant in southern Illinois where the

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1442 consumers are being paid--stuck for billions of dollars over
1443 the multiyear life of the project. And I just read yesterday
1444 it is operating at a 10 percent capacity factor--

1445 Mr. {Shimkus.} Yeah. Yeah.

1446 Mr. {Shelk.} --yet consumers are going to pay for that.
1447 Same thing happened in Ms. Castor's state in Florida, the
1448 nuclear plant closed down. They are now going to be stuck
1449 with the costs of the closure of the nuclear plants. So
1450 there is always that balance between--

1451 Mr. {Shimkus.} Um-hum.

1452 Mr. {Shelk.} --who is going to bear what risk, and how
1453 do you compensate them, and--

1454 Mr. {Shimkus.} Yeah.

1455 Mr. {Shelk.} --you are right, it is a conversation we
1456 are going to have to continue to have.

1457 Mr. {Whitfield.} I understand in about 5 minutes or so
1458 we are going to have a series of like 11 or 12 votes on the
1459 Floor, so I am going to recognize Mr. Pallone for 5 minutes.
1460 And we are going to go as fast as we can.

1461 Mr. {Pallone.} I will try to be--to use less of that if
1462 I can. I just have one question for Braith Kelly. In nearly
1463 all the testimony today, I see a few common themes. First,

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1464 that there are problems with the electricity markets.
1465 Clearly, there is a disagreement as to what the problems are
1466 and what the solutions should be. Second, there is a
1467 disconnect between the state and federal rules on
1468 electricity, even taking into account the general concept
1469 that wholesale markets are regulated by FERC and retailed by
1470 the states. There is a blurring of those lines that needs
1471 resolution, and the states are still responsible for
1472 guaranteeing service to their residents, and also for
1473 implementing a number of state and federal environmental
1474 policies that are affected by these wholesale markets. And I
1475 am not here to take sides on how we resolve this, but
1476 clearly, we are in a transitional phase, and I am concerned
1477 that many of these unresolved issues could have a negative
1478 effect on consumers, public health, and the environment. For
1479 instance, I know the courts have ruled against New Jersey and
1480 Maryland in their efforts to ensure reliability through
1481 bilateral contracts, and that leaves us with a problem with
1482 regard to the responsibility of states.

1483 So, Mr. Kelly, I know your company is dealing with the
1484 result of this lack of clarity, so could you describe how the
1485 current situation affects project developers and states,

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1486 particularly with regard to my home state?

1487 Mr. {Kelly.} It was one of the examples I used earlier.
1488 The cost of capital on that project is almost 30 percent
1489 higher. That all has to come from somewhere. It puts us in
1490 a position where we were under contract for that project, it
1491 was a much lower cost, we had what was called a CFD, a
1492 contract for differences. We bit in a competitive process
1493 with over a dozen other developers for a contract. That
1494 competitive process resulted in three projects being
1495 selected. Those three projects went forward, and had to go
1496 through what was the--screen to determine if they were
1497 economic. Two projects passed through, one did not, proving
1498 that the system worked. That project was not economic, it
1499 was not allowed to participate. Unfortunately, there is a
1500 great deal of confusion as to where the state's right to--
1501 under the Federal Power Act, to manage their generation
1502 collides with the--with FERC and its authority. The rules
1503 are very, very clear. The rules were created about these
1504 contracts. There was very little doubt in our mind that we
1505 would get through that process. Unfortunately, some--you
1506 know, there was litigation, findings by two courts, that
1507 these, what were called subsidies were not constitutional.

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1508 That is going to have far-reaching implications. There are
1509 some cities being considered in Illinois in--for the nuclear
1510 fleet there. There are some cities being considered in Ohio
1511 to keep First Energy and AEP's fleet. These are all
1512 subsidies, but these are the states making the judgment.
1513 Whether or not there is a--you know, that collision--where
1514 those courts--I mean it is going to be very, very difficult
1515 for the states to implement the Clean Power Plan without this
1516 tool, without the ability to support generation.

