FERC Commissioner Tony Clark Speaks Out as He Nears End of Term

He Sees Challenges Ahead and Much Litigation in the Energy Space

Gary Guy & David Martin Connelly

There are many goodbyes and hellos at the Federal Energy Regulatory Commission these days. Recently, we reported on our “exit” interview with now former FERC Commissioner Phillip D. Moeller, followed by a “Welcome Back, Kotter” interview with General Counsel Max Minzner, a returning FERC official. Now, we are excited to recount an interview with FERC Commissioner Tony Clark prompted by his notification to the White House that he does not desire to remain once his term expires June 30, 2016 beyond the adjournment of the Congress at the latest. He once before granted EBA’s interview request in January 2013, six months after starting out in his Commissioner post. So we are doubly grateful that Commissioner Clark was kind enough to sit down with your reporting team Gary E. Guy and David Martin Connelly (aka “Lester Kinsolving and Herb Kaplow”) now that he is approaching the end of his tenure. While you will want to view the entire video-recorded blow-by-blow conversation at www.eba-net.org, here are just some of the highlights.

A 16-Year, Entire 21st Century Commissioner

It occurred to us that Tony Clark has...
President’s Message

Emma Hand, EBA President

Why Diversity Is Good for Business

Diversity is an issue with which the energy industry and the legal profession are increasingly wrestling. The rise of the prosumer -- proactive customers -- who want more choice and more input into utility services, and shifting American demographics mean that the energy industry is interacting with its customers more than ever and simultaneously that its customer base is more diverse than ever. Minorities now represent over 37% of the population, and will continue to grow. Baby Boomers began turning 65 in 2011, and by 2030, one in five Americans will be over 65, a 32% increase. The Millennial Generation has now surpassed both Baby Boomers and Generation X in size. Women will soon become a majority of heads of household. We are entering the "age of the customer." The energy industry and legal profession must be able to understand, anticipate, and respond effectively to the needs of their customers and clients.

In this new world, diversity of leadership within an organization is increasingly proving to be profitable to corporations and partnerships -- for example, a study released by the Peterson Institute for International Economics in February 2016 presented a gender diversity analysis of a global survey of 21,980 firms from 91 countries which concludes that a move from no female leaders to a 30 percent representation of women in leadership roles within an organization is associated with a 15 percent increase in the net revenue margin.

Studies are also increasingly showing that a lack of diversity and a lack of acceptance of diversity are harmful to business. A December 2013 paper on the concept of covering by Kenji Yoshino, Chief Justice Earl Warren Professor of Constitutional Law at the NYU School of law and Christie Smith, Managing Principal of the Deloitte University Leadership Center for Inclusion, revealed that a corporate leadership signals to employees that they must "cover" their diversity (i.e. take steps to de-emphasize their diversity and give an outward appearance of being more mainstream) in order to advance, 50% of employees reported a "somewhat" to "extremely" negative impact upon their loyalty to the organization. Even when the need to "cover" was not caused by leadership, but rather was viewed as corporate culture 27% of employees indicated that their loyalty to the organization was "somewhat" to "extremely" negatively impacted. Businesses looking to build a loyal workforce will need to address issues of diversity within their corporate culture.

There is also an element of social justice in the energy sector related to diversity that is often overlooked. Power plants, pipelines, and other facilities are often sited in minority neighborhoods that lack the resources and political strength to oppose them effectively.

Implicit bias and confirmation bias are also an increasing problem for institutions. They are more difficult to address than outright discrimination because they are unconscious -- the persons involved are unaware of their bias and likely believe that it does not exist and that they are treating everyone fairly. Yet, there is compelling evidence that it is a very real obstacle to advancement of diverse
personnel. A paper issued in April 2014 by Nextions described an exercise on confirmation bias wherein a legal memorandum crafted with 22 specific errors was distributed to 60 different law partners from 22 different law firms (23 women, 37 men, 21 racial/ethnic minorities, and 39 Caucasian) who had agreed to participate in a “writing analysis study.” Half of the partners received a memo about the associate that indicated he was African American and half were told he was Caucasian, all other factors describing the associate were the same. The results were that -- for the exact same memo, containing the exact same errors -- the African American associate averaged a 3.2/5.0 rating and the Caucasian associate averaged a ranking of 4.1/5.0. The Caucasian associate was noted to have potential and good analytical skills, while the African American associate was described as average at best and needing a lot of work. Even more tellingly, of the 22 errors deliberately inserted into the memorandum, evaluators who were told the associate was African American found on average 14.6 errors while those who were told it was a Caucasian associate found only 10.2 errors on average. Although this was a relatively small exercise, the results are very telling and indicate that lawyers do unconsciously create higher hurdles for diverse attorneys than for non-diverse attorneys.

