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3 HEARING ON ``IMPACTS OF H.R. 3795, THE OVER-THE-COUNTER

4 DERIVATIVES MARKET ACT OF 2009, ON ENERGY MARKETS''

5 WEDNESDAY, DECEMBER 2, 2009

6 House of Representatives,

7 Subcommittee on Energy and Environment

8 Committee on Energy and Commerce

9 Washington, D.C.

10 The Subcommittee met, pursuant to call, at 1:22 p.m., in
11 Room 2322 of the Rayburn House Office Building, Hon. Edward
12 J. Markey [Chairman of the Subcommittee] presiding.

13 Members present: Representatives Markey, Doyle, Inslee,
14 Butterfield, Matsui, McNerney, Welch, Dingell, Waxman (ex
15 officio), Stupak, Upton, Stearns, Shimkus, Walden, and
16 Scalise.

17 Staff present: Bruce Wolpe, Senior Advisor; Greg
18 Dotson, Chief Counsel, Energy and Environment; John Jimison,

19 Senior Counsel; Jeff Baran, Counsel; Joel Beauvais, Counsel;
20 Melissa Cheatham, Professional Staff Member; Caitlin
21 Haberman, Special Assistant; Lindsay Vidal, Special
22 Assistant; Mitchell Smiley, Special Assistant; Andrea Spring,
23 Minority Professional Staff Member; Aaron Cutler, Minority
24 Counsel; and Sam Costello, Minority Legislative Analyst.

|
25 Mr. {Markey.} Welcome to the Subcommittee on Energy and
26 Environment and this very important hearing.

27 As early as next week, the House will vote on
28 legislation to strengthen the oversight of financial
29 derivatives markets. This legislation provides the
30 Commodities Futures Trading Commission a broad new authority
31 to regulate over-the-counter trading in derivatives. This
32 reform is long overdue.

33 Over the past 2 years, we have once again learned the
34 hard way that deregulation of financial markets is a recipe
35 for robbery and ultimately recession. I have long supported
36 tough regulation of derivatives beginning in the late 1980s
37 when I chaired what was then the Subcommittee on
38 Telecommunications and Finance. In the early 1990s, I
39 chaired the first Congressional hearings on the potential for
40 over-the-counter derivatives to create systemic risk in
41 global financial markets, and I warned of the risks that
42 unregulated derivative dealer like AIG and Bear Stearns could
43 pose for those markets.

44 I have also worked to strengthen competition and
45 oversight in electricity markets. I was the author of the
46 transmission access provisions of the Energy Policy Act of
47 1992, which promoted competition by requiring transmission

48 owners to provide independent power providers with access to
49 the grid. In the Energy Policy of Act of 2005, I was amongst
50 the principal supporters of the provision that gave the
51 Federal Energy Regulatory Commission authority to protect
52 against fraud and manipulation in electricity and natural gas
53 markets.

54 So today's hearing isn't about whether or not we need
55 strong oversight of energy markets; clearly, we do. It is
56 about getting regulation right. We must ensure that
57 financial regulatory reform doesn't disrupt FERC's ability to
58 properly structure and oversee organized energy markets.
59 Otherwise, we will undermine FERC's ability to ensure
60 reliable and affordable service for American consumers. We
61 must not let this effort to solve one crisis, create yet
62 another.

63 The derivatives bill reported by the Agriculture
64 Committee threatens to do just that. The bill's definition
65 of swap is so broad that it is likely to cover a number of
66 FERC-related products, including but not limited to Financial
67 Transmission Rights that play a key role in the functioning
68 of the organized electricity markets. These products are
69 inextricably linked to the physical operation of the grid and
70 they exist only because FERC has approved their terms and
71 conditions. Congress has given FERC strong authority to

72 protect against manipulation of these markets and there is
73 broad agreement that FERC has exercised that authority
74 thoroughly and competently. Nevertheless, under the pending
75 derivatives bill, anything that falls within the definition
76 of a swap is under the exclusive jurisdiction of the CFTC,
77 and CFTC has no authority to exempt any swap from the full
78 set of regulations that apply to financial markets.

79 What is the upshot of all of this? Well, FERC could be
80 excluded from regulating the very markets it has created to
81 ensure a reliable and affordable supply of electricity. In
82 FERC's place would be substituted the CFTC, an agency with no
83 expertise in this area. Such an outcome is unacceptable.

84 Chairman Waxman and I have proposed a straightforward
85 and reasonable solution. First, the derivatives legislation
86 should fully preserve FERC's existing statutory authority.
87 Second, whether FERC and CFTC have overlapping authority, the
88 two agencies should conclude a Memorandum of Understanding
89 that sets the boundaries of their respective authority so as
90 ensure effective regulation. And third, in any area where
91 the two agencies agree that FERC should have primacy, CFTC
92 should be allowed to decline to exercise its regulatory
93 authority.

94 We will be working in the coming days to ensure that a
95 resolution along these lines can be reached before the

96 derivatives bill is brought to the House floor. We expect
97 that the members of the subcommittee and the full committee
98 will play an active role in this discussion. This
99 afternoon's hearing will help us to flesh-out the issues and
100 potential solutions.

101 I thank the witnesses for their participation,
102 especially the two chairmen who are sitting in front of us.
103 They are working hard in trying to find a way of resolving
104 these issues. We appreciate their efforts.

105 [The prepared statement of Mr. Markey follows:]

106 ***** COMMITTEE INSERT *****

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107 Mr. {Markey.} Let me now turn and recognize the ranking
108 member of the subcommittee, the gentleman from Michigan, Mr.
109 Upton.

110 Mr. {Upton.} Thank you, Mr. Chairman, and just because
111 the hearing started late, I want to defer my opening
112 statement and I will defer to Mr. Shimkus.

113 Mr. {Markey.} The gentleman is recognized for that
114 purpose.

115 Mr. {Shimkus.} Thank you and I want to thank my friend,
116 Fred Upton. I have got to go over to the Capitol floor
117 meeting on the Illinois Gitmo so that is where I am headed
118 from here.

119 Thousands of companies use derivatives to manage risk.
120 There are winners and losers in the market. One aspect of
121 this bill is transparency and our focus on does this bill
122 achieve this at the cost of the marketplace. With this bill
123 that the Ways and Means and Ag have both passed, are we
124 making it more difficult for these companies to manage risk?
125 I have talked with many and this will cost them more and
126 prices will go up. Will the CFTC and FERC both have
127 jurisdiction? Will it be shared? One has in some instances,
128 one in others. Does this bill make this clear or is this
129 burdensome with the CFTC and the FERC or companies dealing in

130 derivatives? Are any of these completely capable of this
131 request and can they afford new cost placed upon them?

132 This is an important hearing, Mr. Chairman. We need to
133 fix the agencies. We don't need to create new ones and we
134 will be focusing on that.

135 I yield back my time. I thank Fred for the yielding.

136 [The prepared statement of Mr. Shimkus follows:]

137 ***** COMMITTEE INSERT *****

138 Mr. {Markey.} The gentleman's time has expired.

139 The chair recognizes the Chairman of the full committee,
140 the gentleman from California, Mr. Waxman.

141 The {Chairman.} Thank you very much, Mr. Chairman.

142 Today we are examining whether the derivatives reform
143 legislation reported out of the House Agriculture Committee
144 could disrupt the Federal Energy Regulatory Commission's
145 current regulation of critical regional electricity markets.
146 The pending legislation is intended to bring greater
147 transparency and accountability to derivative markets. I
148 absolutely support that goal however the bill's broad
149 definition of swaps is so inclusive that it threatens to
150 displace comprehensive FERC regulation over regional
151 electricity market products. The bill could be read to
152 assign exclusive and mandatory authority over those products
153 to the Commodities Futures Trading Commission.

154 In 2000 and 2001, California experienced a severe energy
155 crisis. There were blackouts. There was economic chaos.
156 Energy prices in the State skyrocketed. We were being
157 victimized by unscrupulous traders in both power and
158 transmission rights. FERC, at the time, was soundly asleep
159 and unresponsive to the alarms we raised. But in the wake of
160 that California energy crisis, Congress amended and Mr.

161 Markey indicated he was the author, changes in the Federal
162 Power Act to give FERC authority to prevent and punish fraud
163 in market manipulation. We thought FERC had that authority
164 but during that period of time, they claimed they needed
165 clearer statutory authority. Well, if the legislation
166 reported out of the Agriculture Committee is not adjusted to
167 preserve the authority of FERC, it could undermine
168 authorities that Congress gave FERC in the aftermath of that
169 energy crisis to investigate and penalize market
170 manipulation.

171 FERC has strengthened its monitoring and enforcement
172 practices. No one, including the CFTC or sponsors of H.R.
173 3795, has suggested to us that the current regulatory regime
174 to prevent market manipulation or abuse in FERC's organized
175 regional markets is broken, so we need to ensure that efforts
176 to strengthen derivative regulation don't weaken existing
177 regulation. Before H.R. 3795 is considered on the House
178 floor, members need to understand how it would affect the
179 organized regional markets FERC has created and
180 comprehensively regulated pursuant to detailed tariffs.
181 These markets not only exist because FERC created them, the
182 products traded in these markets are directly linked to the
183 physical limits of the transmission system and are not traded
184 on broad exchanges. We need to make sure that the

185 legislation doesn't unintentionally displace FERC as the
186 regulator of the markets FERC has created.

187 This hearing is an important opportunity for us to find
188 out what impact the proposed legislation may have on these
189 critical markets and what changes to the legislation may be
190 appropriate. I appreciate the expert witnesses here to help
191 us understand its implications. Our committee has a
192 tradition of acting only on the basis of a thorough
193 understanding of the issues before it and I believe we can
194 help to improve H.R. 3795 before it is voted upon. And I
195 believe we are going to need changes in that legislation that
196 is reported out of the Agriculture Committee to make sure
197 that we don't have consequences that would be harmful to what
198 the good job that FERC is doing in this regard and should
199 continue to be able to do.

200 Thank you, Mr. Chairman.

201 [The prepared statement of Mr. Waxman follows:]

202 ***** COMMITTEE INSERT *****

|
203 Mr. {Markey.} Gentleman's time has expired.

204 The chair once again recognizes the ranking member, Mr.
205 Upton.

206 Mr. {Upton.} Thank you, Mr. Chairman, and I do
207 appreciate having this important hearing today.

208 We have two very distinguished panels and we are
209 fortunate to be able to hear their thoughts and concerns for
210 the legislation. H.R. 3795 as reported out of the Ag
211 Committee has some serious flaws that would negatively impact
212 the energy sector and I, like many members of this
213 subcommittee, oppose the legislation in its current form, and
214 it is my understanding that both Mr. Waxman, Mr. Markey, Mr.
215 Barton do share my concerns and I hope that we can work
216 together to change the bill before it is brought to the House
217 floor as early as next week.

218 As written, H.R. 3795 could lead to an increased energy
219 cost for all Americans and disrupt our nation's energy
220 markets. By limiting access to certain risk management tools
221 as this legislation does, the ability of energy providers to
222 hedge their market risks would be jeopardized and their
223 customers would be vulnerable to increased price volatility.
224 I understand that there is an appetite among many of my
225 colleagues to create new regulations to curb systemic risk in

226 the economy as a whole but this legislation engulfs markets
227 that are working properly, and in doing so creates new
228 problems that our economy and energy consumers do not need
229 during these very difficult times.

230 The legislation will undermine authorities that Congress
231 gave FERC to investigate and penalize market manipulation.
232 As part of the Energy Policy Act of '05, FERC was given the
233 authority to protect electric and natural gas markets against
234 manipulation or fraud by ensuring the transparency of those
235 markets. FERC's ability to exercise these authorities to the
236 full extent Congress intended would be in question with the
237 passage of this bill.

238 Additionally, under current law, FERC regulates
239 interstate transmission and sale of electricity to ensure
240 that electricity prices are just and reasonable. However,
241 this legislation would disrupt transmissions markets by
242 creating what would amount to contradictory regulation by the
243 CFTC. So this bill, H.R. 3795 in current form I don't
244 believe is ready for primetime and I would hope that in the
245 tough times of double-digit unemployment and a sagging
246 economy as we try to get our businesses back to work and
247 employing folks that this legislation will not move as it is.
248 Let us work together to get it right.

249 I look forward to the testimony and questions and I

250 yield back.

251 [The prepared statement of Mr. Upton follows:]

252 ***** COMMITTEE INSERT *****

|
253 Mr. {Markey.} Gentleman's time has expired.

254 The chair now recognizes the gentleman from Michigan,
255 Mr. Dingell. I recall vividly the gentleman from Michigan
256 back in 2005, and the energy conference fighting vigorously
257 in that conference committee to ensure that the anti-fraud,
258 anti-manipulation language was included in that legislation
259 and to a very large extent, that is at the core now of what
260 we are debating. So since I have a vivid memory of that
261 battle and it was the gentleman from Michigan who was leading
262 the fight, I yield him the time for an opening statement.

263 Mr. {Dingell.} Thank you, Mr. Chairman, and I very much
264 appreciate your kind remarks. I will commend you for holding
265 this hearing which I view as very important. If H.R. 3795,
266 the Over-The-Counter Derivatives Act of 2009 is acted upon
267 without significant input from the Committee on Energy and
268 Commerce, much of the work that has been done by this
269 committee over the years going back to before I was in this
270 body to back when Sam Rayburn was Speaker, will be undone,
271 and FERC will probably lose significant authority to protect
272 electric and natural gas markets against fraud and
273 manipulation, and worse than that, consumers will be denied
274 protection of a consumer protection agency in favor of an
275 agency that has a long tradition of failure in protecting

276 consumers. So thank you for doing this hearing today, Mr.
277 Chairman.

278 Most recently in the Energy Policy Act of 2005, as you
279 mentioned, the Congress acting on the suggestions of this
280 committee gave broad authorities to FERC to protect against
281 fraud and market manipulation to ensure price transparency in
282 the electricity and natural gas markets. That has worked
283 well and I look forward to hearing from Chairman Wellinghoff
284 of FERC on the various oversight mechanisms that FERC has in
285 place to ensure proper functioning of various markets.
286 Collaterally, we will look forward to hearing our other
287 witness tell us why it is that he can do better.