1517 Mr. {Pallone.} All right.

1518 Mr. {Shelk.} Mr. Pallone, if I could just provide the--
1519 to balance out the point of view. I think it is important to
1520 point out that this happened in New Jersey, as you know, and
1521 in Maryland, and the proof in the difference in the models is
1522 in the numbers from the results. The developers said they
1523 needed these contracts or the projects would not go forward.
1524 The process Mr. Kelly described occurred in your state. The
1525 prices that would have been locked in for 15 and 20 years
1526 were north of 50 to 75 percent higher than the market
1527 clearing price for that same generation. They said they
1528 would not go forward without this contract for differences,
1529 yet when the courts struck it down, they went ahead and did

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1530 it anyway. And Mr. Kelly refers to the lower cost of
1531 capital, well, that is because there is a different risk-
1532 reward calculation. The reason why their capital costs would
1533 be lower, and I question whether they would pass that on or
1534 not, is because everybody in New Jersey, all of your
1535 ratepayers under that program, would have been stuck paying
1536 for those plans at those inflated costs for 20 years, when I
1537 turned out not only were there--was there other generation
1538 available at less cost, the very same plants that said they
1539 needed the subsidy in Maryland and New Jersey went ahead
1540 without it. And the last point is it was eight federal
1541 judges, two district courts and six Courts of Appeal,
1542 unanimously found, importantly, in the narrow context of
1543 these programs, not all subsidies, not renewable portfolio
1544 standards, but the narrow context of these contracts for
1545 differences, eight federal judges said it was
1546 unconstitutional and preempted by the Federal Power Act.

1547 Mr. {Pallone.} All right, thank you.

1548 Mr. {Whitfield.} At this time, recognize the gentleman-
1549 -where did he go? Is he gone?

1550 {Voice.} Yeah.

1551 Mr. {Whitfield.} Okay. I recognize Mr. Tonko from New

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1552 York for 5 minutes.

1553 Mr. {Tonko.} Thank you, Mr. Chair.

1554 Mr. Kelly, you have pointed out several potential
1555 problems with the language in the discussion draft amending
1556 the Federal Power Act. You also noted the need to update and
1557 modernize our grid system. As you know, there are many
1558 changes occurring in the electricity sector. In your view,
1559 does FERC have adequate tools to manage that grid evolution
1560 and modernization?

1561 Mr. {Kelly.} They do. They--my opinion is they need to
1562 utilize those tools and undertake to move forward. I think
1563 they need to empower the states to move forward, and make it
1564 clear what the states can and cannot do, and then stand by
1565 that rather than, throughout the process that we dealt with
1566 that we were told FERC has spoken by virtue of its silence--

1567 Mr. {Tonko.} Um-hum.

1568 Mr. {Kelly.} --which is approval of what was going on
1569 in New Jersey and Maryland, and then ultimately there was a
1570 complete reversal when we got to the courts and their
1571 opinion. We need clarity. When you make investments that
1572 are above \$1 billion in infrastructure that is critical to
1573 reliability, the constantly changing rules throughout. We

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1574 started with--our projects and then our fee with a state
1575 reliability exemption. That was taken away from FERC. The
1576 states have the authority to do it. It was turned into a
1577 MOPR, minimum offer price rule, one, then MOPR two, to create
1578 more barriers for the state--from the states doing what they
1579 are--have traditionally been empowered to do.

1580 Mr. {Tonko.} So are there other changes beyond that
1581 that the Federal Power Act should consider that would better
1582 facilitate FERC's and the states' management of the changes
1583 in this sector?

1584 Mr. {Kelly.} I think what we are seeing here is some of
1585 the states' current authority being, you know, transitioned
1586 or given to FERC. It is concerning, but if that is the
1587 decision, if that is the direction that we need to go then
1588 that--at least it is a decision--

1589 Mr. {Tonko.} Um-hum.

1590 Mr. {Kelly.} --and I think FERC lacked the authority
1591 that--or the jurisdiction, let me say, that resulted in our
1592 cases.

1593 Mr. {Tonko.} I get the sense that Ms. Kelly wants to
1594 comment. We have hosted her in our district, so it is good
1595 to see you.

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1596 Ms. {Kelly.} Thank you so much. I would just simply
1597 add to that that we as public power utilities are also
1598 concerned about the ability to comply with the Clean Power
1599 Plan and to make the changes to our portfolios that we think
1600 we may be required to do in some states because of these
1601 federal market rules. We share some of the concerns of CPV,
1602 and we actually are involved in the Supreme Court case
1603 regarding New Jersey and Maryland. Thank you.

1604 Mr. {Tonko.} Mr. Cook--thank you. And, Mr. Cook, would
1605 you have any comments in regard to the modernization or
1606 evolution of the grid and FERC?