As an industry, we have not been making as much progress as we should on the diversity front, especially in leadership roles within corporations and law firms. Numbers released by the National Association for Law Placement, Inc. (NALP) in November 2015 indicated that women account for only 21.46% of partners in law firms, despite the fact that women represented between 41.39% and 45.66% of associates from 1999 to 2015. Moreover, women associates peaked at 45.66% in 2009, then fell steadily down to 44.79% by 2013. The numbers have increased slightly since 2013, but are still not back up to the 2009 level. Attorneys of color show similar numbers. Associates of color increased steadily from 12.06% in 1999 to 22.00% in 2015 according to the NALP numbers, but partners of color have only grown from 3.25% to 7.52% over the same time period. Minority women are the least represented group, accounting for only 11.78% of associates and 2.55% of partners. The percentage of openly LGBT lawyers has also been growing very slowly, and only accounts for 1.8% of partners and 3.08% of associates.

This year, in recognition that issues related to diversity are having an increasing impact on EBA’s members, the EBA will be conducting a Spotlight on Diversity. We will be providing programming on diversity in the energy sector throughout the year, working more closely with our sister organizations already doing work on issues of diversity in the energy and legal sectors and performing our own internal review. We hope that you will keep an eye out for these special programs and be active participants in the conversation over the course of the year.

Emma Hand
EBA President
Partner, Dentons
Squeeze in a Little Learning into Your Summer Vacation

What better time to squeeze in a little learning than during the dog days of summer! Before you take off for your vacation, consider downloading to your phone (or other personal device) one or more of the EBA On-Demand programs. EBA, in partnership with WestLegalEd Center, has developed a library of high quality, self-study EBA programming available anytime, online. Many of these programs include CLE credits. While enjoying some time at the beach or mountains, you can listen and learn something new about a segment of energy law. This is also a great educational tool to share with your summer associates. Those who already have a subscription with WestLegalEd Center, can access the EBA programs as part of your subscription. All others can access the library and receive the EBA member discount. Just follow the instructions available through this link: On-Demand Member Discount: these instructions (PDF).

The topics and links to our currently available On-Demand programs are listed below:

*Informing Investors of Climate Risks*
*Energy in the Ski Industry*
*The Hazy “Bright Line”: Defining Federal and State Regulation of Today’s Electric Grid*
*Litigation Adversaries and Public Interest Partners: Practice Principles for New Regulatory Lawyers*
*Renewables 101: An Overview of the Technical, Financial, Legal and Policy Landscape of Renewable Development in the United States*
*Convergence of Electric & Natural Gas - Effect on Smart Grid & Demand Side Resources*
*My Best and Worst Experiences Facing the Appeals Court Judges: Lessons from Real World Experiences*
*Mastering Your First (or Next) State Public Utility Commission Hearing*
*2015 Oil Primer: An Introduction to Federal Oil Pipeline Regulation: Part II*
*2015 Oil Primer: An Introduction to Federal Oil Pipeline Regulation: Part I*
*Financial Products in Organized Electricity Markets: Convergence, Liquidity, Quants and Uplift*
*EBA Primer: Energy Trading - Part 2*
*EBA Primer: Energy Trading - Part 1*
*EBA Energizer: Section 205/206 Fundamentals and Insights*
*EBA Energizer: Locational Marginal Prices - Foundations and Frontiers*
*EBA Energizer: Scaling Renewable Energy: A Perspective from Google*
*EBA - Energizer: Clean Power Plan: Federal and Western Perspectives - A Work In Progress*
*EBA Environmental Law Primer - Day 2*
*EBA Environmental Law Primer - Day 1*
*Breaking the Rules and Changing the Game Will Shale Gas Rock the World*

Mark your calendars and plan to attend the 2016 EBA Mid-Year Energy Forum on October 5-6\textsuperscript{th} and the ever successful annual “Honorable Chief Judge Curtis L. Wagner, Jr., ALJ Reception” just prior to the Forum on Tuesday, October 4, 2016.

I wish you an enjoyable, productive summer and look forward to seeing you at various EBA events this fall!