288 If H.R. 3795 were enacted into law without further
289 amendment, there is a serious potential that many of the
290 instruments used and organized in regional electric markets
291 and currently regulated by FERC would either be displaced by
292 the Commodities Futures Trading Commission or confusing
293 overlaps and conflicts would be created. In the past, such
294 conflicts have led to FTC and a hedge fund jointly litigating
295 to strip FERC of its consumer protection authorities. This
296 would not seem to be beneficial then to consumers and it has
297 been a matter of bipartisan concern as today's record will
298 show. In fact, one of our witnesses today will testify that
299 consumers would see a rate increase of 5 to 15 percent if

300 these activities are forced into exchanges.

301 Following the energy bubble price in natural gas and
302 electricity markets during 2008, FERC economists found that
303 this was caused in significant part by excessive speculation
304 in futures and derivatives markets for natural gas. We will
305 want to hear from the chairman of CFTC what they did about
306 those matters at that time. Likewise, it was FERC that
307 discovered a sharp spike in speculative activity in natural
308 gas futures that led to the prosecution of the hedge fund,
309 Amaranth Advisors. FERC's admission is simple, assist
310 consumers in obtaining reliable and efficient energy services
311 at a reasonable cost through appropriate regulatory and
312 market mechanisms. However, when one considers the
313 complexity of such task, it is critically important that the
314 agency with years of experience and understanding of energy
315 markets and a fine staff expertise required to carry out such
316 a task, should be allowed to continue its successful work.
317 We will also want to inquire as to why we have need of new
318 intrusion into these matters by an agency without any prior
319 expertise in these matters.

320 I thank you, Mr. Chairman.

321 [The prepared statement of Mr. Dingell follows:]

322 ***** COMMITTEE INSERT *****

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323 Mr. {Markey.} The gentleman's time has expired.

324 The chair recognizes the gentleman from Florida, Mr.
325 Stearns.

326 Mr. {Stearns.} Thank you very much, Mr. Chairman.

327 I think the consensus on both sides that FERC has done a
328 good job of closely regulating and monitoring the regional
329 transmission organizations and independent systems operator
330 through the use of tariffs and audits and investigations and
331 they should, I think the consensus is at least both parties
332 here that they should remain the sole regulatory authority
333 over such markets. However, obviously this bill acts in such
334 a way to establish a new and I believe overly expansive
335 definition of swap that would give the Commodity Futures
336 Trading Commission this exclusive authority over a number of
337 transactions that are already extensively regulated by FERC.

338 Now, the regulation by FERC for 15 years here has been
339 successful and, my colleagues, the products that they
340 regulate did not contribute to the meltdown so it is not
341 clear to me why we are moving forward on this. We all agree
342 that transparency is important. Accountability and stability
343 in the nation's financial market is important to minimize
344 systematic risk and prevent another financial crisis but the
345 organized power in the markets and the FERC regulatory system

346 did not cause this meltdown. Any over-the-counter derivative
347 legislation should address problems associated with
348 unregulated financial derivatives and not inadvertently
349 include FERC regulated markets that do not involve this type
350 pf risk that this legislation is proposing. Continued
351 unhindered operation of our energy markets are vital
352 obviously to meeting our electricity needs of millions of
353 Americans and obviously many of us don't see there is a need
354 for a major shift in the oversight of these markets.

355 So I think, Mr. Chairman, you and Mr. Waxman and Mr.
356 Upton have all voiced this clearly and I think that it is
357 very good that we have a hearing and confirm that we all
358 believe.

359 [The prepared statement of Mr. Stearns follows:]

360 ***** COMMITTEE INSERT *****

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361 Mr. {Markey.} We thank the gentleman very much.

362 The chair recognizes the gentleman from Pennsylvania,
363 Mr. Doyle.

364 Mr. {Doyle.} Mr. Chairman, thank you for holding this
365 hearing and inviting all of the important stakeholders to
366 provide their testimony today.

367 In particular, I am happy to see Vincent Duane from PJM
368 here today. As you know, PJM is the regional transmission
369 organization that keeps the lights on in my district and I
370 think it is important to get their input on how this bill
371 will affect them.

372 I am glad we are holding this hearing today to bring
373 attention to some potential unintended consequences of
374 reforming our financial regulatory system. It was only a
375 year ago that our financial system was on the edge of
376 grinding to a halt. Though there were many contributing
377 factors, lack of regulations in our commodities market
378 undoubtedly added to the problem.

379 I applaud my colleagues, the chairman of the House
380 Financial Services and Agriculture Committee, for their work
381 on this legislation to remedy the poor regulation of over-
382 the-counter derivatives and force irresponsible speculators
383 out of the market. However, in their attempt to be thorough,

384 I am concerned that my colleagues have overlooked a
385 duplicative effect that this bill could have on energy
386 markets at the end of the day, rate payers, also.

387 Since the creation of regional transmission
388 organizations, FERC has had a responsibility to monitor
389 energy markets in each RTO and review and report on any hint
390 of manipulation or abuse. In fact, with the passage of EPACT
391 2005, we gave FERC even greater authority to protect against
392 fraud and abuse in electricity and natural gas markets. Let
393 me be clear, we need to clean up our financial derivatives
394 markets and I think this bill does a good job of getting us
395 there. The CFTC needs to increase oversight and control of
396 these financial products and bring more transparency to the
397 swaps market. We just need to be sure that it doesn't
398 inadvertently require our RTOs to endure another layer of
399 regulation that would keep them from providing electricity to
400 consumers at competitive rates.

401 I look forward to the testimony from all our
402 distinguished witnesses and hope that we can produce an
403 excellent bill to bring to the floor. With that, Mr.
404 Chairman, I will yield back my time.

405 [The prepared statement of Mr. Doyle follows:]

406 ***** COMMITTEE INSERT *****

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407 Mr. {Markey.} Gentleman's time has expired.

408 The chair recognizes the gentleman from Louisiana.

409 Mr. {Scalise.} Thank you, Mr. Chairman.

410 I am strongly in favor of pursuing policies that prevent
411 another financial market collapse from occurring and I
412 strongly support increasing transparency and oversight in our
413 financial markets. However, I have serious concerns about
414 provisions in this bill that will raise utility costs on
415 every American family and will ship thousands more American
416 jobs overseas. Derivatives serve many purposes including
417 stabilizing prices and ensuring future deliveries of
418 commodities. Market participants also use derivatives to
419 ensure that consumers are protected from sudden price hikes
420 and other events including natural disaster that can
421 negatively impact costs. While I support increasing
422 oversight and transparency to reign in the large financial
423 institutions which contributed to the current economic
424 crisis, we need to make sure to consider the effects on those
425 who play by the rules.

426 Mr. Chairman, as with cap and trade and other reckless
427 policies, these proposals would kill American jobs and
428 increase costs for businesses and families across this
429 country. From the perspective of my position on this

430 committee, I have serious concerns about the utility rate
431 hikes that will result from provisions in this bill but it
432 doesn't stop there. We are seeing a dangerous trend with
433 this administration and the Democrats running Congress.
434 Provisions in this bill will have serious negative impacts on
435 our economy and these proposals taken with the cap and trade
436 energy tax and the government takeover of healthcare will
437 prohibit our small businesses, those very job creators in our
438 country from getting our economy back on track. These
439 reckless policies will result in billions of dollars in new
440 taxes on American families, millions of American jobs lost
441 and shipped overseas and the destruction of our economy. In
442 this current economic crisis, our focus should be on creating
443 new jobs not more reckless policy that run jobs out of our
444 country.

445 Again, Mr. Chairman, I am strongly in favor of pursuing
446 policies to prevent bad players from bringing down our
447 markets in the future and I believe that oversight and
448 transparency are key components to that goal. The American
449 people are asking where are the jobs and all they get from
450 this tone-deaf Congress are more radical schemes that raise
451 taxes on American families and run more jobs out of our
452 country. Enough is enough.

453 Thank you and I yield back.

454 [The prepared statement of Mr. Scalise follows:]

455 ***** COMMITTEE INSERT *****

|
456 Mr. {Markey.} Gentleman's time has expired.

457 The gentlelady from California, Ms. Matsui.

458 Ms. {Matsui.} Thank you, Mr. Chairman. Thank you for
459 calling today's hearing.

460 I would like to thank today's panelists for joining us
461 today to discuss legislation that would affect FERC's
462 jurisdictional markets and the transactions and products
463 created for use in these regulated markets. I look forward
464 to hearing all of your expert opinions. The expertise you
465 share here will be useful throughout the committee process as
466 we continue to discuss these matters.

467 I think all of us here would agree that the recent
468 financial crisis revealed serious weaknesses in the U.S.
469 financials regulation. While it is critical that we respond
470 to the risky trading strategies that nearly brought the
471 American economy to the brink of collapse, it is equally
472 crucial that we acknowledge the potential effects that
473 legislative efforts to improve transparency and stability in
474 over-the-counter derivatives markets may have on our energy
475 markets, particularly electricity and natural gas. Toward
476 this end, I believe that it is important to note that
477 electric utilities and other stakeholders have expressed
478 serious concerns about providing the CFTC the authority

479 already possessed by FERC to regulate regional electric
480 markets.

481 In my district, the Sacramento Municipal Utility
482 District, SMUD, enters into natural gas supply contracts and
483 OTC derivative agreements to reduce Sacramento's exposure to
484 price volatility. Unfortunately, most Californians vividly
485 recall at the beginning of this decade the rationing of
486 electricity which led to an artificial scarcity that created
487 opportunities for market manipulation by energy speculators.
488 We cannot allow our best intentions to examine regulatory
489 authorities to impair the ability of utilities to employ
490 tools to manage price risk and help keep rates affordable for
491 consumers, and we need to continually examine systemic risk
492 and the implications of applying certain means of
493 transparency to the derivatives markets.

494 I look forward to hearing from the panelists on the bill
495 before us today, and working with the committee and
496 stakeholders on these important matters. Once again, I thank
497 you, Mr. Chairman, for highlighting this important topic and
498 I yield back the balance of my time.

499 [The prepared statement of Ms. Matsui follows:]

500 ***** COMMITTEE INSERT *****

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501 Mr. {Markey.} Thank the gentlelady.

502 The chair recognizes the gentleman from North Carolina,
503 Mr. Butterfield.

504 Mr. {Butterfield.} Thank you very much, Mr. Chairman,
505 for convening this important hearing.

506 I am not an expert on these matters and I have tried to
507 learn as much as I can but from what I can understand, these
508 products minimize risk in a capricious system for end users.
509 Unfortunately, excessive over-the-counter trading by
510 speculators continues to increase the risk for system
511 irregularity and unpredictability. I am pleased given the
512 number of important domestic priorities vying for our
513 attention that Congress is paying close attention to
514 reforming the way we regulate derivatives. We simply cannot
515 afford the risk of allowing the system to operate like an
516 open casino and I appreciate the work thus far done on this
517 bill by the two committees. Still, as the chairman stated it
518 is critical that this subcommittee question the imprecise
519 definitions in the bill given the potential problems such
520 ambiguity would create for end users.

521 Last year, the newspaper in my district reported on the
522 importance of derivative for one of North Carolina's largest
523 utilities, Progress Energy. Manned, round-the-clock progress

524 power traders make OTC trades to hedge against risk and find
525 the lowest energy prices that are available. These
526 activities are critically important to minimize risk.
527 According to our State utility commission officials
528 interviewed in the article, electricity rates would be at
529 least double, that is double, without the success of
530 Progress' trading department. I mention this to illustrate
531 just how critical these financial instruments are in
532 controlling costs for consumers. I welcome and encourage the
533 transparency this legislation would create and I am hopeful
534 that the legislation will be crafted in a way that ensures
535 that end users can continue to enjoy these cost-cutting
536 benefits.

537 I look forward and thank the witnesses for their
538 testimony today and this microphone is not working.

539 [The prepared statement of Mr. Butterfield follows:]

540 ***** COMMITTEE INSERT *****

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541 Mr. {Markey.} Gentleman's time has expired.

542 The chair recognizes the gentleman from Vermont, Mr.

543 Welch.

544 Mr. {Welch.} I will waive my opening statement.

545 [The prepared statement of Mr. Welch follows:]

546 ***** COMMITTEE INSERT *****

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547 Mr. {Markey.} The chair recognizes the gentleman from
548 Washington State, Mr. Inslee.

549 I am sorry. I had an obstructed view here. The chair
550 recognizes the gentleman from California, Mr. McNerney.

551 Mr. {McNerney.} Thank you, Mr. Chairman, for convening
552 today's important hearing on the potential impacts of H.R.
553 3795 on energy markets. Reforms to our financial regulatory
554 system will affect the energy sector and consumers and I
555 appreciate the opportunity to hear the perspective provided
556 by our witnesses today.

557 As Congress proceeds with financial regulatory reform,
558 it is important that we avoid creating unnecessary
559 bureaucratic or jurisdictional impediments. We should build
560 on the regulatory processes that are functioning well, while
561 at the same time fixing flaws in the system. I am committed
562 to working with my colleagues, with outside experts, with
563 energy stakeholders to ensure that reforms increase
564 transparency, protect consumers and allow businesses to grow
565 and hire new workers. We should also carefully examine the
566 potential consequences that legislative proposals pose for
567 derivatives end users who represent a broad spectrum of
568 businesses across America.

569 And with that, I will yield back the balance of my time.

570 [The prepared statement of Mr. McNerney follows:]

571 ***** COMMITTEE INSERT *****

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572 Mr. {Markey.} Gentleman's time has expired.

573 The chair recognizes the gentleman from Washington

574 State, Mr. Inslee.

575 Mr. {Inslee.} I will waive. Thank you, Mr. Chair.

576 [The prepared statement of Mr. Inslee follows:]

577 ***** COMMITTEE INSERT *****

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578 Mr. {Markey.} And all members of the subcommittee have
579 completed their opening statements and by unanimous consent
580 we will recognize the gentleman from Michigan, Mr. Stupak, to
581 make an opening statement.

