FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

January 5, 2007

OFFICE OF THE CHAIRMAN

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515-6115

Dear Mr. Chairman:

I am writing in response to your December 18, 2006 inquiry regarding the Federal Energy Regulatory Commission's (FERC or Commission) implementation of the Energy Policy Act of 2005 (EPAct 2005). The enclosed responses address your questions regarding: (1) the legal memorandum authored by Professor Richard Pierce, Jr. regarding the Commission's *ex parte* regulations and practices; (2) the Commission's final rule with respect to "Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities;" (3) the Commission's pre-filing practices and procedures prior to consideration of transmission siting applications; (4) the Commission's procedures for complying with the National Environmental Policy Act of 1969 in connection with its transmission siting authorities under EPAct 2005; and (5) a list of all actions taken or planned by the Commission with respect to its authorities and responsibilities under EPAct 2005 relating to the electric industry.

As your inquiry notes, EPAct 2005 gave the Commission substantial new authorities and responsibilities. The Commission has taken on these new authorities and responsibilities with a sense of purpose, mindful of the public trust they entail. The Commission has been dedicated to meeting these obligations within the time allotted by Congress. So far, the Commission has met every deadline Congress has set for matters over which the Commission has lead authority and control, and we continue to be vigilant in our undertaking of these obligations under the law.

I hope this information is helpful. Should you have further questions about these or any other Commission matters, please do not hesitate to contact me.

Sincerely,

Joseph T. Kelliher
Chairman

Enclosures

RESPONSES TO QUESTIONS FROM THE HONORABLE JOHN D. DINGELL AND THE HONORABLE RICK BOUCHER

Question 1: The Commission staff recently forwarded to Committee staff a legal memorandum authored by Richard Pierce, Jr. entitled "Federal Energy Regulatory Commission Ex Parte Regulations and Practices." The memo states that the Commission had requested Mr. Pierce's views on these subjects, and that "FERC's request was prompted, in part, by allegations in recent cases that pre-filing meetings between applicants and FERC Commissioners may violate the rules regarding ex parte communications contained in the Administrative Procedure Act (APA)" (p.1).

Question 1a: Why did the Commission seek this outside counsel? Was any compensation provided?

Response: As explained in a recent Commission decision, *MidAmerican Energy Holdings Company*, 118 FERC ¶ 61,003 (2007) (Docket No. EC05-110-001), which is attached to this response as Appendix A, "prompted by allegations in this and other recent cases that [the Commission] . . . violated the *ex parte* prohibition of the APA by allowing pre-filing meetings," the Commission "engaged a leading expert on administrative law to look into the question." *Id.* P 11 n.17. Professor Pierce was engaged so that the Commission would have the benefit of "an independent report" on this question. *Id.* P 16. The Commission sought an independent report from Professor Pierce because of the importance of this legal issue, and because of Professor Pierce's expertise regarding this legal issue.

Professor Pierce's compensation for this report was $25,000.

Question 1b: Does the Commission concur in Mr. Pierce's conclusions?

Response: Yes. The recent *MidAmerican* order, attached to this response as Appendix A, found – consistent with Professor Pierce's conclusions – that the *ex parte* prohibitions of the APA did not apply to the Commission proceedings at issue, and that the pre-filing meetings complained of were not barred.

Question 1c: Please describe any relevant circumstances or cases involving Commissioners or Commission staff that have given rise to allegations of inappropriate ex parte contacts.

Response: The issue of whether pre-filing meetings with Commissioners or Commission staff violate the APA has arisen in recent cases: *MidAmerican Energy*

Holdings Co., Docket No. EC05-110 (the subject of the order attached to this response as Appendix A); *Exelon Corp.*, Docket No. EC05-43; *Duke Energy Corp.*, Docket No. EC05-103; *National Grid plc*, Docket No. EC06-125; *Commonwealth Edison Co.*, Docket No. ER06-43; and *NorthernStar Energy LLC*, Docket No. CP06-365, *et al.*

Question 1d: Do the Commission's current rules and practices ensure adherence with not only applicable legal requirements regarding ex parte communications, but also with the need to avoid the appearance of impropriety with respect to matters related to the public interest?