Lisa A. Levine, CAE
Executive Director
EBA Ambassadors
Membership Growth and the ‘Each One – Reach One’ Campaign

EBA members value the information and connections they have made through the association, and this year, we have challenged all members to recruit members. The EBA Ambassador Each One Reach One campaign was successful in recruiting 504 new members between May, 2015 and April, 2016, truly bringing EBA’s stretch goal of 500 new members by the close of the board year to life. These numbers represent a 48% increase in member recruitment over the same period between 2014 and 2015. Over 170 members sprang into action to help realize this achievement. A special thanks to our top recruiters:

Richard Meyer, recruited 17
Daniel Pancamo, recruited 16
Dana Shelton, recruited 14
Adrienne Clair, recruited 13
Michael Stosser, recruited 13
Vicki Baldwin, recruited 12
Crystal McDonough, recruited 11

Women Leading the Way for EBA

For the first time in the history of the Energy Bar Association, EBA and sister organizations FELJ and CFEBA all have elected women Presidents at the same time.

“I am honored to be elected President of the Energy Bar Association. EBA already offers its various constituents outstanding services and educational opportunities. During this year as President, I look forward to working with the Board to grow and enhance EBA’s offerings and to engage with the Board in developing EBA’s next strategic plan. I am also excited to work with a tremendously engaged group of volunteers leading committees, chapters and task forces to help shine a spotlight on diversity within the energy law sector.”

- Emma Hand, EBA President

"Looking around me at the fellow attendees at this year’s annual EBA conference, I was struck by how many more women are in attendance and in speaking roles than even ten years ago. I’m excited to be a part of the EBA leadership team this year and looking forward to continuing the great work of the CFEBA!"

- Jane Rueger, CFEBA President
TEN YEARS AGO
“The declining importance of QFs in the wholesale market may be counterbalanced somewhat by an increasingly important role for QFs in the retail market. Given the elimination of the restriction on utility ownership, QFs may become an attractive way for utilities or their unregulated affiliates to compete with marketers for retail loads. This appeal of QFs in retail markets may be reinforced by retention of the QF exemption from state regulation. Although the elimination of key FPA exemptions mean that QFs may be regulated at the federal level much more like all other generators with respect to both rates and sales of facilities, QFs will be able to make sales of power at retail without being subject to state utility regulation.”


THIRTY YEARS AGO
“Hydropower is one of the oldest sources of electric energy; the first hydropower-electric generating plant in the United States was built more than 100 years ago. Regulatory and financial incentives enacted in recent years, however, have led to an unprecedented surge of interest in hydropower development. This, in turn, has generated intense competition for the finite number of hydropower sites which are economically desirable as well as technologically and environmentally feasible. Because of the preemptive nature of federal regulation of hydropower development, this competition has focused on the federal licensing authority under the Federal Power Act. In competing for project development rights under the Federal Power Act, municipalities and other governmental bodies enjoy a decided advantage due to the municipal preference provided under the Act.”


TWENTY YEARS AGO
“FERC should encourage all potential consolidations of transmission assets. It should defer to the positions of state PUCs with respect to all proposed consolidations of distribution assets. It should take a conservative initial attitude toward all proposed changes in the structure of the wholesale market, both proposed consolidations and potential coerced divestitures. It should eliminate price controls on virtually all wholesales on an experimental basis and use the data made available by that experiment as the basis for a more refined set of policies applicable to the structure of the wholesale market in the dramatically new environment that it is in the process of creating.”


About FELJ
Since 1980, the Energy Law Journal has provided great value to the Energy Bar Association's members. The Journal provides in-depth analyses on current, salient issues affecting members and their clients and businesses and provides a forum for the exploration and understanding of new, cutting edge issues. The Journal is a benefit to EBA members and subscriptions are available to non-EBA members.

Visit www.felj.org to download the current issue or subscribe.
Thank you for attending!

CONFERENCE RECAP

The 2016 Annual Meeting & Conference welcomed over 500 attendees this year on June 7-8, 2016 in downtown Washington DC. Attendees earned CLE credit during 14 sessions on all topics of energy law, including the renewable energy grid, Mexico energy reforms, electricity market pricing, COP 21 and the Paris Agreement implications on energy markets, crude oil bans from a strategic and economic perspective and merger and acquisition activities in the power, oil and gas industries.

To kick things off, a panel of appellate experts discussed the recent trilogy of Supreme Court cases that have defined the lines of FERC and State authority under the NGA and FPA in “The Court Has Spoken – What Does it Mean?” General Session.

Concurrent Sessions for Day 1 began with “Tomorrow’s Grid is Here: Technical, Financial, Policy, and Legal Ramifications,” a panel discussion on the types of small scale infrastructure developments and models that are transforming retail and wholesale markets, and the policies and economics that are driving their success, and “Building the Bridge from Energy Law Education to Practice,” an interactive panel session on how the legal community and associations can help young attorneys foray into the energy law arena.