1607 Mr. {Cook.} Well, certainly, the promotion of advanced
1608 technologies and the encouragement that you have in the draft
1609 discussion to direct FERC to consider and identify how
1610 advanced technologies might support the grid I think is good
1611 direction to FERC. In addition, I think one of the things
1612 FERC needs to look at, particularly for companies like ours
1613 who would like to expand out of one ISO and into another, and
1614 we offer a standardized product for consumers that can be
1615 utilized in grids, and that the markets are similar in other
1616 ISOs. I mean as we transition from PJM to New York and New
1617 England, or the mid-continent ISO, the rules for the kinds of

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1618 services we provide can be vastly different, and that means
1619 in some cases we can't participate in the market, or in some
1620 cases we have to redesign our technology in order to
1621 participate in those different markets.

1622 I know there is a lot of discussion about how utility
1623 grids are different, but in most cases, I think you could buy
1624 a toaster, it works anywhere within the U.S. The grid is
1625 surprisingly identical across our country.

1626 Mr. {Tonko.} You know, you talk about this technology,
1627 and obviously storage is part of the enhancement that would
1628 enable us to have a stronger outcome. So do you see--do you
1629 anticipate that other states or markets will follow suit with
1630 some of the policies that we have seen that have advanced
1631 technology and expansion of distributed generation?

1632 Mr. {Cook.} Yes, absolutely, and I think and I hope
1633 that other jurisdictions will follow the kinds of things PJM
1634 has done to encourage customer-sided storage facilities to be
1635 able to participate in their markets and provide valuable
1636 grid services. I think storage has huge opportunities for
1637 growth, huge opportunities for cost declines, and when
1638 combined--and I think one of the key components is combined
1639 to find the different resources and values that storage can

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1640 provide. So a customer that is utilizing their storage for
1641 back-up power, so they have power when the grid goes down,
1642 shouldn't be prohibited from also utilizing that facility to
1643 provide valuable grid services when there is no technological
1644 or other prohibition on that. There shouldn't be regulatory
1645 barriers that prohibit that kind of participation.

1646 Mr. {Tonko.} Okay. Well, I thank you, Mr. Chair.

1647 Mr. {Whitfield.} At this time, recognize the gentlelady
1648 from Florida, Ms. Castor, for 5 minutes.

1649 Ms. {Castor.} Thank you. I am going to follow up on
1650 that because I think the innovative cost saving development
1651 of storage capacity, as you said, has a very bright future,
1652 and I want America to be the leader in the world in the
1653 development of that technology. So I was concerned that you
1654 testified that changes to PURPA in the discussion draft would
1655 harm--complicate the future economic growth of this
1656 technology and be a significant barrier to entry in a state
1657 or region without a well-functioning market, or at least some
1658 competition. And many states, including my home State of
1659 Florida isn't--doesn't have a competitive regional wholesale
1660 market, and small power producers don't have access. So
1661 would you provide us with additional--is it as easy as

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1662 striking this language, does it need to be changed, could you
1663 go over what your specific recommendation is here?

1664 Mr. {Cook.} And thank you. In my opinion, I don't
1665 think the language is needed. I think you could strike it in
1666 its entirety. I don't see a dysfunction in FERC Order 688
1667 which separates and says if there is an open market, large
1668 generators are assumed to have access--nondiscriminatory
1669 access to that market and, therefore, don't need any of the
1670 PURPA protections.

1671 Ms. {Castor.} And then if the language is included, do
1672 you agree that it would harm the economic vitality of this
1673 emerging--

1674 Mr. {Cook.} The--

1675 Ms. {Castor.} --technology?

1676 Mr. {cook.} Yes, absolutely, because it changes the
1677 presumption which is, on the other side, to say big stuff has
1678 open access and can utilize its wherewithal in those markets.
1679 Small stuff does not.

1680 Ms. {Castor.} Um-hum.

1681 Mr. {Cook.} And what the language would do is say small
1682 stuff does. And I think it is a factual matter in having
1683 dealt with development of solar projects for over a dozen

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1684 years, many of which were in the 50 kilowatt to 200 kilowatt
1685 range, there are a myriad of barriers that we face and, you
1686 know, the simple contracting mechanism that is simple for
1687 utilities, not simple when you are dealing with a commercial
1688 customer that is not used this kind of arcane language. So
1689 the PURPA protections for the smaller generation I think
1690 needs to continue, but it is not absolute. As FERC balanced
1691 in its order, it said it is a rebuttable presumption. So if,
1692 indeed, you do have a big system that is serving a small
1693 municipal system, perhaps they do have open access and can go
1694 directly into the market, and that can be presented to FERC
1695 as a rebuttable presumption.