582 Mr. {Stupak.} Mr. Chairman, thank you for your courtesy
583 but I will waive this opening statement.

584 [The prepared statement of Mr. Stupak follows:]

585 ***** COMMITTEE INSERT *****

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586 Mr. {Markey.} Great, well, we thank the gentleman for
587 that.

588 So we will turn to our very distinguished panel and
589 recognize our first witness, Chairman Jon Wellinghoff of the
590 Federal Energy Regulatory Commission. As the head of FERC,
591 Chairman Wellinghoff oversees wholesale electricity
592 transactions and interstate electric transmission in the
593 United States amongst other matters. He has been a member of
594 the Commission since 2006, and was appointed chairman by
595 President Obama in March of this year. Thank you for joining
596 us this afternoon, sir. Whenever you feel comfortable,
597 please begin.

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598 ^STATEMENTS OF JON WELLINGHOFF, CHAIRMAN, FEDERAL ENERGY
599 REGULATORY COMMISSION; AND HON. GARY GENSLER, CHAIRMAN,
600 COMMODITY FUTURES TRADING COMMISSION

|
601 ^STATEMENT OF JON WELLINGHOFF

602 } Mr. {Wellinghoff.} Good afternoon, Chairman Markey.

603 Mr. {Markey.} If you could move that microphone down a
604 little bit closer to you.

605 Mr. {Wellinghoff.} Will do that. I think it is on.

606 Chairman Markey, Chairman Waxman, Ranking Member Upton
607 and members of the subcommittee, I would ask that my full
608 testimony be submitted for the record.

609 Mr. {Markey.} Without objection, it will be included.

610 Mr. {Wellinghoff.} Thank you and I will summarize as
611 follows.

612 Organized wholesale electric markets are currently
613 operated by independent entities called Regional Transmission
614 Organizations or Independent System Operators. They are
615 legally considered to be public utilities and fully under the
616 jurisdiction of the Federal Energy Regulatory Commission.
617 FERC fully and comprehensively regulates these wholesale
618 electric markets and all products traded in those markets.

619 That regulation extends both to the organization of those
620 markets through thousands of pages of market tariffs and
621 rules specifically and exclusively approved by FERC, and to
622 their operation through FERC's extensive oversight,
623 monitoring and enforcement. The products in those markets
624 are intentionally linked in a structure established by FERC
625 in an integrated market design that is intended to ensure
626 that rates and services in those markets are just and
627 reasonable. In addition to ensuring that market participants
628 do not engage in market manipulation and fraud, only FERC has
629 a Congressional mandate to ensure that rates charged and the
630 services provided in these markets are just and reasonable.

631 Duplicative oversight and enforcement in the RTO
632 electric markets by the CFTC would create market uncertainty
633 and the potential for disruption of market structure such
634 that rates and services could no longer be found by FERC to
635 be just and reasonable. Further, such duplication would
636 result in market inefficiencies and higher costs for
637 consumers through higher cost of capital and additional
638 regulatory expense. Interposing a new regulator unfamiliar
639 with the purpose and dynamic structure of these markets would
640 not serve the public interest.

641 Last month, Chairman Gensler testified that giving the
642 Federal Reserve certain authority in financial markets as ``a

643 potential of setting up multiple regulators overseeing
644 markets and market functions of the United States.'' He also
645 stated that ``While it is important to enhance the oversight
646 of markets by both the SEC and the CFTC, I think Congress
647 would want to closely consider whether it is best to set up
648 multiple regulators for some functions.``

649 The context of today's hearing is different but the
650 concern is the same. Any improvements warranted in the RTO
651 and ISO markets can be made by FERC. Interposing a new
652 regulator or having multiple regulators has not been
653 justified, is not needed and would be harmful to the
654 consumers that we are all charged to protect.

655 That completes my summary. I would be happy to answer
656 any questions of the subcommittee. Thank you.

657 [The prepared statement of Mr. Wellinghoff follows:]

658 ***** INSERT 1 *****

|
659 Mr. {Markey.} Thank you, Mr. Chairman, very much.

660 Our next witness is Gary Gensler. He is the chairman of
661 the Commodity Futures Trading Commission. Chairman Gensler
662 previously served at the United States Department of Treasury
663 as Undersecretary of Domestic Finance during the Clinton
664 Administration and prior to joining Treasury he worked for 18
665 years at Goldman Sachs where he was a partner and co-head of
666 finance. He was sworn in as chairman of the Federal, of the
667 CFTC in May by President Obama. We welcome you back to the
668 committee actually, Mr. Chairman. Whenever you feel
669 comfortable, please begin.

|
670 ^STATEMENT OF GARY GENSLER

671 } Mr. {Gensler.} Mr. Chairman, again if my full statement
672 could be in the record, I will just try to summarize.

673 Mr. {Markey.} Without objection, it will be included at
674 the appropriate place.

675 Mr. {Gensler.} Chairman Markey, Ranking Member Upton,
676 Chairman Waxman, it is good to be back here. I believe about
677 10 years ago I was in front of this committee or the full
678 committee, and I thank you for inviting me to testify
679 regarding regulation of the over-the-counter derivatives
680 markets, particularly with respect to energy markets.

681 If I might just before I turn to that discuss a little
682 bit what the CFTC is and we do as an agency. We oversee, as
683 you know, risk management contracts called futures. We
684 regulate these markets to ensure market integrity, protect
685 against fraud and manipulation, promote transparency of the
686 price discovery function to help lower risk to the American
687 public. We have broad surveillance and enforcement powers
688 and regulate, of course, exchanges, clearinghouses and then
689 the intermediaries that bring transactions there. The CFTC's
690 exclusive jurisdictions over the futures markets coexist
691 alongside other agencies' jurisdiction for underlying

692 commodities. For instance, Department of Agriculture
693 regulates marketing standards for corn and cash milk prices
694 and the CFTC regulates corn and milk futures. The Treasury
695 Department oversees the issuance of all Treasury Bills, Notes
696 and Bonds while, of course, the CFTC oversees Treasury
697 futures. And the Federal Energy Regulatory Commission
698 oversees many elements of the energy markets that this
699 committee is familiar with including natural gas pipelines
700 and electricity markets while the CFTC oversees natural gas
701 and electricity futures. So we live and coexist along other
702 Federal regulators.

703 The CFTC currently oversees futures trading in crude
704 oil, natural gas, electricity and other energy products,
705 gasoline and ore and so forth. Just to give an example, so
706 far this year futures equivalent to 114 billion barrels of
707 oil have traded with the notional amount of nearly \$7
708 trillion this year on the futures exchanges that we oversee.
709 Natural gas, a similar number would be nearly \$1.6 trillion
710 of notional amount of natural gas futures. Electricity
711 actually has futures on the NYMEX, on ICE and on a small
712 exchange you might not have heard of, the Nodal Exchange,
713 outside of this RTO issue that again we oversee some of these
714 futures markets and there, there is about 23 million
715 contracts have traded. It is about 7 percent of the overall

716 energy futures market is actually in electricity markets.

717 Now, the over-the-counter derivatives market is that
718 which is currently not regulated by FERC, by the CFTC, by any
719 other Federal regulator and we believe that that is certainly
720 part of the crisis last year, not the only part of the crisis
721 but that we need broad reform in the over-the-counter
722 derivatives market and it is currently out of sight of
723 Federal regulators. As Congress considers this, I believe
724 there are two principal goals, to lower risk to the American
725 public and promote transparency to the American public, and
726 statutory exemptions can undermine those two principal goals
727 as we move forward and as we have seen sometimes in the past
728 can lead to unintended consequences.

729 In terms of transparency, four quick things, one, the
730 administration has proposed that all standardized derivative
731 transactions be moved to under regulated transparent
732 exchanges. This allows for every treasurer, every assistant
733 treasurer of a corporation to see where the real time trading
734 is happening in standard contracts. Customized transactions
735 should still be allowed but the dealers would be subject to
736 comprehensive regulation. Two, all non-cleared transactions,
737 those too customized to be on those exchanges should be in a
738 trade repository and the regulators should be able to see
739 those trades. Three, data on that over-the-counter

740 derivatives market should be aggregated and made public as we
741 do weekly in the futures market. And fourth, stringent
742 recordkeeping and reporting should be established for the
743 swap dealers in these markets.

744 To lower risk in the market, to lower risk the
745 administration has proposed first that the standard contracts
746 be brought into centralized clearing. There is a very
747 natural debate as to who that covers. Do some end users are
748 they out of it or into it but I think that is separate from
749 the transparency debate because everybody benefits from
750 transparency. Secondly, swap dealers and major swap
751 participants would explicitly have to have capital to back up
752 what they are doing in their swap business. And third, the
753 swap dealer should be required to post and collect margin for
754 individual transactions. And lastly, the CFTC and SEC should
755 be authorized to mandate robust business conduct standards to
756 protect the market integrity, to protect against fraud and
757 manipulation.

758 Over-the-counter derivatives have traditionally not been
759 something that have any protection against fraud,
760 manipulation and importantly to this committee, position
761 limit authority. We have proposed and the administration has
762 proposed that the over-the-counter energy markets, oil,
763 natural gas and the like, also have extended position limit

764 authority aggregate position limit authority. We support
765 that.

766 I thank you for inviting me to testify today. I will be
767 happy to answer any questions you may have.

768 [The prepared statement of Mr. Gensler follows:]

769 ***** INSERT 2 *****

|
770 Mr. {Markey.} Thank you, Chairman Gensler, very much
771 for being here.

772 The chair will recognize himself for a round of
773 questions.

774 Chairman Wellinghoff, the House Agriculture Committee
775 has passed legislation dealing with the subject of
776 derivatives which has an impact on the FERC. Could you tell
777 us in your opinion, what is the worst case scenario that
778 could result from the passage of the House Ag Committee bill
779 without modification?

780 Mr. {Wellinghoff.} I think the worst case scenario is
781 one that has been discussed some by some of the members in
782 their opening remarks. If the swaps in that bill are
783 considered to be the exclusive jurisdiction of the CFTC and
784 interpretive to include products in the RTO markets to the
785 extent that we in fact can't regulate and we can't design and
786 develop those markets in ways that ultimately can ensure
787 functioning, I think it would be virtually impossible for use
788 to ensure that those markets are producing just and
789 reasonable rates, and we talked about one set of products
790 there. There has been some discussion of something called
791 FTRs, Financial Transmission Rights but that is just one
792 example. There will be a number of other products that are

793 going to be necessary to do things like bringing demand
794 response into the markets, to bring in wind and other
795 renewables into the markets. All those products are ones
796 that will be functioning fully as an integrated whole in the
797 RTO markets and if we in fact can't have authority and
798 jurisdiction over them and instead the CFTC has that
799 authority, then I think it is likely that those products
800 cannot be fully developed and integrated in a way that will
801 allow us to do things like bring in new renewables, bring in
802 the demand side of the markets.

803 Mr. {Markey.} So if the FERC lost jurisdiction over
804 these products which are created under the authority of the
805 FERC, would the FERC then have to consider not allowing for
806 the issuing of those products?

807 Mr. {Wellinghoff.} Well, certainly ultimately we could
808 close down the markets and go back to cost-based regulation
809 but I don't think anybody wants us to do that because I think
810 markets ultimately will produce the efficiencies that we need
811 to move forward towards a low-carbon future. So that is what
812 I am looking for, the ability to have those markets be
813 flexible, open, transparent and operated in a way that the
814 FERC can ensure that they do produce just and reasonable
815 rates.

816 Mr. {Markey.} Chairman Gensler, how can we avoid that

817 outcome?

818 Mr. {Gensler.} Well, Chairman Markey, I believe that
819 the CFTC as it coexists with other Federal regulators whether
820 it is the Agriculture Department or FERC today can continue
821 to coexist and we have had good productive meetings with you
822 and Chairman Waxman and your staffs and Chairman Peterson on
823 this very issue in the last several days. I think that we
824 need to bring broad reform to the over-the-counter
825 derivatives market. Neither agency currently oversees the
826 over-the-counter derivatives market. Neither agency
827 currently oversees the over-the-counter derivatives for
828 natural gas, electricity, fuel oil or any energy product
829 today. We need to bring that into these marketplaces but at
830 the same time as you say to work together with FERC and with
831 your committee staff to ensure that the public is best
832 protected and we continue to coexist and promote the public
833 interest.

834 Mr. {Markey.} Well, analyzing the kind of job that the
835 FERC does right now overseeing these markets, do you see any
836 gap in the work that they do, any under appreciation of
837 dangers that exist in the marketplace that the FERC is not
838 observing?

839 Mr. {Gensler.} Well, I wouldn't want to comment on FERC
840 and all of its authorities. They, of course, are very

841 important to the American public ensuring just and reasonable
842 rates as the chairman said and as a rate regulator. Our
843 domain is more as a market regulator to promote market
844 integrity of these derivative marketplaces and so I think
845 each of us right now do not oversee the over-the-counter
846 derivatives marketplace and that is a gap to the American
847 public.

848 Mr. {Markey.} Chairman Wellinghoff, much of your
849 testimony focuses on the potential for the bill approved by
850 the House Ag Committee to harm RTO markets and mechanisms
851 used in those markets to ensure just and reasonable prices
852 such as Financial Transmission Rights or Forward Capacity
853 Markets but isn't there also a risk that this bill could also
854 limit your ability to approve these or other mechanisms in a
855 non-RTO market as well?

856 Mr. {Wellinghoff.} Well, we certainly maintain that we
857 don't have regulatory oversight authority per se of the other
858 markets beyond the RTOs but we do believe that the authority
859 that you gave us in 2005 with respect to fraud and
860 manipulation allows us to look at those participants in those
861 other markets and to the extent they are acting in those
862 other markets in ways that we determine to be engaging in
863 fraud and manipulation that can, in fact, affect the cash
864 markets and the RTOs that we oversee, we believe we have

865 jurisdiction over that. We want to preserve that as well.
866 We think that is absolutely essential to ensuring that our
867 ability to stop fraud and manipulation in the electric
868 markets and the gas markets we have to have that ability to
869 look into those other areas.

870 Mr. {Markey.} Thank you, Chairman Wellinghoff, very
871 much and I just want to say to you, Chairman Gensler, your
872 testimony here back in 1998 was very instrumental in ensuring
873 that there was strong privacy protections in what became
874 known as the Gramm-Leach-Bliley bill. Almost all of the
875 privacy protections emanated from this committee and your
876 testimony helped enormously and for us to be able to do that.