Steven Croley, General Counsel, U.S. Department of Energy, delivered a luncheon address on Day 1 that offered a riveting look into the future of our domestic and international energy landscape, offering ideas of what is to come and how energy markets will change.

An ethics presentation on ABA Model Rules of Professional Conduct, and “Sitting Through Regulatory Changes in the Gas Pipeline Industry” was offered concurrently with a riveting panel discussion of the potential for PHMSA regulations affecting gas storage field operations, intersecting FERC regulatory impacts and anticipated changes to pipeline industry economic and environmental compliance, particularly regarding methane leakage. A panel of three sitting FERC ALJs with give tips on do’s and don’ts that all FERC practitioners need to know in “View from the FERC Bench,” and a panel discussed Mexico’s seismic shift in how it regulates the energy industry during “Mexico Energy Reforms: Opportunities and Challenges.”

Representatives of the major natural gas trade associations discussed issues facing their segment of the industry and proposed solutions in the Day 2 General Session, “Natural Gas Industry - Pressures and Solutions.”

Two panels discussed issues and obstacles to interconnecting the renewable energy grid, and the energy outlook following COP 21 and the Paris Agreement on Emissions during two mid-morning concurrent sessions.

EBA welcomed luncheon speaker Sandra S. Yamate, CEO of The Institute for Inclusion, for an enlightening look at diversity in the workplace, and former EBA President Rich Meyer welcomed Emma Hand as President for the 2016-2017 year.

Afternoon Concurrent Sessions included a panel exploring the two legal actions of the TransCanada Keystone Pipeline, L.P., as well as Presidential Permit applications in the future, and a panel of experienced energy economists and regulators discussed potential changes in electricity market pricing in “Evolution or Revolution: Electricity Market Pricing.”

Attendees heard from bankers and investors about the current activity in energy transactions, capital funding forecasts and financing strategies, including the roles of project bonds and term loan B’s in financing energy assets in the closing General Session, “Downturn to Upswing: Energy Investment and Finance.”

View the full conference photo album on Flickr: https://www.flickr.com/photos/143705656@N05/sets/72157669325684606/
2016 Annual Meeting & Conference

Photo Gallery
Richard Meyer recognizes Michael Stosser for his service & leadership as CFEBA President for 2015-2016
2016 Annual Meeting & Conference

Adrienne E. Clair gives the report from the Committee on Nominations

2016-2017 EBA Officers (from left to right) Matthew Rudolphi, Vice-President, Emma Hand, President and Robert A. Weishaar, Jr., President-Elect
Charitable Foundation of the Energy Bar Association (CFEBA) Update

The NEW Gala, Fundraising Campaign Sets Huge Record and an exciting year ahead for the 2016-2017 Board

This year, the CFEBA made some significant changes to its program in an effort to take the Foundation’s activities to a new level. First, the CFEBA set higher fundraising goals than ever before, in order to fund a project of magnitude that it had never funded before. Further, it decided to host a first-ever, sit-down dinner gala that was held in conjunction with the Energy Bar Association’s Annual Meeting & Conference this past June.

The CFEBA cornerstone project for the 2015-2016 year was to provide electricity to 461 families in the northeast region of rural Bolivia. Through this project, the men, women and children in these communities will have better healthcare, improved education, safer streets and a chance at a better life. The CFEBA partnered with the International Foundation of the National Rural Electrification Association. The CFEBA raised money from its membership in order to contribute the costs of the materials necessary for the installation of the infrastructure. The International Foundation will be providing the volunteers to install the infrastructure and train the villagers on the system’s operation. Volunteer linemen from Missouri, Oklahoma and Arkansas will construct 21 miles of power lines to interconnect these families.

The CFEBA’s Gala, “Light Up the Village!” which was held in Washington, D.C. at the Renaissance Downtown Hotel, was a huge success and a very proud moment for the CFEBA.

The Fundraising Campaign set a challenging goal of raising $200,000 at the start of their Board year, hoping to cover the majority of the infrastructure costs associated with the Bolivia project. The Gala had unprecedented support, with 30 sponsors, many individual donations, and 225 guests in attendance at the Gala. As a result of this generous support, the Fundraising Campaign surpassed our goal raising a total of $260,000 – the most money ever raised by The CFEBA.