1696 Ms. {Castor.} Okay.

1697 Mr. {Cook.} So I think that is the proper balance.

1698 Ms. {Castor.} Thank you very much.

1699 Mr. Shelk, I think you gave the committee some wise
1700 advice. You said don't pass a law that will be outdated in
1701 the next few years. The energy market is changing and there
1702 are new requirements, and it is--it appears that the old
1703 traditional electric utility model does not match the
1704 challenges of the modern world. And there has been so much
1705 resistance from some utilities, and they have a mission to

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1706 provide the best return for their shareholders, but--and that
1707 is largely based on kilowatt hour use. What can we do in
1708 this discussion draft to begin to provide greater incentives
1709 to electric utilities to invest in greater efficiency and
1710 renewables, with the understanding we have to maintain the
1711 grid?

1712 Mr. {Shelk.} A lot of it is, frankly, outside of what a
1713 legal instrument like a statute could do, because what is
1714 happening in every state, you know, until recently you had--
1715 and we still do have these different business models, and we
1716 have been clear as an organization we have got all--like I
1717 said, 95 percent of our member assets in the RTOs. So in
1718 regions like yours that don't have open markets, frankly,
1719 that is not where an independent power producer can or would
1720 go. But what is really changing for all of us, because the
1721 common denominator of just about everybody I think on the
1722 panel, except for Mr. Cook, is we are all on the central
1723 station power plant business, as we have been since the
1724 advent of electricity for the most part. And what is
1725 happening now is the technology is there to empower
1726 consumers--

1727 Ms. {Castor.} Um-hum.

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1728 Mr. {Shelk.} --regardless of the laws of the state. So
1729 you have, as you know in Florida and elsewhere, initiatives
1730 on all these different distributed resources, energy storage,
1731 energy management, and so it is really the technology that is
1732 driving it, less than the legal side.

1733 The challenge, however, is unlike just about anything
1734 else I can think of, you know, we don't deliver electricity
1735 to this room or our homes in separately packaged units. And
1736 as someone said earlier, it is all part of this
1737 interconnected machine, essentially, and the challenge now is
1738 as these distributed resources and storage come about, the
1739 whole thing has to work together. And we have this federal-
1740 state jurisdictional divide, and while we might disagree on
1741 how to resolve it, I think that is one of the things that is
1742 going to have to happen, because the Federal Government will
1743 continue to have a role through FERC, you all have a role, of
1744 course, the states do, but I don't--can't imagine any one
1745 particular law. Really, technology, as often is the case, is
1746 ahead of the law, but to the extent you can encourage more
1747 competition, I think then we are going to get the innovation
1748 and put the risk of the innovation on those who are bringing
1749 it to market, rather than on your consumers.

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1750 Ms. {Castor.} Thank you very much.

1751 Mr. {Whitfield.} Mr. Weisgall, you tried to get
1752 attention.

1753 Mr. {Weisgall.} Ten seconds. Just to clarify from your
1754 earlier questions, Congresswoman. Number one, the PURPA
1755 proposals that we have would specifically not apply to
1756 markets that--to states that lacked competitive markets.
1757 Would, therefore, not apply to Florida. Number two, I am not
1758 aware of any energy storage QF. Clearly, that is--energy
1759 storage is the Holy Grail for renewable energy, we all know
1760 that, and certainly nothing--and anything we would propose
1761 as--especially as a company that has put billions into wind
1762 and solar, this is something we want to encourage. So the
1763 last thing we would want to do would be to discourage energy
1764 storage through any PURPA amendments. But it is kind of
1765 apples and oranges. As Mr. Cook himself said, energy storage
1766 is not really a generation asset, and we are really looking
1767 at generation assets. I just wanted to clarify those 2
1768 points.

1769 Mr. {Whitfield.} Well, thank you very much. And I want
1770 to thank the panel of witnesses, and we will need to get
1771 together again soon to continue our discussion, but we do

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1772 look forward to working with all of you, and we are going to
1773 need your advice and counsel as we move forward trying to
1774 develop a piece of legislation.

1775 And with that, we will keep the record open for 10 days.

1776 And thank you very much, and see you soon.

1777 And with that, we will adjourn the hearing.

1778 [Whereupon, at 11:42 a.m., the Subcommittee was
1779 adjourned.]