877 Mr. {Gensler.} Well, I thank you. I remember working
878 well with you then. I look forward to working with you well
879 to bring reform to the over-the-counter markets here as well.

880 Mr. {Markey.} We appreciate that, sir, thank you.

881 The chair recognizes the ranking member, Mr. Upton.

882 Mr. {Upton.} Thank you. Thank you very much.

883 Chairman Wellinghoff, the Energy Policy Act of '05 gave
884 FERC the anti-manipulation authority over electric and
885 natural gas markets as you know and one of the reasons I had
886 supported the bill I thought it was a good provision. Could
887 you give us some examples in which FERC has used the
888 authority to protect consumers over the last couple of years?

889 Mr. {Wellinghoff.} I would be happy to. Thank you.

890 The Commission settled two major manipulation cases in
891 2009, Amaranth and ETP. We also analyze other cases and
892 concluded in those that manipulation didn't occur but we
893 opened over 100 investigations between 2007 and 2009, and an
894 increasing percentage of those are for investigations in
895 market manipulation. In fact, 70 percent of the
896 investigations opened in fiscal year 2009 were for market
897 manipulation specifically and in 2009, we recovered \$39
898 million in penalties and \$38 million in disgorgement so we
899 have acted extensively under that authority that you gave us
900 in 2005.

901 Mr. {Upton.} Great. I know this is--a number of us
902 sent a letter to the Speaker. I don't know if you saw this
903 letter. It was dated yesterday. I don't know if you saw it
904 or not. You haven't seen it. That is correct, sir. Have
905 you heard about the letter?

906 Mr. {Wellinghoff.} Just now.

907 Mr. {Upton.} Well, let me, all right, sorry. The
908 Chairman Markey outlined in his opening statement what might
909 be a reasonable compromise at least from this committee's
910 standpoint as you heard the opening statements from both
911 sides here as to a process that might be able to work. I
912 think it is all of us at least that I have heard this

913 afternoon have indicated that I think the underlying bill
914 does not provide that at all and something that Chairman
915 Markey outlined where you would actually define
916 responsibilities. FERC would in fact take sole
917 responsibility on a number of those issues might be something
918 that this committee, subcommittee could support as compared
919 to the underlying bill.

920 Mr. Gensler, I don't know if this is the first that you
921 have heard of that. It sounds like there have been some
922 discussions. Is that an approach that you think the CFTC
923 could accept and support?

924 Mr. {Gensler.} There have been constructive discussions
925 with the chairman directly both chairs and their staffs and
926 Chairman Peterson from the House Agriculture Committee and
927 his staff so I think those have been constructive dialogs.
928 There has been no resolution. I did want to comment one
929 thing about the as I understand it on the manipulation
930 standards that were raised by a number of members in their
931 opening statements. I believe you did, as well,
932 Representative Upton, but from what I understand there is
933 nothing in this swaps bill, the 3795 or as the administration
934 proposed it that would affect FERC's anti-manipulation
935 authority as outlined in the 2005 Act over its markets, the
936 markets that they oversee, the natural gas and the

937 electricity markets as you so well put into that bill in
938 2005. I think what we have been talking a lot with the
939 committee about is this issue of how we coexist. How the
940 CFTC as a market regulator oversees futures and derivatives
941 while very important functions that FERC oversees the
942 electricity and natural gas market is, you know, for just and
943 reasonable rates in the electricity markets is and so forth.
944 How we coexist and bring the best to the American public
945 particularly the thing that has been at the focus is these
946 Financial Transmission Rights that have been raised by a
947 number of members.

948 Mr. {Upton.} Mr. Wellinghoff, I know that you have not
949 been chairman of FERC for all that long but if you look back
950 to when we gave FERC the authority in the Energy Policy Act
951 of '05, are there things that FERC might have done
952 differently in terms of the role that they have played?

953 Mr. {Wellinghoff.} I am not sure that there are things
954 that we could have done differently. Fortunately, you will
955 have another FERC chairman before you later on. Betsy Moler
956 will, former FERC chairman, so you might want to ask that
957 question to her as well but I give Betsy a little question.
958 Certainly I will tell you that that authority in 2005 was
959 tremendously helpful to us with respect to the ability to go
960 in and investigate fraud and manipulation and ensure that it

961 wasn't ongoing. I think FERC prior to 2005, did have some
962 tools in its toolbox. I am not sure that they used them all
963 to the extent that they should have but I am not going sit
964 here post-judging a prior Commission or prior chairman but
965 certainly in hindsight, there are probably are some things
966 that could have been done. I can't give you any specifics
967 though.

968 Mr. {Upton.} Time has expired.

969 Mr. {Markey.} Gentleman's time has expired.

970 The chair recognizes the chairman of the full committee,
971 Mr. Waxman.

972 The {Chairman.} Thank you, Mr. Chairman.

973 In 1999, Californians paid \$7.4 billion for wholesale
974 electricity. A year later, those costs rose 277 percent to
975 \$27.1 billion so it was clear these prices were the result of
976 deliberate market manipulation and fraud that gave rise to
977 the legislation that has been referred to a number of times.
978 Now, Chairman Gensler, you just said you don't think that the
979 bill would interfere with FERC enforcing that law, is that
980 your position?

981 Mr. {Gensler.} As I understand it the 2005 Act which
982 granted the anti-manipulation authorities that have been
983 referred to by many members, I am not aware of something in
984 3795, nothing in that swaps bill that I am reading carefully

985 because the general counsel for the CFTC wrote this but that
986 it wouldn't affect FERC's anti-manipulation authority under
987 that Act over the markets that they oversee. As you
988 mentioned the electricity crisis, I do think that one of the
989 important lessons out of the Enron crisis and the electricity
990 crisis which was then, you know, complemented in a bad way
991 with this terrible crisis last year is that we have to bring
992 reform to the entire over-the-counter derivatives market and
993 not have an exception for instance for some part of the over-
994 the-counter derivatives marketplace.

995 The {Chairman.} I don't disagree that we need
996 regulation in light of the experience we have had where there
997 was no cop on the beat in these over-the-counter trades but
998 as I read H.R. 3795, I think there is a very good chance that
999 RTO products and services regulated under FERC approved rules
1000 would fall under the definition of a swap and that means that
1001 CFTC would have exclusive jurisdiction over these products
1002 and services. You don't think it means that. Would you
1003 disagree with the idea of a clarification that FERC's
1004 jurisdiction is not being intruded upon?

1005 Mr. {Gensler.} Well, I think that is what we are
1006 working with you and Chairman Markey and Chairman Peterson,
1007 hopefully productively on. I do think that the CFTC has an
1008 important role to play as a market regulator over derivatives

1009 products to ensure market integrity and market transparency
1010 and FERC has a very important public role to play.

1011 The {Chairman.} If market manipulation or fraud
1012 occurred in a FERC regulated marketplace under CFTC's
1013 jurisdiction, would the exclusivity clause of the Commodities
1014 Exchange Act prevent FERC from exercising its anti-market
1015 manipulation authorities? In other words, would FERC
1016 regulation be displaced by CFTC regulation? You don't think
1017 so but that is what we are concerned about. I think it needs
1018 to be clarified if you don't think--if you agree with us.

1019 Mr. {Gensler.} Well, I think that anti-manipulation
1020 standard that you put in place in the '05 Act which talked
1021 about in connection with the physical markets that the
1022 natural gas markets and the electricity markets. Similar to
1023 how we coexist with the Agriculture Department that has many
1024 authorities in the agricultural markets.

1025 The {Chairman.} Well, you coexist now with FERC, right?

1026 Mr. {Gensler.} Yes.

1027 The {Chairman.} Okay, so the question is well, let me
1028 ask Chairman Wellinghoff, what do you think of the
1029 possibility given the way this swap is defined that they may
1030 just some court may come along and say well, either you both
1031 have the regulation or they have exclusive regulation?

1032 Mr. {Wellinghoff.} I think it is a definite concern.

1033 Not only a concern but it is a looming one in that in the
1034 Amaranth case that we have in part pending, part of that case
1035 is still pending. One of the parties was not let out of the
1036 case and we are moving forward with it but in that case the
1037 CFTC was arguing in court that FERC did not have jurisdiction
1038 in the financial markets so it is already cloudy and I think
1039 all we are doing is moving the other direction here with this
1040 legislation of making it more cloudy or more certain that the
1041 exclusive jurisdiction is on the CFTC side. So we need to
1042 ensure that FERC has the ability to go in and do the
1043 investigation and have the jurisdiction over the parties that
1044 are engaged in the manipulation and fraud, otherwise we can't
1045 do our job.

1046 The {Chairman.} Well, the financial reform legislation
1047 is important because the financial meltdown demonstrated that
1048 there were significant regulatory gaps but the RTO markets
1049 are comprehensively regulated by FERC and we need to make
1050 sure that we don't unintentionally roll back important
1051 protections against market manipulation and fraud that are
1052 already in the law. And as I pointed out as a Californian,
1053 the reason that law was changed was to plug up the gap and we
1054 filled that gap very clearly by designating FERC as the
1055 agency to be responsible. I don't want us now to plug up
1056 another gap in regulatory authority by confusing FERC's

1057 jurisdiction. Yes, Chairman Gensler.

1058 Mr. {Gensler.} I was just going to say actually neither
1059 agency right now have jurisdiction over a transaction between
1060 a large financial house and a utility company called an over-
1061 the-counter derivative in natural gas, heating oil,
1062 electricity. Where FERC has very clear jurisdiction on the
1063 RTOs and to protect the public, where we have very clear
1064 jurisdiction on something called a futures market like NYMEX
1065 or this Intercontinental Exchange, we do have some pretty
1066 good authorities and we coexist but there is a whole world
1067 out there, trillions of dollars notional amount. What I
1068 quoted big numbers the over-the-counter market is bigger and
1069 that is where we want to regulate the dealers to lower risk
1070 and promote transparency to the American public and I think
1071 we can continue to coexist and work with your staffs to make
1072 sure that the FERC doesn't inadvertently or unintentionally
1073 be less able to protect the public.

1074 The {Chairman.} It is not that we are trying to protect
1075 FERC. We are trying to make sure the regulation makes sense
1076 and it makes sense for you to regulate futures and but it
1077 makes sense for FERC to regulate the manipulation of the
1078 markets, and there may be some ambiguity down the line. What
1079 do you think ought to be done then? I suppose you two ought
1080 to get together and figure it out but we ought not to start

1081 with a law that is so ambiguous that neither of you will
1082 regulate or both of you will regulate. And then it seems to
1083 me, Chairman Wellinghoff, if the chair would permit just one
1084 last thing. What do you think the impact would be on the
1085 energy markets if there are two regulators they have to
1086 respond to?

1087 Mr. {Wellinghoff.} Well, uncertainty in the markets
1088 creates more risk and it creates more cost, and we have seen
1089 that over and over and that would be the result.

1090 The {Chairman.} Thank you. Thank you, Mr. Chairman.

1091 Mr. {Markey.} Gentleman's time has expired.

1092 The chair recognizes the gentleman from Louisiana, Mr.
1093 Scalise.

1094 Mr. {Scalise.} Thank you, Mr. Chairman.

1095 Chairman Gensler, if you have done an analysis on the
1096 legislation can you talk about any kind of impact that you
1097 have assessed that it would have on energy prices or on
1098 energy products?

1099 Mr. {Gensler.} I think that the legislation if able to
1100 pass with strong transparency initiatives where utility
1101 companies whether small or large could clearly see where this
1102 market trades on a real time basis that helps to lower cost.
1103 Right now this market has a significant information deficit,
1104 where Wall Street benefits and Main Street loses out frankly,

1105 and that is because that small utility company or large
1106 utility company can't see on a real time basis the trades in
1107 the over-the-counter natural gas marketplace, the over-the-
1108 counter coal marketplace, the over-the-counter electricity
1109 marketplace. They can see a lot of transparency on a futures
1110 market or on some of the markets that FERC regulates but not
1111 on these over-the-counter so I think that helps in a
1112 significant way. It would also lower the cost to the
1113 American public of the crisis that could come when large
1114 financial institutions concentrate so much risk when they
1115 keep these trades on their books.

1116 Mr. {Scalise.} All right and we have talked about the
1117 large financial institutions and the problem they have and
1118 the concern that those of us that have opposed this bill have
1119 is that it is not necessarily the large folks who actually
1120 did the damage. It is the small guys who played by the rules
1121 that would be hurt by this and with that I would ask, Mr.
1122 Wellinghoff, you talked about in your testimony you actually
1123 used the term harmful to consumers. If you can expand on,
1124 you know, kind of your take on how this legislation would be
1125 harmful to consumers.

1126 Mr. {Wellinghoff.} Harmful in the sense that if we had
1127 two regulators in the space and the industry and the
1128 participants in that market were uncertain as to the clarity

1129 of that regulation which they certainly could be if you had
1130 two regulators with conflicting positions. Ultimately you
1131 are going to increase cost because you are going to do two
1132 things. Number one, you are going to increase the cost of
1133 equity because risk is going to be increased and number two,
1134 you are going to increase regulatory costs as well. So both
1135 of those, all of those costs the consumer pays for
1136 everything. All of those costs are ultimately going to go to
1137 the consumer. Now, I haven't quantified it and I am willing
1138 to accept former Chairman Moler's numbers that she has
1139 presented in her testimony but we haven't done a specific
1140 quantification.

1141 Mr. {Scalise.} Okay and then, Chairman Gensler, would
1142 there be more systemic risk if companies chose not to hedge
1143 their risk and, you know, they just thought that the cost
1144 would be prohibitive?