At the Gala, the CFEBA honored linemen as a profession in recognition of their skills, courage and dedication to their profession in times of emergencies and in their day-to-day operations. The honorees included linemen from the Kissimmee Utility Authority, Rochester Public Utilities, Shenandoah Valley Electric Cooperative and PEPCO. Touching remarks from our honorees on memorable aspects of their professional experience, as well as their volunteer work, proved to be a highlight of the event. Other highlights included two Bolivian dance performances by Centro Cultural Bolivia Dance Organization. The program also included a short video that showed how the money raised by the CFEBA and implementation of the project will impact the community. In the video, Isabel, a nurse in one of the Bolivian communities, explains...
About CFEBA

The Charitable Foundation of the Energy Bar Association’s (CFEBA) mission is to engage in a wide variety of energy-related internships, providing educational grants and scholarships, participating in volunteer community service projects and providing financial support to needy individuals and non-profit organizations for payment of utility bills and other purposes. The Foundation relies upon tax-deductible contributions from EBA members and businesses for its funds and the active participation of EBA members for its service projects.

The Charitable Foundation of the Energy Bar Association
Wishes to Thank the Sponsors of the 2016 Annual Fundraising Gala

Light Up the Village!

Alston & Bird LLP
American Public Power Association
Arnold & Porter LLP
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Day Pitney LLP
Dentons US LLP
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Husch Blackwell LLP
Jones Day
K&L Gates LLP
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McNees Wallace & Nurick LLC
Morrison & Foerster LLP
National Rural Electric Cooperative Association
Paul Hastings LLP
Pierce Atwood LLP
PJM Interconnection, L.L.C.
Skadden Arps Slate Meagher & Flom LLP
Steptoe Johnson
Stinson Leonard Street LLP
Sutherland Asbill & Brennan LLP
Thompson Coburn LLP
Troutman Sanders LLP
Van Ness Feldman, LLP
White & Case LLP
Wright & Talisman, P.C.

How her life and the life of the other villagers will change with electricity.

Outgoing CFEBA President Michael Stosser of Sutherland, Asbill & Brennan, concluded with a moving quote from “Where Eagles Dare”:

“Do we make a difference? Maybe… Sometimes… Not always a lot, but… I do know that we should never stop trying and we need to remember that every little bit counts.”

New CFEBA President, Jane Rueger of White & Case LLP plans to “build on the successes of the past year by broadening CFEBA’s appeal, clarifying our “brand” to reach more potential donors, and engaging young lawyers in our work. “ Beginning the Board year with funding for grants is an exciting adventure for the Grants Committee, which has been tasked to find a worthy project for funding every three months. CFEBA will be finalizing the total grant amount for the Bolivian project shortly, and is in the process of sending grant award letters to Arlington Thrive and Global Solace, both to receive a $10,000 grant from CFEBA in the coming weeks. More details will be announced in upcoming CFEBA communications.

If you would like to become more involved with the Foundation, or want more information on CFEBA’s good works, visit www.cfeba.org or contact Michele L. Smith, Manager, Chapter & Foundation Relations at 202-499-5841 or Michele@eba-net.org.
2016 CFEBA Fundraising Gala, *Light Up the Village!*

June 7, 2016
2016 CFEBA Fundraising Gala, Light Up the Village!

Lineman Honoree John Medved of Shenandoah Valley Electric Cooperative

Aaron Haderle (left) and Eddie Gluc (right) of Kissimmee Utility Authority with outgoing CFEBA President Michael Stosser (center)

Incoming CFEBA President Jane Rueger of White & Case LLP with Michael Stosser, outgoing CFEBA President

Michael Stosser (left) with Honoree Wykaine Nelson of the Potomac Electric Power Company (PEPCO)
been either a state (including being a state commission Chairman (in North Dakota) and President of NARUC) or a federal Commissioner for the entirety of the 21st century, at least so far. He observed that the average length of service of a regulatory commissioner throughout the country is approximately four years. "I am about four times past my shelf life," he joked, having spent the last 16 years in that capacity.

He was elected to two terms, beginning in 2000, to the North Dakota PSC. After 12 years in that office, he was appointed to his FERC slot, where he will be completing four years in June, with the possibility of remaining until Congress adjourns in December. Prior to holding these prominent positions, he had been elected to the North Dakota legislature. And he also became NARUC President by election of his peers among the state commissioners. So he is a popular fellow.

"The whole energy industry has been in a transformative time" throughout his FERC tenure, he observed, and that has made it an especially meaningful experience for him. He states that this transcends the regulatory side, the legal landscape (with very significant Supreme Court decisions), and technological developments. He also talked about having had a "front row" seat during revolutionary energy industry changes when he was a North Dakota Commissioner.

As for the prospect of extending this service another five-to-six years, Commissioner Clark volunteered that he could foresee himself thinking he had "been there, done that" by the time he entered his 20th year. So he opted out of consideration for that prospect.