Response: Yes. In the recent *MidAmerican* order, attached to this response, the Commission explained that the Commission's current *ex parte* prohibitions are not only consistent with the APA, but, in fact, they go beyond what is required by the APA because they are initiated earlier than would be required by the APA (assuming that the APA even applied). *MidAmerican*, 118 FERC ¶ 61,003 at P 11 n.17, P 19-20. Moreover, as the Commission noted, its decision on the parties' filing, and both the reasons for that decision as well as the record upon which the Commission based that decision, all were public, ensuring not only that judicial review of its decision would not be frustrated but also that no serious questions of fairness would exist. *Id.* P 19 n.50; *accord id.* P 10, 21.

Question 2: In a press release accompanying the Commission's final rule "Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities (Order No. 689, November 16, 2006), Chairman Kelliher stated that FERC would use its authority under EPACT "to supplement state transmission siting."

Question 2a: Why does the Commission view its authority as a "supplement" to State authority?

Response: The Commission views its electric transmission siting authority as supplemental to state authority because the new federal siting authority under section 1221 of EPAct 2005, 16 U.S.C.A. § 824p (West Supp. 2006), is not exclusive and is limited in a number of important respects. Under section 1221(b), 16 U.S.C.A. § 824p(b) (West Supp. 2006), the Commission has authority to site electric transmission facilities within a national interest electric transmission corridor only if: (1) a state lacks authority to site such facilities or to consider the interstate benefits expected to be achieved by such facilities; (2) the applicant does not qualify to apply for siting approval in a state because the applicant does not serve end-users in that state; or (3) a state has withheld approval for the later of one year after the filing of an application or one year after a corridor designation by the Secretary or has conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission

congestion in interstate commerce or is not economically feasible. This limited authority stands in contrast to the Commission's plenary authority to site natural gas transportation facilities under section 7 of the Natural Gas Act, 15 U.S.C. § 717f (2000), which is both exclusive and preemptive.

Question 2b: Does the Commission interpret EPACT sec. 1221 as authorizing it, under certain circumstances, to preempt State determinations and effectively moot ongoing State proceedings?

Response: Yes. As discussed above, section 1221 of EPAct 2005, 16 U.S.C.A. § 824p (West Supp. 2006), provides that the Commission may issue construction permits under specified circumstances. Where a state has withheld approval for more than the later of one year after the filing of an application or one year after a corridor designation by the Secretary or has conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible, the Commission, under the authority granted by Congress to the Commission in section 1221(b), would have preemptive authority to site electric transmission facilities. Similarly, section 1221(b) also provides that if a state does not have siting authority at all, or has siting authority but does not have authority to consider the interstate benefits of proposed electric transmission facilities, then the Commission may exercise siting authority.

However, these circumstances would constitute the exception, not the rule. Even after enactment of section 1221, states will remain the primary siting authorities for electric transmission facilities. Furthermore, even in those narrow instances where the Commission's authority under section 1221 is invoked, the expectation is that the Commission would coordinate closely with all affected state entities in exercising its authority.

Question 3: Order No. 689 modified the Commission's proposed rule with respect to "prefiling" transmission siting applications, providing that neither a formal application nor "the initiation of prefiling" could occur until one year after the initiation of a State proceeding.

Question 3a: What activities are included in the term "prefiling"?

Response: The purpose of pre-filing is to facilitate maximum participation from all stakeholders and to assist the applicant in compiling the information necessary to file a complete application for Commission review.

Activities include: (1) assisting the applicant in identifying stakeholders, including landowners, interested organizations, and other individuals; (2) conducting site visits, examining potential alternatives, and holding open public meetings; (3) facilitating the identification of issues and resolution of those issues; (4) coordinating other necessary federal authorizations; (5) preparing and issuing the environmental scoping documents; (6) facilitating cooperating agency environmental review and the preparation of a preliminary environmental assessment or environmental impact statement under the National Environmental Policy Act of 1969; and (7) providing technical assistance to other permitting entities, upon request.

Question 3b: What rules govern contacts between prospective applicants, interveners, and other members of the public and Commission staff, the Chairman, or other Commissioners?