1145 Mr. {Gensler.} Congressman, hedging is a very important
1146 part of our economy. We are promoting that in this bill. We
1147 are lowering risk to the American public allowing utilities
1148 and energy companies to hedge customized risk but those risks
1149 that are standard enough, for instance a 2-year risk on
1150 natural gas pricing, standard contract, we want to move that
1151 onto the clearinghouses to lower risk and very importantly on
1152 the transparent trading venues. And if I might note, I don't

1153 think the transparency costs end users. If you didn't know
1154 what an apple cost when you walked in the store, does it help
1155 you if you have to pay an extra nickel or 10 cents for that
1156 apple because you don't know what it cost the prior person
1157 walking in the store? I don't think so. We bring every
1158 securities transaction and every futures transaction to
1159 transparent markets. Why shouldn't we do that in natural gas
1160 and electricity over-the-counter markets?

1161 Mr. {Scalise.} Chairman Wellinghoff, you had mentioned
1162 that one of FERC's responsibilities is to ensure that
1163 consumers have adequate supplies of energy at reasonable
1164 prices.

1165 Mr. {Wellinghoff.} Correct.

1166 Mr. {Scalise.} How important is it to you that the
1167 responsibility as a core tenet of energy regulatory system is
1168 ensuring that reasonable prices exist for consumers?

1169 Mr. {Wellinghoff.} Well, it is essential and the only
1170 way to have reasonable prices with these RTO markets is to
1171 ensure that they are well-designed as a structural package
1172 and that is why it is so important to have one entity who
1173 oversees that structural package to make certain that the
1174 design is adequate to ultimately get to the end result of the
1175 reasonable prices.

1176 Mr. {Scalise.} Okay and then you had also talked about

1177 or I think in your testimony, the intensive capital
1178 expenditures, just the energy industry as a whole is a
1179 capital-intensive industry. Could you comment on the role
1180 that the FERC regulated financial products play in securing
1181 capital for the development of new technologies and if that
1182 capital is limited by new regulations, what that role would
1183 be on the ability to have newer technologies developed?

1184 Mr. {Wellinghoff.} Certainly, with respect to recovery
1185 of investment like in transmission to the extent that those
1186 entities are not able to recover their full investments, they
1187 are not going to invest in new technologies, the newest
1188 market that we need to ultimately move us into the next phase
1189 of where we need to go with respect to our energy futures.

1190 Mr. {Scalise.} Thank you and I yield back.

1191 Mr. {Markey.} Gentleman's time has expired.

1192 The chair recognizes the chairman emeritus of the
1193 committee, Mr. Dingell.

1194 Mr. {Dingell.} Thank you.

1195 Mr. {Markey.} Mr. Chairman, could you move the
1196 microphone over a little?

1197 Mr. {Dingell.} Right, the legislation would make energy
1198 hedging and trading subject to CFTC's exclusive jurisdiction
1199 and require that all of these transactions be cleared and
1200 traded on exchanges. FERC would lose jurisdiction. First of

1201 all, of what would you lose jurisdiction?

1202 Mr. {Wellinghoff.} As I understand it we would lose
1203 jurisdiction over these markets and their operation
1204 ultimately.

1205 Mr. {Dingell.} What would you be able to do with regard
1206 to an RTO that you wanted or with regard to an RTO that
1207 wanted to put in some carrying capacity? What would happen
1208 with regard to your efforts with regard to dealing with fraud
1209 or market manipulation? If you couldn't get at the
1210 derivative and you couldn't inquire into the derivative, how
1211 would you then be able to conduct a meaningful and complete
1212 investigation in those two instances?

1213 Mr. {Wellinghoff.} Our hands would be tied.

1214 Mr. {Dingell.} I am sorry.

1215 Mr. {Wellinghoff.} Our hands would be tied.

1216 Mr. {Dingell.} Your hands would be tied. Now, where
1217 else would your hands be tied by that provision?

1218 Mr. {Wellinghoff.} In creating new products for these
1219 markets as I mentioned by moving forward into things like
1220 renewables and energy efficiency demand response we are
1221 starting to put the demand side into these markets. It has
1222 never been done before. It is just starting to over the last
1223 couple of years.

1224 Mr. {Dingell.} And so the derivatives that would

1225 finance this you would not be able to go into?

1226 Mr. {Wellinghoff.} That is correct.

1227 Mr. {Dingell.} And so you would not have any way of
1228 knowing whether you had a successful investigation or
1229 rulemaking or ratemaking procedure, is that right?

1230 Mr. {Wellinghoff.} That is possible, yes.

1231 Mr. {Dingell.} All right, I would--I am going to submit
1232 and ask unanimous consent that I be permitted to submit a
1233 letter to the Commission following up with some of these
1234 questions.

1235 Mr. {Markey.} Without objection, so moved.

1236 Mr. {Dingell.} Now, what is the problem here, Mr.
1237 Wellinghoff, with regard to the situation which brings about
1238 this legislation requiring us to force all of the derivatives
1239 into exchanges and what authority do you lack to address
1240 these questions?

1241 Mr. {Wellinghoff.} I think the issue as I understand it
1242 is again to the extent that the definition of swaps in the
1243 legislation could intrude into the RTO markets it would in
1244 fact take away our ability to develop and shape these markets
1245 in ways that can ensure that rates are just and reasonable.

1246 Mr. {Dingell.} You wouldn't understand the underlying
1247 financing and you would have no power whatsoever to go into
1248 those questions, is that right?

1249 Mr. {Wellinghoff.} That is correct.

1250 Mr. {Dingell.} All right, now, FERC has stated in its
1251 State of the Markets report that natural gas and related
1252 electricity costs in the U.S. were driven up in 2008, by
1253 flows of funds in the derivatives and financial products such
1254 as futures and swaps at a time when there was adequate
1255 inventories of natural gas. Did the CFTC do an adequate job
1256 of regulating excessive speculation at that time?

1257 Mr. {Wellinghoff.} I would suggest you ask Chairman
1258 Gensler that question.

1259 Mr. {Dingell.} The answer is what?

1260 Mr. {Wellinghoff.} I would suggest you ask Chairman
1261 Gensler that question.

1262 Mr. {Dingell.} Okay now, Mr. Gensler, did you do a good
1263 job of regulating those matters at that time?

1264 Mr. {Gensler.} It is good to be back before you,
1265 Representative Dingell.

1266 Mr. {Dingell.} Let us talk about your agency. Did it
1267 do an adequate job? The answer to that question is no is it
1268 not?

1269 Mr. {Gensler.} I keep calling you chairman I know
1270 because if I am allowed to, Chairman Emeritus, I came onto
1271 the agency in May of this year.

1272 Mr. {Dingell.} I don't want to do that. Did the agency

1273 do an adequate job in 1 minute and 20 seconds?

1274 Mr. {Gensler.} And what I found is the staff in the
1275 agency is very strong and what we have done is we have taken
1276 a serious look at bringing back, we have had position limits
1277 at the energy space until June of 2001, working with the
1278 exchanges. We are looking seriously about bringing them
1279 back. I also just wanted to comment.

1280 Mr. {Dingell.} So your answer is you did not do an
1281 adequate job? Now, given FERC's pervasive regulation of RTO
1282 and ISO markets is there a regulatory gap in those areas that
1283 must be filled by the CFTC and if so, what is it?

1284 Mr. {Gensler.} I think there is a significant
1285 regulatory gap right now in what is called over-the-counter
1286 derivatives. Transactions that are not on a RTO, they are
1287 transactions between.

1288 Mr. {Dingell.} Require you to have legislation that
1289 excludes the FERC in its entirety from jurisdiction over
1290 those kinds?

1291 Mr. {Gensler.} Currently, the CFTC has exclusive
1292 jurisdiction over futures markets and that is whether it is
1293 on NYMEX or and so forth and I don't think there is any
1294 dispute here between our agencies here on that.

1295 Mr. {Dingell.} But your legislation here would say to
1296 it that there could be no inquiry into those matters

1297 whatsoever by FERC?

1298 Mr. {Gensler.} It is not, with all respect that is not
1299 how we read.

1300 Mr. {Dingell.} Let me finish.

1301 Mr. {Gensler.} I am sorry.

1302 Mr. {Dingell.} That benefit by depriving FERC of any
1303 authority to address those questions which might lie under
1304 its concern?

1305 Mr. {Gensler.} Our read of 3795, it does not affect
1306 that which you put in place in 2005, and in fact there has
1307 been an exclusion from our statute since the 1930s that we
1308 don't regulate what we call forwards, spot markets or forward
1309 markets, what some people call the cash market so the day
1310 ahead market and the electricity market all of these are not.

1311 Mr. {Dingell.} That is splendid but not responsive. I
1312 would like to hear what CFTC has done to prosecute the
1313 excessive speculation that was cited in the FERC State of the
1314 Market report regarding natural gas and electricity prices be
1315 driven up by flows of funds into derivatives. What have you
1316 done about that?

1317 Mr. {Gensler.} We have a very strong and robust
1318 enforcement agency that would bring numerous cases. In fact,
1319 the Amaranth case that was earlier referred to we both
1320 brought and settled, and Jon and I met on that in a very

1321 constructive way. We have had their enforcement people
1322 working with ours and our enforcement people working with
1323 FERC I think in a very constructive way and have a memorandum
1324 on understanding which we can build upon.

1325 Mr. {Dingell.} Now, if you please, Mr. Wellinghoff,
1326 please tell us how you will be able to carry out your mission
1327 with regard to making the RTOs work, deal with the supply
1328 problem, deal with all of your other responsibilities if you
1329 don't have authority to get into the derivatives which are a
1330 major part of the financing of all of these apparitions?

1331 Mr. {Wellinghoff.} I won't with certainly with respect
1332 to fraud and manipulation. I need that authority, continue
1333 to have that authority to ensure that there is no fraud and
1334 manipulation.

1335 Mr. {Dingell.} Thank you. Thank you, Mr. Chairman.

1336 Mr. {Markey.} We thank the chairman.

1337 The chair now recognizes the gentleman from Oregon, Mr.
1338 Walden.

1339 Mr. {Walden.} Thank you very much, Mr. Chairman, and
1340 thank you for holding this hearing on this important
1341 legislation.

1342 Mr. Wellinghoff, I want to ask you, I have some concerns
1343 regarding the clarity of H.R. 3795 as to whether it would
1344 impact the operation and cost of the Federal power marketing

1345 administrations and customers? As you know, I am from the
1346 great northwest, the State of Oregon and we do things and we
1347 don't necessarily operate under an RTO but Bonneville has its
1348 own trading floor and so I am curious from both of you on how
1349 this your take on this legislation and its effect there and,
1350 Mr. Wellinghoff, you can start and then maybe, Mr. Gensler,
1351 if you could comment, as well.

1352 Mr. {Wellinghoff.} Congressman Walden, quite honestly I
1353 haven't looked at it from that perspective so I don't really
1354 want to give you a view, you know, from off the top of my
1355 head. I mean there may be some collateral affects but I
1356 really haven't analyzed it.

1357 Mr. {Walden.} Mr. Gensler.

1358 Mr. {Gensler.} Again, I am not aware of any but we
1359 would be glad to work with you and your staff as we are
1360 working with Chairman Markey.

1361 Mr. {Walden.} I think one of the issues that has been
1362 raised is that this should be clear it doesn't cover the
1363 physical delivery of commodities such as electric power and
1364 gas, and is that clear?

1365 Mr. {Gensler.} That is right just as in the Commodities
1366 and Exchange Act for 70-some years it has not only excluded
1367 the physical delivery but also the forward markets that is
1368 excluded. Similarly 3795 and the administration would

1369 exclude the forward, these day-ahead markets and so forth.

1370 Mr. {Walden.} And, Mr. Wellinghoff, do you concur with
1371 that analysis?

1372 Mr. {Wellinghoff.} Yes.

1373 Mr. {Walden.} So it is clear that real time day-ahead
1374 turn markets for physical delivery power and gas are not
1375 included in coverage of this bill?

1376 Mr. {Gensler.} That is as we understand it as well some
1377 of the other forward markets that are well, you know,
1378 regulated elsewhere. Anything that has a forward market and
1379 has a physical delivery is out.

1380 Mr. {Walden.} Okay, then I just want to ask about your
1381 concern again raised to me by folks who operate in these
1382 markets about the concern about restriction of capital and
1383 limited ability to hedge under this legislation and from a
1384 power perspective, from FERC's perspective maybe first, what
1385 sort of concerns are you hearing? What sort of concerns do
1386 you have about this notion that it could restrict capital and
1387 limit the ability for some of these concerns to hedge?

1388 Mr. {Wellinghoff.} People that do hedge certain
1389 products in these markets, utilities primarily, their fuel
1390 have expressed concerns to me.

1391 Mr. {Walden.} Right.

1392 Mr. {Wellinghoff.} Again, I haven't quantified the

1393 affect. I think probably again the testimony of former
1394 Chairman Moler goes into that in some great detail and
1395 actually does some quantification there that might be helpful
1396 to you.

1397 Mr. {Walden.} Okay.

1398 Mr. {Gensler.} I think, Congressman, commercial hedgers
1399 have raised two concerns. One is could they enter into
1400 commercially needed but particular tailored transactions that
1401 aren't standard and the answer is an unambiguous yes but that
1402 is a legitimate question they have raised. Some members of
1403 the Senate or the House might feel differently but the
1404 administration says yes. Two is on the standard contracts
1405 they have raised the question is how is credit priced in
1406 there? Will they have to post collateral if it is lowering
1407 risk to a clearinghouse?

1408 Mr. {Walden.} Right.

1409 Mr. {Gensler.} There is some like myself, I believe
1410 that standard transactions should be brought to a
1411 clearinghouse to lower risk to the American public but there
1412 is a legitimate public policy debate whether end users,
1413 commercial hedgers using these transactions are exempted.
1414 The 3795 does exempt them. I have called that they not be
1415 exempted and so that is the public policy debate there. I
1416 think even if Congress exempts this commercial end users from

1417 the clearing requirement, we should not inadvertently exempt
1418 them from the transparency. We can separate that. Congress
1419 can write the law that the large financial houses have to
1420 bring it into a trading venue and then everybody gets the
1421 benefit of transparency and then you sidestep the clearing
1422 issue.