**Taking His Leave in a Period of Regulatory Uncertainty: Count the Ways**

He does see unsettled issues continuing into the future; that is, he did not decide to remove himself from consideration because everything has been solved. For example, he tells us that the Supreme Court’s *FERC v. EPSA* decision on federal jurisdiction over demand response bidding into RTO markets will cause regulators and practitioners to "muddle around a bit for a while" because "the Court did not tear down the wall between federal and state jurisdiction or significantly reset it." Instead, in his interpretation, the ruling stands for the proposition that "if a state is doing things that affect wholesale rates then conceivably there can be situations where it is FERC jurisdictional." While Order No. 745 was upheld as within FERC’s purview, he believes that no bright line has been established. In future cases, he expects litigants to "probe that outer line" between federal and state activity. He believes it is a gray area now, with FERC’s assertion a "little stronger" than before the decision was issued. So he foresees a series of cases coming along to establish the jurisdictional parameters. Good news for energy lawyers!

Another concern for Commissioner Clark is how the capacity markets are evolving. Recounting that as...
Over the last two months, the Southern Chapter has hosted two Road Show events at southern laws schools — February 17 at Emory University in Atlanta, and March 31 at Florida State University in Tallahassee.

For the Emory Road Show, Ade Adeniyi, a third year law student at Emory, did an amazing job of organizing students and logistics, including engaging several student organizations to help sponsor and provide refreshments for the students. The Emory program had over 30 students in attendance, with many students staying another hour after the program to talk individually with the speakers.

Floyd Self, a partner with Berger Singerman and President Elect for the Southern Chapter, organized an outstanding group of speakers. Curtis Romig, a partner with Byran Cave and a Southern Chapter board member, provided an introduction to Energy Law. Chris Demko from Southern Company’s legal department and a former FERC staff attorney talked about his experiences at FERC and provided an overview of its history and electricity regulation. Shannon Coleman, Senior Attorney with Colonial Pipeline Company and an EBA Board member, talked about her work for an oil pipeline company. Shannon Pierce, Vice President, State & Federal Regulatory Affairs for AGL Resources and a former President of the Southern Chapter as well as a current Southern Chapter board member, addressed natural gas regulation and finance. Then all the speakers joined in the hot topics discussion.

As a result of the Emory Road Show, eight students signed up for EBA Memberships. Scott Johnson, who organizes the EBA’s Road Shows, along with various members of the Southern Chapter Board volunteered to sponsor these student memberships.

Floyd moderated the panel and provided background on the EBA and its many services to members as well as a brief presentation on his private practice experience representing electric and gas utilities as well as other parties before the Florida Public Service Commission, the Florida Supreme Court, other state PUCs and local governments. We greatly appreciate our fantastic group of Tallahassee-based speakers who provided a decidedly state and local focus on energy law and policy.

Lisa Edgar, a Florida PSC Commissioner and immediate past President of NARUC, discussed her journey from state Senate analyst, to environmental lawyer and policy director, to PSC Commissioner. J.R. Kelly, the Florida Public Counsel, discussed the importance of his role as a consumer advocate and internship opportunities available to law students. Diana Caldwell, the Staff Director for the Florida Senate Committee on Communications, Energy, and Public Utilities, discussed how she transitioned from marketing student to legislative analyst, to PSC attorney, to legislative staff director where she handles a wide variety of legislation.
on energy and utility issues. Cindy Miller, a former senior counsel at the Florida Public Service Commission, discussed her work representing the PSC before federal agencies and courts. Richard Brightman, a partner with Hopping Green & Sams, provided a state and local perspective for his oil and gas pipeline practice. Angela Morrison, a partner with Berger Singerman, discussed her extensive experience in environmental air quality issues for electric utilities and other power plant operators before state and federal agencies.

The FSU event was a great success, with over 30 students, and many students stayed afterward to talk individually with the speakers. Professor Wiseman will be helping us to assist those Tallahassee students who want to join the EBA as well as providing registration information to the Southern Chapter’s CLE program May 10 in Atlanta and Charlotte.

The one constant theme from both Road Shows was the feedback from the students, most of whom had no idea as to the great variety of career options available in our industry. Both events were so successful that both universities have asked us to work towards a return engagement this fall, which is a better time for the students to be thinking about summer and permanent jobs.

It is important to combine your presentation with a group of outstanding attorneys well experienced in the field. This breaks it up and gives the students more diverse insight into the different, and usually indirect, paths lawyers often follow in becoming successful energy attorneys.

