

January 8, 2018

Max Minzner


The Honorable Fred Upton, Chairman
Subcommittee on Energy
House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Upton:

Thank you for your December 19, 2017 letter containing additional questions for the hearing record on "Powering America: Examining the Role of Financial Trading in the Electricity Markets."

My responses to the questions are enclosed. I want to thank you again for the opportunity to appear before the Subcommittee on Energy on November 29, 2017.

Sincerely,


Max Minzner

cc: The Honorable Bobby Rush, Ranking Member
Subcommittee on Energy

Attachment Enclosed

**Max J. Minzner
Partner, Jenner & Block LLP
Responses to Questions for the Record**

**Committee on Energy and Commerce
Subcommittee on Energy and Power
United States House of Representatives
January 8, 2018**

The Honorable Fred Upton

- 1. In terms of enforcement of financial trading, you stated that "*financial markets inevitably move much faster than regulators.*" Is there anything that Congress can do to ensure that FERC can remain nimble and be able to evaluate new offerings of increasing complex financial products?**

Broadly speaking, FERC has the statutory authority it needs to regulate the financial products in its markets. The Federal Power Act provides the Commission multiple options to intervene when necessary. First, products generally cannot be traded in the organized markets unless FERC approves tariff provisions that permit the transactions. FERC can and should carefully scrutinize new offerings to ensure that they improve the functioning of the market. Second, FERC can regulate the transactions after they occur by bringing appropriate enforcement actions or changing the market rules. Third, market participants can bring complaints if they identify a flaw in the market rules. These tools, if used appropriately, should be adequate for the agency to carry out its mission. Of course, Congress should ensure that the Commission has adequate resources to carry out its mission.

- 2. In your testimony, you stated that financial traders should not be treated differently just because they are financial, rather than physical, participants in the jurisdictional markets. Can you elaborate on this point?**

Market participants should be treated equally and allowed to engage in market transactions on a level playing field. Differences in regulatory requirements should depend on risk-based policy considerations and should not vary based on the type of market participant. Enforcement actions generally should not turn on whether an entity is a physical or financial participant in the market. Instead, FERC should focus on the conduct of the enforcement target when bringing an action.

The Honorable H. Morgan Griffith

- 1. As the former General Counsel of FERC and a Special Counsel in FERC's Office of Enforcement, you've likely seen instances of improper conduct by traders of financial products. Now that you are no longer with the Commission, can you provide a frank assessment of FERC's abilities to detect and investigate improper activity involving financial trading?**

FERC is generally well-equipped with the tools needed to investigate and bring enforcement actions in cases involving financial trading. FERC has prioritized the detection of improper conduct by developing new algorithmic screens and working to develop other analytic tools. These cases are inherently difficult, though, when they involve conduct that crosses jurisdictional boundaries. For example, FERC regulates physical energy products while the CFTC regulates the financial derivatives that take their value from physical energy. Traders can thus take simultaneous positions in linked physical and financial products, only one of which is regulated by FERC. Enforcement actions in these cases necessarily involve close coordination between sister federal agencies. FERC has historically worked to improve that coordination and should continue to do so.

The Honorable Bill Johnson

- 1. FERC Commissioner Neil Chatterjee recently stated that one of the Commission's priorities moving forward will surround "de novo review." As you may know, the majority of current court cases regarding FERC's interpretation have gone on for years. Mr. Mizner, do you have any thoughts on how FERC should address this issue?**

The agency is currently litigating the scope of federal court review of enforcement actions under the Federal Power Act. So far, district courts have decided that enforcement cases will proceed as traditional civil actions under the Federal Rules of Civil Procedure. If this interpretation of the FPA ends up being correct, FERC should reexamine its process in enforcement cases. The agency needs to carefully balance the procedural protections at the agency with the need to expeditiously resolve enforcement matters. If federal court review is likely to be more searching, the agency may need to streamline consideration of the actions at FERC. The court decisions provide the agency an opportunity to take a fresh look at those processes.