1423 Mr. {Walden.} All right, thank you, Mr. Chairman, that
1424 is all the questions I have.

1425 Mr. {Markey.} Gentleman's time has expired.

1426 The chair recognizes the gentleman from Michigan, Mr.
1427 Stupak.

1428 Mr. {Stupak.} Thank you, Mr. Chairman.

1429 Mr. Wellinghoff, Mr. Dingell indicated that your State
1430 of the Markets report and that report strongly indicated a
1431 lack of physical market fundamentals was used in determining
1432 the price of natural gas and electricity, and the conclusion
1433 was that large pools of capital flowed into these various
1434 financial instruments that turned the commodities like
1435 natural gas into investment vehicles as opposed to providing
1436 a product there. Does that accurately reflect FERC's current
1437 position that financial speculation in the natural gas market
1438 has increased prices?

1439 Mr. {Wellinghoff.} We believe it did at that time.

1440 That was one reason we went after Amaranth.

1441 Mr. {Stupak.} Do you believe that is still going on now
1442 and we have seen 100 percent increase in the price of while
1443 supplies are more than adequate.

1444 Mr. {Wellinghoff.} Actually, natural gas prices have
1445 gone down substantially.

1446 Mr. {Stupak.} I meant gasoline. You are right, natural
1447 gas.

1448 Mr. {Wellinghoff.} Natural gas and that is what we
1449 focus on is natural gas.

1450 Mr. {Stupak.} Right.

1451 Mr. {Wellinghoff.} So I don't believe it is occurring
1452 now.

1453 Mr. {Stupak.} Okay, do you believe that natural gas--so
1454 you think natural gas has leveled out then? It is not
1455 continuing to be distorted at all?

1456 Mr. {Wellinghoff.} We have a lot of different dynamics
1457 going on in natural gas right now. There has been a
1458 tremendous amount of new shale finds in this country and
1459 technology to develop those shales. Shales, as well, can be
1460 more easily shut-in then traditional wells and brought back
1461 up much quicker so that dynamic is going to affect the
1462 market, that technological and that resource dynamic is going
1463 to have a big affect on the market.

1464 Mr. {Stupak.} You mentioned Amaranth a couple times and

1465 Mr. Gensler has also too, that started what in about 1995
1466 when you first, when Amaranth started to break? When did you
1467 start really getting into Amaranth?

1468 Mr. {Wellinghoff.} I believe it was 2006-2007,
1469 actually.

1470 Mr. {Stupak.} 2006, okay, were you going to bring a
1471 cease and desist that stopped the transaction or restraining
1472 order?

1473 Mr. {Wellinghoff.} We do not have cease and desist
1474 authority.

1475 Mr. {Stupak.} Is that something you need to?

1476 Mr. {Wellinghoff.} It would be helpful.

1477 Mr. {Stupak.} I mean on Amaranth that was like \$6
1478 billion, wasn't it?

1479 Mr. {Wellinghoff.} Yes, it would have been extremely
1480 helpful in that case.

1481 Mr. {Stupak.} And what have you been able to recover?

1482 Mr. {Wellinghoff.} We have recovered \$7 and a half
1483 million.

1484 Mr. {Stupak.} \$7 and a half million out of \$6 billion?

1485 Mr. {Wellinghoff.} Well, the total fund was that amount
1486 yes.

1487 Mr. {Stupak.} All right, if you had cease and desist
1488 would that assist you?

1489 Mr. {Wellinghoff.} That would assist us tremendously,
1490 yes.

1491 Mr. {Stupak.} Mr. Gensler, let me ask you this. You
1492 made a number of statements for Congress a need to keep any
1493 end user exemption from centrally clearing swaps as narrow as
1494 possible. As the current bill is written, financial
1495 institutions have posed systemic risk to the U.S. economy are
1496 exempt from clearing swaps if they are a counter party to an
1497 end user so does CFTC have an estimate of how much of the
1498 market will be exempt from the clearing requirement because
1499 of this exemption?

1500 Mr. {Gensler.} It is a very good question. It is hard
1501 to determine because there is such a darkness in this market
1502 but it is very significant. The standard part of the market
1503 in oil and energy products may well be, the standard part of
1504 the market over half of the market is standard enough to be
1505 cleared.

1506 Mr. {Stupak.} Right.

1507 Mr. {Gensler.} But then the question is what portion of
1508 that do have end users. Now, and that is a very hard number
1509 to get but it is not in the single digit percents. I mean it
1510 is a significant portion and that is why we think at least we
1511 should do it to exchanges and if possible to clearing.

1512 Mr. {Stupak.} Well, does the CFTC then believe that

1513 tier one financial companies that pose systemic risk to the
1514 financial services industry should be exempt from centralized
1515 clearing of swaps?

1516 Mr. {Gensler.} No, I believe strongly that all swaps
1517 that are standard enough be brought into clearing and that
1518 end users be able to be allowed to do individual credit
1519 arrangements as they do now in these marketplaces and again,
1520 if Congress thinks to exempt them, let us not exempt them
1521 from the trading requirement at least.

1522 Mr. {Stupak.} Good. Well, we talked a little bit about
1523 liquidity too here today so if we allow the end users to
1524 remain exempt, would requiring tier one financial companies
1525 to centrally clear swaps on exchange regardless of their
1526 counterparty providing us liquidity in the market for pricing
1527 and hedging?

1528 Mr. {Gensler.} I think it does. I think right now
1529 these markets are internalized and there are five or six
1530 large concentrated pools of capital. They are sophisticated.
1531 Many Americans wonder as they go home for the holidays why so
1532 much money is being made on Wall Street. This is at the core
1533 of it. It is not the only reason but they internalize dark
1534 markets and I understand that but I think it is now time I
1535 believe working with Congress to bring transparency as this
1536 Congress did with President Roosevelt in the '30s to the

1537 securities and futures markets.

1538 Mr. {Stupak.} You mentioned OTC, you mentioned ICE and
1539 the Dubai market, has that been up and running now?

1540 Mr. {Gensler.} It has been very small, sir.

1541 Mr. {Stupak.} Still?

1542 Mr. {Gensler.} Yeah.

1543 Mr. {Stupak.} Yet you see?

1544 Mr. {Gensler.} Well, it might develop larger but right
1545 now it has been very small. I just wanted to mention
1546 something on an earlier question.

1547 Mr. {Stupak.} Go ahead.

1548 Mr. {Gensler.} Right now these markets base, these
1549 Financial Transmission Right markets.

1550 Mr. {Stupak.} Yes.

1551 Mr. {Gensler.} From the statistics right from the PHM
1552 market, about 74 percent of their transactions are with the
1553 large financial houses, the houses you are talking about.

1554 Mr. {Stupak.} Tier one.

1555 Mr. {Gensler.} On dollar value it is apparently lower.
1556 Its transaction volume is high but over 30 percent is with
1557 the large financial houses and so they are very much
1558 participating in as speculators in these markets. They
1559 provide capital to these markets, important capital but they
1560 are part of these markets, as well.

1561 Mr. {Stupak.} Thank you, Mr. Chairman.

1562 Mr. {Markey.} Thank the gentleman very much.

1563 I would just like to ask one final question and then we
1564 will move to the next panel.

1565 Ask this of Chairman Gensler, if the CFTC is doing an
1566 antifraud or anti-manipulation investigation of oil futures
1567 trading on the New York Mercantile Exchange and you believe
1568 that part of the fraudulent scheme may have involved
1569 wrongdoing in the cash market, you have the power under the
1570 Commodities Exchange Act to extend your investigation to
1571 cover that part of the fraud and you wouldn't want the
1572 Congress to deny the CFTC the power to look at transactions
1573 in both the NYMEX futures market and the cash market in your
1574 own investigation, is that correct?

1575 Mr. {Gensler.} As I understand it, our authorities are
1576 in the futures markets and that is where it starts and then
1577 if there is other attributes to this.

1578 Mr. {Markey.} It tracks the cash market.

1579 Mr. {Gensler.} But it has got to track into the futures
1580 market because that is where our authority is.

1581 Mr. {Markey.} But you would not want your power to
1582 track it to be constrained. You would not want your powers
1583 to track it from the futures market into the cash market to
1584 be constrained?

1585 Mr. {Gensler.} Well, I don't believe that Congress has
1586 constrained it but it has to start, it has to be in the
1587 futures market. Our whole--we are a market regulator. We
1588 don't regulate the cash markets.

1589 Mr. {Markey.} Right, so that is but the opposite from
1590 our perspective should also be true. In other words, if the
1591 FERC finds activities in the cash market that leads it into
1592 the futures market we are basically concerned that they could
1593 be constrained in heading in the opposite direction and that
1594 is a problem that is actually being created by this
1595 legislation that we are concerned about.

1596 Mr. {Gensler.} I understand that concern. With
1597 respect, I don't think 3795 does that with the 2005
1598 provisions, the important provisions that you provide FERC.
1599 We, of course, would not bring an action solely in the cash
1600 market. It always starts--it has got to be in the futures
1601 market where we are.

1602 Mr. {Markey.} We would like your comments on this,
1603 Chairman Wellinghoff.

1604 Mr. {Wellinghoff.} Well, I think you put your finger
1605 exactly on it although I am not sure that the 3795--I think
1606 3795 may exacerbate it but the situation already exists as I
1607 mentioned. CFTC has, you know, gone into Federal court
1608 saying we can't go into the futures market in Amaranth, for

1609 example, because we don't have jurisdiction there yet. We
1610 started in the cash market. We started in the cash market.
1611 Started our action there and we were tracking it, trying to
1612 track it through into the futures market and CFTC says we
1613 don't belong there.

1614 Mr. {Markey.} So from your perspective, you don't have
1615 a problem if the CFTC tracks it into the cash market?

1616 Mr. {Wellinghoff.} No, problem coming to us.

1617 Mr. {Markey.} But the CFTC has filed an amicus brief in
1618 the Amaranth case.

1619 Mr. {Wellinghoff.} Yes, yes.

1620 Mr. {Markey.} Saying that they don't want the FERC to
1621 be able to track from the cash market into the futures?

1622 Mr. {Wellinghoff.} That is correct.

1623 Mr. {Markey.} So that is a problem, it seems to me in
1624 terms of no comity there, creating comity between, you know,
1625 sister agencies, Mr. Gensler.

1626 Mr. {Gensler.} You know, I think what was done, an
1627 important thing in 2005 that you did was that in connection
1628 with the purchase or sale of natural gas or electricity are
1629 subject to the jurisdiction of FERC that they could pursue
1630 fraud and manipulation if it was in connection with the
1631 purchase or sale of natural gas and electricity in the cash
1632 markets effectively, but that Congress did not expressly in

1633 that statute in 2005 expressly say that another Federal
1634 agency should regulate in the futures market and, of course,
1635 back in 1974, Congress had adopted exclusive jurisdiction for
1636 the futures market for the CFTC to ensure uniformity and
1637 consistency in the derivatives marketplace we call futures.

1638 Mr. {Markey.} Okay, you have the last word, Mr.
1639 Wellinghoff.

1640 Mr. {Wellinghoff.} Again, I just think there should be
1641 parody there. If they can come from the futures market into
1642 the cash market with respect to investigation, we should be
1643 able to do the same going from the cash market into the
1644 futures market.

1645 Mr. {Markey.} I agree with you, Mr. Wellinghoff, but we
1646 thank both of you for being here and we thank both of you for
1647 working together with the committee to try to find a peaceful
1648 resolution of these issues and I think if we continue to make
1649 the progress that we have in the past couple of days that we
1650 have a good chance of doing so but it requires good faith on
1651 all parties in order to accomplish that goal.

1652 Mr. {Gensler.} Thank you, it is good to be back with
1653 you.

1654 Mr. {Wellinghoff.} Thank you, Mr. Chairman.

1655 Mr. {Markey.} Thank you, I thank both of you. We
1656 appreciate it. So this panel has completed its testimony. I

1657 would ask the next panel to please come up and take their
1658 seats behind their nametags.

1659 Welcome back to this panel. This is like a hall of fame
1660 weekend here. We have a lot of, you know, longtime visitors
1661 to our committee who are returning for this very important
1662 hearing and we are going to begin by recognizing Betsy Moler
1663 who is the Executive Vice President for Governmental Affairs
1664 and Public Policy at Exelon Corporation. Prior to joining
1665 Exelon, Ms. Moler served as commissioner on the Federal
1666 Energy Regulatory Energy Commission from 1988 to 1998,
1667 including as chair from 1993 to 1998. Under her leadership,
1668 FERC issued order number 888 requiring utilities to open up
1669 their transmission lines on an equal access basis to their
1670 competitor paving the way for the development of wholesale
1671 competitive electricity marketplaces. She did that pursuant
1672 to the Markey amendment in the 1992 Energy Policy Act. We
1673 welcome you back here again, Ms. Moler. Whenever you are
1674 ready, please begin.

|
1675 ^STATEMENTS OF ELIZABETH A. MOLER, EXECUTIVE VICE PRESIDENT,
1676 GOVERNMENT AFFAIRS AND PUBLIC POLICY, EXELON CORPORATION ON
1677 BEHALF OF THE EDISON ELECTRIC INSTITUTE; PATRICK MCCULLAR,
1678 PRESIDENT AND CEO, DELAWARE MUNICIPAL ELECTRIC CORPORATION,
1679 ON BEHALF OF THE AMERICAN PUBLIC POWER ASSOCIATION; GLENN
1680 ENGLISH, CEO, NATIONAL RURAL ELECTRIC COOPERATIVE
1681 ASSOCIATION; JOHN SHELK, PRESIDENT AND CEO, ELECTRIC POWER
1682 SUPPLY ASSOCIATION; AND VINCENT DUANE, ESQUIRE, GENERAL
1683 COUNSEL, PJM INTERCONNECTION, INC.

|
1684 ^STATEMENT OF ELIZABETH A. MOLER

1685 } Ms. {Moler.} Thank you very much, Mr. Chairman.

1686 Mr. {Markey.} We are going to hold you to 5 minutes
1687 each of you in this round so please be aware of that just
1688 because of the roll calls that are pending out on the House
1689 floor and our need to be able to telescope this process in
1690 order to make sure that all of the members get a chance to
1691 ask questions so none of that came out of your time, Ms.
1692 Moler, please begin

1693 Ms. {Moler.} Thank you very much, Mr. Chairman, Mr.
1694 Upton and members of the subcommittee. It is, believe it or
1695 not, a pleasure to be back. I guess it is like a moth in the

1696 flame.