When offering the Road Show, know your audience. If you have a law school with a number of energy, environmental, and administrative law courses, the Road Show PowerPoint provides a nice overview, but don’t limit yourself to the presentation. If you bring in additional speakers as we did at Emory and FSU, know your limits. The students really appreciated the great diversity of people and legal careers we presented at both universities. Collectively, one person could not have given as great a presentation as our collective speakers offered. However, it is impossible to cover the material and keep each lawyer to only to 5-7 minutes when your program is limited to one hour! Also, try to save some time for questions by the students. We will continue to refine how we use speakers, but providing different viewpoints through a great group of speakers makes your program much more attractive to a law school.

We have found presenting the Road Show program to be a great way of inspiring law students and helping them connect in different ways to potential careers in energy law. It is also a great way to recruit EBA student members who can also attend CLE and other events and later become practicing attorney members of the EBA.

On behalf of the Southern Chapter, appreciate the tremendous support from Emory and FSU, especially the great work of Ade Adeniyi and Professor Wiseman in organizing the programs. We look forward to expanding our Road Show offerings to more schools in the fall.

Visit the EBA Road Show homepage for more information about presenting a program at your university:
www.eba-net.org/road-show

For more information about EBA regional chapters, please go to:
www.eba-net.org/get-involved
restructuring took place especially along the northeast and mid-Atlantic beginning in the 1990s, merchant generators became dependent on FERC-jurisdictional wholesale price signals to make investment, refinancing, and retirement decisions, he said that at the same time state energy policies are attempting to promote specific types of resources, despite market forces, such as solar, wind, and renewables, or to preserve nuclear plants in the carbon-free footprint. These latter political pressures, as he characterized them, raise a challenge for FERC, namely, that we have a “quasi-structured, quasi-integrated resources planning” industry without knowing what the end result will be. In other words, “there are so many interventions in the wholesale market from state political planning that we are not getting a wholesale market signal anymore.”

He does not condemn public policy intervention per se, such as with respect to renewable portfolio standards. He views many such state actions as “benign” or exercising legitimate authority but that FERC must decide how to react to state actions that distort markets by mandating or promoting resources that are not what markets would pick as winners. He sees the challenge as being the promotion by FERC of market-based solutions, while being agnostic as to what resource prevails under a market-driven choice.

On the gas front, he also sees a heavy workload and a need to continue to do “a good job in siting infrastructure.” He stated that it is essential that the agency maintain
adequate staffing to process in a timely manner the large volume of pending applications that are coming in, including having "boots on the ground in terms of holding public hearings." He observed that the Commission has a strong track record of courts upholding its decisions issued pursuant to the Natural Gas Act. He cautioned that FERC must be mindful of the increasing demands in this area to ensure that it maintains its good record. So this is another fruitful area for EBA practitioners!

Cybersecurity is another area of challenge. "It's a real threat," he tells us. He describes FERC, with other agencies, striving to achieve "an ecosystem" to dampen the odds of a catastrophic event.

Enforcement too is an area where Commissioner Clark continues to be outspoken. "The way that I see FERC's authority (and it is generally working pretty well)," he tells us, "is not that different from how any agency, primarily the SEC, deals with fraud." It includes both a principles-based and fact-based determination because "you cannot write a play-book that comes up with every potential way that someone may engage in fraud." It is only limited by the ingenuity of man, is how he paraphrased a court ruling. This is why a principle needs to be enunciated to be applied to new facts that are not foreseeable as they arise. He uses the analogy of driving a car, where you could be cited for reckless driving, which is an infraction of a legal principle, but the policeman must draw a conclusion that the facts surrounding your driving constitute that offense without having your specific action stated as being prohibited within the particular Code section. He has to evaluate the speed you were going, the road conditions, and the visibility to determine if you drove recklessly. By the same token, he believes that FERC has to lay out principles of market behavior that indicate the types of action that constitute market manipulation without specifying every action that is prohibited. For example, he maintains that one should not take economic losses in one market in order to increase a profit in a separate market. "You don't make economic trades that don't make any economic sense in order to arbitrage something else."

**Clark’s Confidences**

My favorite thing about Washington, D.C. is: History (Hint, see why below.)

My least favorite thing about Washington, D.C. is: The commute

My favorite song is: *Detroit Rock City*

My favorite holiday is: Christmas

My favorite movie is: *Raiders of the Lost Ark*

My favorite sport to play is: Fishing and Golf

My favorite sport to watch is: Hockey and Baseball

My favorite food is: Mexican

My favorite flavor ice cream is: Mint Chocolate Chip

A signature dish I cook is: Baked Alaska

The most recent book I read is: *Dead Wake: The Last Crossing of the Lusitania* by Eric Larson. "I am a big fan of this author."