Response: The Commission's rules regarding off-the-record communications, 18 C.F.R. § 385.2201 (2006), generally prohibit off-the-record communications in contested proceedings between persons outside the Commission and persons who are decisional employees, such as the Commission's advisory staff, the Chairman, and other Commissioners. The prohibition applies to any proceeding before the Commission in which there is a right to intervene and in which an intervenor disputes any material issue; complaint proceedings; and certain proceedings initiated by the Commission. The prohibition does not apply, however, to notice-and-comment rulemakings, certain investigations, proceedings not having a party or parties, or proceedings in which no party disputes any material issue. *See id.* § 385.2201(c)(1). Moreover, while certain off-the-record communications are considered to be exempt from disclosure, *e.g.*, communications related to emergencies or to the preparation of an environmental impact statement or environmental assessment, *see id.* § 385.2201(e), even certain of those otherwise-exempt communications are subject to disclosure either by disclosing the document received or a summary of the oral communication received. *Id.* § 385.2201(g).

As explained above and in the *MidAmerican* order that is attached to this response, the *ex parte* prohibitions of the APA and the Commission's regulations do not bar pre-filing meetings. "Prospective applicants" or others who believe that a filing may be made thus are not barred from participating in meetings before a filing has been made and before a proceeding has been commenced; the *ex parte* prohibitions would not be applicable at that time.

Question 3c: How do such rules differ during the time prior to prefiling, during prefiling process, and after prefiling?

Response: As noted above, neither the APA nor the Commission's rules prohibiting off-the-record communications between persons outside the Commission and persons who are decisional employees apply before a filing has been made and a proceeding has been commenced. That is, before an application has been filed with the Commission (and therefore before there is a proceeding in which there is a right to intervene and in which an intervenor has disputed a material issue), there is no prohibition. Once an application has been filed and a proceeding has been contested, however, the Commission's rules prohibiting off-the-record communications would apply.

Question 3d: Will a record of such contact be made public? Why or why not?

Response: As pre-filing communications are not prohibited by the APA or the Commission's regulations, the Commission is not required to and generally does not maintain a record of public contacts that pre-date the filing of a formal application with the Commission. However, in the context of the Commission's Order No. 689, establishing procedures for transmission siting requests, although the Commission is not compelled to do so by either the APA or the Commission's *ex parte* regulations, the Commission nevertheless has provided that all materials filed by outside persons, including prospective applicants, or issued by the Commission during this formal pre-filing process, should be posted in the Commission's eLibrary and available to the public under the pre-filing docket number.

After an application has been filed and been contested, contacts between persons outside the Commission and persons who are decisional employees must be made public. If prohibited off-the-record communications occur, the Commission's regulations provide that such communications will not be part of the decisional record, but that they must nonetheless be disclosed and documented in the Commission's public files. 18 C.F.R. § 385.2201(f) (2006).

Question 4: Please describe the Commission's procedures for complying with the National Environmental Policy Act of 1969 in connection with its transmission siting authorities under EPACT, including any authority or responsibility delegated to it by the Department of Energy.

Response: The Commission will prepare an environmental assessment under section 380.5 or an environmental impact statement under section 380.6 of the Commission's regulations. 18 C.F.R. §§ 380.5, 380.6 (2006). The environmental review will: (1) identify and assess the potential impact on the natural and human environment that would result from the implementation of a proposed project; (2) identify and

recommend reasonable alternatives, including, as appropriate, alternatives other than transmission lines, and specific mitigation measures to avoid or minimize environmental impact; and (3) encourage and facilitate public involvement in the environmental review process. In conjunction with the environmental review, pubic notice providing information about proposed projects will be issued, scoping meetings will be held in the project area and all interested parties will be invited to file environmental comments. In acting on a permit application, the Commission will consider the environmental analysis and any comments filed with respect to it.

Question 5: With respect to Commission's authorities and responsibilities under EPACT relating to the electric industry, please provide a list of (a) all actions taken by the Commission and (b) any other actions planned for EPACT implementation.

Response: The table attached as Appendix B provides: (a) a description of actions taken by the Commission pursuant to EPAct 2005 relating to the electric industry (including final rules, reports, memoranda of understanding, policy statements, guidelines, studies and other reviews); (b) the relevant provisions of EPAct 2005 under which the Commission took action; (c) the date by which action by the Commission was required (if any); (d) the date by which the Commission completed the action (if completed); and (e) any related completed and pending actions.