1697 Exelon is an electric and gas public utility holding
1698 company headquartered in Chicago. Our subsidiary is Con-Ed
1699 in Chicago and PECO Energy in Philadelphia, serve 5.4 million
1700 customers or about 12 million people, more than any other
1701 company. Our competitive generation affiliate, Exelon
1702 Generation, owns, operates or controls about 30,000 megawatts
1703 of generation. Our nuclear fleet is the largest in the
1704 country and the third largest in the world.

1705 I am testifying today on behalf of Edison Electric
1706 Institute. EEI, as you know, is the trade association of
1707 U.S. shareholder-owned electric companies. My testimony
1708 today details why utilities use over-the-counter derivatives
1709 products, examines the costs to consumers of duplicative
1710 regulation of OTC derivatives transactions and encourages the
1711 subcommittee to support amendments to H.R. 3795 to clarify
1712 that FERC has and should remain exclusive, should retain,
1713 excuse me, exclusive jurisdiction over organized electricity
1714 markets and transactions.

1715 We look at H.R. 3795 from the perspective of our
1716 customers who are electric and natural gas consumers. We
1717 support the goal of regulatory reform but do not support the
1718 current version of the bill. It would result in costly,
1719 duplicative and overlapping regulation over organized energy

1720 markets and higher costs for our customers. In our view,
1721 subjecting OTC transactions to additional regulations, two
1722 regulators is simply not warranted because they do not
1723 involve or cause the type of systemic risk that the
1724 legislation is theoretically designed to deal with.

1725 EEI, EPSA, American Gas Association and 69 other
1726 organizations have sent a letter to the members articulating
1727 what we believe would be an effective approach to regulating
1728 OTC products. In short, the energy industry is united in our
1729 belief that this legislation should recognize the clear
1730 authority of FERC or the Public Utility Commission of Texas
1731 in the case of ERCOT and exempt all Regional Transmission
1732 Organizations or Independent System Operators, products and
1733 services from regulation by the CFTC. Why? It is simple.
1734 Subjecting these types of transactions to additional layers
1735 of regulation would be a duplication of effort, impose
1736 potential conflicts and gender additional litigation where
1737 you have two agencies looking at the same types of
1738 transactions and both of them trying to assert jurisdiction
1739 over them, and most importantly cost our customers billions
1740 of dollars in higher rates.

1741 Your invitation asked me to focus on organized energy
1742 markets, the RTOs. Over 65 percent of Americans, 134 million
1743 customers live in regions served by RTOs and ISOs. It is not

1744 a trivial problem. These independent entities operate the
1745 electric road and operate markets. We need to make sure that
1746 FERC retains effective authority to regulate RTOs and ISOs.

1747 I do not believe that the legislation is clear on this
1748 subject. It gives under the Commodities Exchange Act where
1749 the CFTC has authority over things they maintain, ``exclusive
1750 authority.'' I don't see how you can have two exclusive
1751 bosses in this area. Nor, I might add, do I believe that it
1752 can be dealt with by a Memorandum of Understanding between
1753 the two agencies because if CFTC has the exclusive authority
1754 over these types of transactions, that would at least
1755 arguably trump the FERC's jurisdiction. I think that can
1756 only be sorted out by statute.

1757 We believe that these transactions such as FTRs, swaps,
1758 excuse me, and other types of transactions that routinely
1759 entered into as part of RTOs are important consumer
1760 protection mechanisms. They reduce electricity costs to our
1761 customers and the authority of the FERC to regulate them
1762 should not be in doubt. We believe that any proposed
1763 legislation should clarify that FERC is the sole regulatory
1764 authority governing the organized RTO or ISO markets and the
1765 transactions entered therein.

1766 I appreciate very much your offer to have me testify
1767 today and would be happy to try to answer any questions.

1768 [The prepared statement of Ms. Moler follows:]

1769 ***** INSERT 3 *****

|

1770 Mr. {Markey.} Thank you, Madam Chairman, very much.

1771 Our next witness is Patrick McCullar, President and CEO

1772 of Delaware Municipal Electric Corporation. He is today

1773 testifying on behalf of the American Public Power

1774 Association. We welcome you, sir.

|
1775 ^STATEMENT OF PATRICK MCCULLAR

1776 } Mr. {McCullar.} Thank you very much, Mr. Chairman.

1777 Chairman Markey, Ranking Member Upton and members of the
1778 subcommittee, I profoundly appreciate the opportunity to
1779 testify before you today.

1780 I am representing the American Public Power Association,
1781 as you said. We represent the interests of more than 2,000
1782 publicly owned, not-for-profit electric utility systems
1783 across the country serving approximately 45 million
1784 Americans, and the majority of our systems are serving
1785 communities with populations of 10,000 people or less.

1786 DMEC, my company, provides generation and other services
1787 to nine municipal distribution utilities in the State of
1788 Delaware and is constituted as both a load-serving entity and
1789 a generation owner in the PJM RTO. I have also served as the
1790 chairman of the PJM members committee which means I am very
1791 familiar with markets and processes within the RTO. I also
1792 represent and I often remind my colleagues at PJM that I
1793 represent the folks who at the end of the day write the
1794 checks to pay for all of these services and our mission is to
1795 make sure those checks are as reasonable as possible for the
1796 value received.

1797 My statement is going to focus on three areas, energy
1798 markets in general, the regulatory overlap between FERC and
1799 the CFTC, mandatory clearing of over-the-counter derivative
1800 contracts. While energy markets suffer from volatility for
1801 many reasons including storage capacity, weather and
1802 economics, in recent years the price of energy commodities
1803 has not been determined solely by these traditional
1804 variables. Manipulation and speculation for profit in energy
1805 markets have often caused artificially high prices.

1806 APPA and DMEC have therefore consistently supported
1807 increased transparency in these markets to mitigate market
1808 manipulation. For example, APPA passed two resolutions the
1809 last few years in support of increased transparency in
1810 regulation in over-the-counter or OTC natural gas markets,
1811 therefore we support the provisions of H.R. 3795 that enhance
1812 transparency in these markets including reporting by large
1813 traders of OTC positions and the application of aggregates
1814 speculative position limits. Because of these strong
1815 concerns with market manipulation, APPA and DMEC recognize
1816 that the CFTC can help to police and prevent manipulation in
1817 the energy markets but CFTC and FERC should work together to
1818 prevent manipulation in the energy markets that are run by
1819 RTOs, including PJM. However, we urge Congress to avoid
1820 creating duplicative authorities between CFTC and FERC over

1821 the many other aspects of power supply and transmission
1822 markets that are run by the RTOs.

1823 In regions with RTOs, market participants buy and sell a
1824 variety of electric products and services in the centralized
1825 RTO-run markets. One such market is for the purchase and
1826 sale of Financial Transmission Rights or FTRs which APPA
1827 members and other Load Serving Entities use to hedge the cost
1828 of transmission congestion created when moving their power
1829 from the generation sources to their retail customers which
1830 is often referred to as load. While these Financial
1831 Transmission Rights are financial contracts, their terms,
1832 conditions and rates are comprehensively regulated by FERC
1833 and they should remain under FERC jurisdiction. LSE's access
1834 to FTRs is absolutely essential to their ability to serve
1835 their retail loads at reasonable rates and with less price
1836 volatility.

1837 RTO markets are fully regulated by FERC and are set out
1838 in FERC-approved tariffs. The rates, terms and conditions
1839 applicable to any RTO product under a FERC tariff should not
1840 be subject to concurrent jurisdiction by CFTC. Concurrent
1841 jurisdiction could result in inconsistent regulations and
1842 uncertainty over the enforceability of transactions. Because
1843 of this concern, if concurrent jurisdiction is found, CFTC
1844 should be required to consult with FERC regarding these

1845 markets and should be given statutory authority to cede
1846 jurisdiction to FERC. However, as I mentioned, we recognize
1847 CFTC has helped to police and prevent manipulation of prices
1848 in energy markets. APPA would therefore support concurrent
1849 FERC and CFTC jurisdiction over market manipulation in RTO
1850 administered markets. APPA would urge the two agencies to
1851 pool their resources and expertise to provide more
1852 comprehensive oversight in this specific area.

1853 I would also like to mention the critical importance of
1854 continuing to allow LSEs and energy end users to use non-
1855 cleared, individually negotiated OTC transactions to hedge
1856 the price of energy fuels in order to continue to offer the
1857 best electric rate possible to our customers. APPA supports
1858 the clearing language in H.R. 3795 that provides an exemption
1859 from clearing for LSEs and end users. Specifically,
1860 requiring not-for-profit public power systems to clear would
1861 pose significant financial hardships to them and the local
1862 governments that own them without addressing any of the
1863 systemic problems that cause the financial crisis in which we
1864 now find ourselves. Derivatives end users such as Plug Power
1865 Systems do not pose systemic risks to the market as do the
1866 bank-to-bank exchanges for the purposes of profit making,
1867 therefore, derivative end users should not be subject to the
1868 same type of regulation as other entities.

1869 Mr. {Markey.} If you could summarize, sir.

1870 Mr. {McCullar.} Thank you. Therefore, APPA and DMEC's
1871 perspective from our perspective a well-drafted bill will
1872 include provisions necessary to curb market manipulation
1873 while preserving FERC's primary jurisdiction over RTO markets
1874 including the FTR markets in preserving the ability of energy
1875 end users to use non-cleared OTC swaps to hedge against
1876 energy price volatility. Thank you.

1877 [The prepared statement of Mr. McCullar follows:]

1878 ***** INSERT 4 *****

|

1879 Mr. {Markey.} Thank you very much. We appreciate it.

1880 Our next witness is an old friend and the year is

1881 winding down and it is great to have another visit from Glenn

1882 English, our former colleague in the Congress and the CEO of

1883 the National Rural Electric Cooperative Association. He

1884 served 10 terms in Congress representing the great State of

1885 Oklahoma and is a great friend of our committee, and he spent

1886 the whole year tutoring us on how rural America interacts

1887 with all of the major energy issues in our country and we

1888 thank you for that, and whenever you feel comfortable, please

1889 begin.

|
1890 ^STATEMENT OF GLENN ENGLISH

1891 } Mr. {English.} Thank you very much, Mr. Chairman, and
1892 being very mindful of vote pressures that you are under, the
1893 committee is under I will move right along.

1894 I would ask that my entire written testimony be made a
1895 part of the record.

1896 Mr. {Markey.} Without objection, so ordered.

1897 Mr. {English.} And also as the chairman pointed out,
1898 electric cooperatives, of course, are very important to rural
1899 America. I am the CEO of the National Rural Electric
1900 Cooperative Association. We have 47 States in which we have
1901 some 930 co-ops, 42 million consumers. We are not for-profit
1902 and consumer-owned, and we are very proud of that so as you
1903 can imagine has been the case all this year, Mr. Chairman,
1904 our focus has been on the issue of affordability, and once
1905 again, I come to talk to you about the issue of
1906 affordability.

1907 First of all, I would like to commend Chairman Peterson
1908 for the work that he has done, certainly increasing
1909 transparency and reduces systemic risk for end users. I
1910 think it is extremely commendable. I think the legislation
1911 goes far in achieving these objectives, however the subject

1912 of this hearing focuses on a very narrow area and it is one
1913 that we have great concern over and I know that this
1914 committee does, and I want to commend you, Mr. Chairman, for
1915 having this hearing and calling attention to this issues.

1916 We have what I think many of us are very familiar with
1917 in which you have two Federal agencies here that could
1918 potentially have jurisdiction over an area that is very
1919 sensitive, and I would point out to the committee and I think
1920 most members of the committee are very aware of the fact that
1921 certainly this is a very volatile, sensitive area when you
1922 talk about movement of power in this country. And it is
1923 extremely important, as this committee has discussed many
1924 times that that power move freely, and that it move in a
1925 timely fashion, and it move in an affordable way. And in
1926 this particular area, I know of no problems that have
1927 occurred with regard to the Federal Energy Regulatory
1928 Commission in helping bring that about. I am not familiar
1929 with any market manipulation issues that have arisen since
1930 2005, and the legislation passed by this committee, and
1931 certainly I think that we all are very mindful that it is in
1932 all of our best interests, whether we be for-profit or
1933 consumer-owned as part of the electric utility industry that
1934 we continue to make certain that the power in this country
1935 moves in an efficient manner. That is important to consumers

1936 and it is certainly important to keep the lights on
1937 throughout this nation.

1938 So we have become very concerned, Mr. Chairman, in that
1939 we have some questions that have arisen here of exactly how
1940 we are going to proceed, and this is something that troubles
1941 us a great deal. We would strongly suggest, Mr. Chairman,
1942 that as we talk about these transactions, both before the
1943 transaction takes place and during the period in which the
1944 transaction is being carried out that we have one agency that
1945 focus on meeting those responsibilities and that be the
1946 Federal Energy Regulatory Commission. I would suggest, Mr.
1947 Chairman, a very bright line can be painted after the
1948 transaction. They should be fair gain for anyone on any
1949 wrongdoing, any market manipulation that is detected whether
1950 it be the Federal Energy Regulatory Commission or the
1951 Commodity Futures Trading Commission. Either way we should
1952 encourage and hope that they root out any wrongdoing, and
1953 they take those steps that are necessary to deal with it but
1954 I think it is very important for us to keep in mind, Mr.
1955 Chairman, that we need one agency to focus on that very
1956 sensitive, critical period of time as to when these
1957 transactions are being carried out. And I know the chairman
1958 is very sensitive to time in this area as well so I will wind
1959 up by simply saying, I hope that you encourage the two

1960 Federal agencies to come together, work with us and work with
1961 the two committees in Congress into resolving this difficulty
1962 so that we don't have any interference taking place in this
1963 marketplace.

1964 Thank you, Mr. Chairman.

1965 [The prepared statement of Mr. English follows:]

1966 ***** INSERT 5 *****

|
1967 Mr. {Markey.} Thank you, Mr. Chairman, as well. When
1968 did you leave, Glenn?

1969 Mr. {English.} That was 1994, and we did have
1970 jurisdiction out of my subcommittee at the Commodity Futures
1971 Trading Commission back in those days.