A perfect summer vacation I had was: At the Lake

Something important I learned in childhood was: Be Nice to Others

In school, I excelled at: History (See what he likes best about D.C. above.)

Advice I received that served me well is: Came from Pat Wood. Namely, take a few months off before you get in the job and try not to be gone from the house more than 3 or 4 nights a month.

As for being a night owl or early riser, I am: An Early Riser

People would be surprised to know that I can: "Recite way too much knowledge about the TV show, *The Bachelor*. My wife and I are fans, as is my whole office. While it’s not what I would call ‘high-brow entertainment,’ it makes for great water cooler talk and pop psychology studies!"

To Dissent or Not to Dissent; Perchance to Lead

With Commissioner Moeller having left the Commission without a successor even yet nominated, and Commissioner Clark due to leave by no later than the end of the year, no Republicans are likely to be FERC Commissioners going into 2017, and only three Commissioners will be in place.

Given the strong views that Commissioner Clark has held on matters coming before the agency, we asked him about any concerns he has about where
the Commission is heading or where he would have preferred to lead it. Our question reminded him
of something United States Supreme Court Justice Stephen G. Breyer had to say recently about
the process of writing dissents or concurrences. What he heard the Justice say over his car radio
resonated with him as being applicable to his own separate statements. “In a sense when you
write a dissent, in a way you are admitting defeat but at the same
time it is an opportunity to shape future cases decided by future Justices (or Commissioners) by
saying this is how I would have done it.” So Commissioner Clark writes separately in order to
influence future events, and persuade successors even though he has not persuaded his colleagues.

Sometimes FERC orders are “the process of collaboration” where not everybody gets the desired
outcome on everything but all can support the package result, he explains, whereas other times there
is a “tipping point” by which there are so many points of disagreement that a full dissent is considered to
be necessary.

He described how the initial draft order reflecting the view of the Chairman is circulated for review by
the other Commissioners, who can suggest revisions for how they can support the order, or otherwise give a
heads-up to their colleagues as to key points to be made in a concurrence, partial dissent, or perhaps a dissent
from the entirety of the order. If accommodations are made in the order, then the separate statement
will be modified as well, or perhaps withdrawn altogether.

He has also taken what might be called pre-emptive action that might have forestalled the need to consider
writing a dissent. That is, he has continued throughout his term to meet with Staff leaders from the various
offices on a monthly basis in most instances. “It gives them a heads-up as they write policy memos and draft
orders to the Chairman’s office as to where pressure points on the Commission might be so that no one
is blindsided, and helps the communication effort.”

Getting Down to Three; Looking Ahead to Additions
That approach of speaking regularly with department heads is something that he might recommend to his
successor, along with something else. Specifically, as other Commissioners have told us, Commissioner Clark was advised
by some of his predecessors to avoid the speaking circuit for about the first six months of taking office
as a FERC Commissioner. He found that to be good advice in that he was able to first get a solid
 grounding at the agency (and it was a nice break from so many speaking engagements as NARUC President,
etc.) before accepting the invitations to talk before various organizations. One of the first places he appeared
was at EBA’s Mid-Year Meeting in 2012, where he gave a tremendous

luncheon address, followed by questions from the audience.

Speaking of successors, he noted that a third of the Senate is up for re-election, that there are two FERC positions to be filled, and that court nominations are “gummed up,” all of which leads him to doubt that a successor will be in place before his departure. He also suggested that the opening of Commissioner Colette D. Honorable’s Democratic seat next year might provide an opportunity for the pairing of nominations from both parties to be voted on together. (He and Democratic nominee John R. Norris were essentially paired when they were both confirmed.)

Even if Commissioner Honorable is renominated and reconfirmed, given the prospect of two new Republican Commissioners, and possibly a third depending on the outcome of the Presidential election, Commissioner Clark sees significant turn-overs to be imminent at the Commission.

Moving v. Laying Down Roots

He has a child in high school and another in middle school and a third in grade school. They each have different school day times and different busses to ride. The last four years have been a “significant chunk” of their lives, considering one was 5-years old when the family moved to D.C. The eldest was especially taken by the move, particularly the warmer weather. “They are all kind of curious about what is happening next” after Dad leaves the Commission. He says he does not know the answer to their biggest question, which is whether they will be changing schools. “The only thing I know for sure is that by January 1st of next year, I will no longer be here.”

Like the Clark children, the Energy Bar is also anxious to know what comes next in the career of this distinguished public servant. We also have a stake in that next step as we stand to be greatly enriched by his continuing active involvement and leadership in the energy sector.

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