1972 Mr. {Markey.} I remember that yeah, long ago.

1973 Mr. {English.} I am afraid so, very long ago. We are
1974 both getting older.

1975 Mr. {Markey.} Our next witness is John Shelk. He is
1976 the President and CEO of the Electric Power Supply
1977 Association. That is the national trade association
1978 representing competitive power suppliers, and back when I was
1979 the chairman of this subcommittee in 1985 and 86, John was
1980 the chief counsel for the ranking member of the committee at
1981 the time. We did the Appliance Efficiency Act that year,
1982 Carlos the refrigerator warhead and that was when, if you
1983 remember, William ``the Refrigerator'' Perry couldn't get a
1984 bigger and better nickname than that. But I don't know if
1985 you know this but refrigerators now basically consume 50
1986 percent less electricity for the same size device as they did
1987 in 1986, and so Mr. Shelk has--what John?

1988 Mr. {Shelk.} That is a long time ago.

1989 Mr. {Markey.} It is a long time ago but we welcome you

1990 back, John.

|
1991 ^STATEMENT OF JOHN SHELK

1992 } Mr. {Shelk.} Thank you, Mr. Chairman, we appreciate the
1993 invitation.

1994 As you indicated, EPSA represents competitive wholesale
1995 suppliers including generators and marketers who do business
1996 both in the two-thirds of the country with organized markets
1997 and in the one-third without them. The competitive sector
1998 has 40 percent of U.S. generating capacity with an even
1999 greater role in the organized markets.

2000 As you kindly mentioned, for 10 years I had the honor of
2001 working for members of this committee including on FERC
2002 matters, and more recently I have joined the CFTC's Energy
2003 and Environment Markets Advisory Committee and fully support
2004 the transparency goals Chairman Gensler outlined to you this
2005 afternoon, the question is how to do so. Our position is
2006 that there is no more important issue to be acted upon by the
2007 Congress in the near future that will impact the electric
2008 sector than maintaining cost-effective access to OTC risk
2009 management products for all the reasons you have heard from
2010 the other panelists. We commend the CFTC for listening to
2011 our concerns and we also appreciate changes to the original
2012 version on H.R. 3795 made by the Committees on Financial

2013 Services and Agriculture, however for reasons that you have
2014 heard, three crucial details remain.

2015 First, definitions should ensure access to OTC risk
2016 management products by those of us primarily managing
2017 commercial risks without imposing mandatory clearing due to
2018 how it would constrain our capital availability at a time
2019 when you rightly expect us to be investing in the energy
2020 infrastructure of the future. Second, margin requirements
2021 should not apply to those who use OTC products to manage
2022 commercial risks for the same reason and for you have been
2023 focusing on this afternoon, we agree that a clear line should
2024 be drawn in the statutory language between the important
2025 responsibilities Congress assigns to the two agencies.
2026 Understandably, for those actually implicated in the
2027 financial crisis, the bill as it stands today defines what is
2028 within the CFTC's exclusive purview very broadly, however as
2029 you have heard this raises very serious question as to FERC's
2030 exclusive regulation of wholesale markets, markets which were
2031 not implicated by the financial crisis and we share those
2032 concerns.

2033 FERC's exclusive jurisdiction should be preserved by
2034 adding a provision to the bill that excludes any products
2035 transacted through or in reference to the RTOs and ISOs FERC
2036 regulates, and most importantly for my members who serve many

2037 of your constituents, these are the markets from which
2038 electricity suppliers receive the revenues necessary to
2039 operate and invest. As a result, electricity markets are
2040 systems that are physically and financially integrated so
2041 extensively as this committee is well-aware, as to sharply
2042 distinguish electricity from the corn and Treasury bill
2043 examples you heard earlier, thus dual or coexisting
2044 regulation while not impossible, is more problematic, hence
2045 the recommendation for a statutory bright line because as you
2046 know, all these things are interrelated. Physically you
2047 cannot pull them apart like you corn and T-bills from the
2048 different agencies.

2049 For all the reasons you have heard that I won't belabor,
2050 RTOs and ISOs are subject to multiple layers of oversight.
2051 The extent of this oversight and the documented competitive
2052 market results that the organized markets produced to benefit
2053 consumers are ample evidence of the effectiveness of FERC's
2054 regulation that should be preserved. Unfortunately, the bill
2055 as it stands, as I mentioned, does not yet expressly and
2056 fully address this important issue. We strongly urge you to
2057 do so to preserve FERC's jurisdiction over the organized
2058 markets of which a large and growing share of the country
2059 depends for its electricity.

2060 And again, we thank you for the invitation and look

2061 forward to your questions.

2062 [The prepared statement of Mr. Shelk follows:]

2063 ***** INSERT 6 *****

|
2064 Mr. {Markey.} Thank you, Mr. Shelk, very much.

2065 Our final witness is Vincent Duane, General Counsel for
2066 PJM, that is Pennsylvania, Jersey and Maryland.

2067 Mr. {Duane.} Originally, that is correct.

2068 Mr. {Markey.} Right, the regional transmission
2069 organization that serves much of the mid-Atlantic and parts
2070 of the Midwestern region of the country. So what other
2071 States are in now?

2072 Mr. {Duane.} We are, Chairman, in 14 States if you
2073 include the District of Columbia, 13 States and the District
2074 of Columbia, as far out west as Illinois up to the New
2075 Jersey-New York border down into North Carolina and a good
2076 part of the country in between.

2077 Mr. {Markey.} And they wouldn't want to be run by a
2078 group called Pennsylvania, Jersey and Maryland so the name
2079 change is to protect, you know, the innocence.

2080 Mr. {Duane.} Hence, my reluctance in agreeing with you
2081 on the original, historical derivation.

2082 Mr. {Markey.} I see, yes. You probably made a
2083 consultant \$100,000 to make that recommendation so you joined
2084 PJM in 2003 as deputy general counsel and has served as
2085 general counsel since 2007. Have you ever been before this
2086 committee before?

2087 Mr. {Duane.} This is my first time, sir.

2088 Mr. {Markey.} First time so we have a brand new
2089 witness. Welcome to our committee and, you know, it is just
2090 great to have some new faces coming before us so whenever you
2091 feel ready, please begin.

|
2092 ^STATEMENT OF VINCENT DUANE

2093 } Mr. {Duane.} Well again, thank you, Mr. Chairman,
2094 Ranking Member Upton and the rest of the committee members
2095 for the invitation to be here today.

2096 I am testifying on behalf of PJM and I would request
2097 that the written testimony be included as part of the record.

2098 Mr. {Markey.} Without objection, it will be so ordered.

2099 Mr. {Duane.} Thank you very much.

2100 We are as has been mentioned a RTO, Regional
2101 Transmission Organization, and a public utility. That means
2102 we are regulated by the FERC. We perform several functions
2103 and the one that is of most interest today is our function in
2104 administering organized wholesale electricity markets. We
2105 administer these markets for two reasons.

2106 First, we want to bring competitive forces to the
2107 transacting of wholesale purchases in the electricity markets
2108 and we use them and this is very important as a tool to help
2109 us discharge our responsibility in managing the grid
2110 reliably. It is a tool that incents people, be they
2111 generators, transmission customers and increasingly consumers
2112 and load interests in responding to prices that result in
2113 behavior that keeps the grid reliable and basically helps us

2114 in our mission in keeping the lights on. But the markets are
2115 the focus today and with particular attention being given to
2116 the FTR product that we administer in PJM. This product has
2117 caught the attention of the CFTC. I believe it is part of
2118 its overall interest as Chairman Gensler mentioned in
2119 bringing oversight to the over-the-counter markets.

2120 My first point, and probably the most important point I
2121 want to make is that the public policy and they are very
2122 important public policy imperatives that are driving
2123 financial market reform are simply not present when it comes
2124 to the RTO markets. Its not that we don't share in the
2125 objectives that Chairman Gensler mentioned, lowering risk,
2126 promoting transparency and bringing integrity to the public.
2127 Absolutely do we endorse those risks, in fact, we feel we put
2128 those at the very front of our windshield. We just get them
2129 to them and we get to those objectives in a slightly
2130 different way.

2131 We are not an OTC environment. We are a centralized
2132 marketplace and one that is pervasively, some would say
2133 intrusively regulated by the FERC. Our markets are not
2134 opaque. It is hard to think of a more transparent
2135 environment than an RTO. Let us look at the FTR with
2136 particular reference here. When an FTR is bought and sold,
2137 the name of the holder of the FTR is publicly available. The

2138 price they pay for that FTR is publicly available and the
2139 identity of the particular FTR pathway is publicly available.
2140 It is all available to market participants in the FTR markets
2141 on the PJM website and there is no transparency issue. We
2142 get to that through the centralized markets regulated by the
2143 FERC and the products are not synthetic financial products.
2144 Admittedly they do settle financially but they are very
2145 closely tied to the physical capability of the transmission
2146 system and they are essential to our mission of delivering
2147 firm transmission to customers and ensuring that those
2148 customers have some degree of price certainty in moving their
2149 electricity from point A and point B, and these are missions
2150 that this committee and the Congress has squarely entrusted
2151 to the FERC.

2152 The second point I would like to make is we are not and
2153 we are quite distinct from the sort of financial institutions
2154 that operate in the OTC markets. We are a non-profit entity.
2155 We don't make money on FTRs and we don't have structuring
2156 desk that is populated by Ph.D. mathematicians devising
2157 exotic instruments, packaging them and marketing them to
2158 other financial institutions. That is not what an FTR is all
2159 about. In fact, we have another function that I mention in
2160 my testimony where we are a transmission planner and we look
2161 at opportunities to expand the transmission system to remove

2162 congestion to increase transfer capability which is to say
2163 the ability to move electricity from one point to another and
2164 in doing so reduce the reliance on FTRs. So we are quite
2165 distinct from a financial institution that might be trying to
2166 market a product. We are in a sense, trying to eliminate the
2167 need for or at least lessen the reliance on the FTR product.

2168 The last point I would like to make is to sort of answer
2169 the question I think is at the heart of this which is well
2170 what is so wrong with having a dual role with the CFTC and
2171 the FERC, and why is this a matter that needs some statutory
2172 attention, and it is not just a desirability to bring
2173 clarity. It is not just to eliminate duplication and dare I
2174 say it is not just to avoid costs. It is really a question
2175 that the tools that the CFTC uses just have not been a very
2176 good fit for the products and markets and environments that
2177 we operate. We get to those objectives through different
2178 mechanisms and don't see the same need to get to the risks
2179 that have been identified.

2180 I would like to close on that point and make myself
2181 available for questions.

2182 [The prepared statement of Mr. Duane follows:]

2183 ***** INSERT 7 *****

|
2184 Mr. {Markey.} Thank you so much. We appreciate it, Mr.
2185 Duane.

2186 The chair will now recognize himself for some questions.

2187 Ms. Moler, your position is that FERC should have
2188 exclusive authority over RTO products and services. That is
2189 a much more aggressive position than Mr. Waxman and I and Mr.
2190 Upton and Mr. Barton have taken. We basically say lets
2191 preserve FERC's authority and where there is overlapping
2192 authority, let the FERC and the CFTC work it out. Why is
2193 your approach better in your opinion?

2194 Ms. {Moler.} My concern is born of the language in the
2195 bills that have gone through the two other committees. Under
2196 the Commodity Exchange Act, if the CFTC has jurisdiction over
2197 a transaction, it supplants other agencies' jurisdictions.
2198 They have exclusive jurisdiction and I do not understand
2199 having negotiate a number of Memoranda of Understanding when
2200 I was at FERC and when I was Deputy Secretary of Energy how
2201 one agency that has preemptive authority over transactions
2202 that are currently regulated by another agency, how those two
2203 agencies can successfully negotiate a Memorandum of
2204 Understanding.

2205 So if you give the CFTC authority over or if they claim
2206 authority over things like Financial Transmission Rights,

2207 that trumps FERC's authority and FERC's ability, at least
2208 arguably, and FERC's ability to allocate transmission rights
2209 and the like, and I worry about that. I understand that they
2210 have under the Energy Policy Act of 2005, authority to look
2211 at fraud and manipulation but they wouldn't have anything to
2212 do with those transactions. That is why I am not as
2213 comfortable with the MOU approach.

2214 Mr. {Markey.} Okay, great.

2215 Mr. English, what would be the practical impacts on
2216 consumers and your members if FERC's authority over Financial
2217 Transmission Rights and other RTO products were eliminated as
2218 a result of the pending bill?

2219 Mr. {English.} I think the problem is we don't know,
2220 Mr. Chairman. We have an agency that really is not equipped
2221 to regulate these markets and certainly that would raise
2222 questions I think about as I mentioned earlier a very
2223 volatile marketplace and how well it would work so I have
2224 serious questions whether it would work.

2225 Mr. {Markey.} Great.

2226 Mr. Shelk?

2227 Mr. {Shelk.} As I indicated, these are the markets in
2228 which we receive the revenue on which we rely to operate and
2229 invest so our concern would be, depending on what aspects of
2230 the RTOs and the ISO markets the CFTC might consider under

2231 its purview, and as Ms. Moler said this is the later enacted
2232 statute so if it stands as it is today, we would be
2233 subsequently basically reaffirming and even strengthening the
2234 CFTC's role which would raise concerns in our minds about the
2235 revenue strengths we depend on.

2236 Mr. {Markey.} Okay, great.

2237 And, Mr. McCullar?

2238 Mr. {McCullar.} We heard the two chairmen discussing
2239 the very issue and it is our position that FERC should
2240 maintain primary jurisdiction in these markets but CFTC can
2241 be helpful in an oversight mode and in, frankly, combining
2242 resources to deal with these problems could only help the
2243 markets and the consumers.

2244 Mr. {Markey.} Great, thank you.

2245 Mr. Duane, what changes would be made if PJM had to
2246 adhere to the principals in place under the Commodities
2247 Exchange Act as a derivative clearing organization? What
2248 effect would those requirements have on the marketplace?

2249 Mr. {Duane.} Let me first state I am not sure we would
2250 be able to comply with those directives. Again, those
2251 directives are designed to promote transparency, to limit
2252 lower risk and to preserve the integrity of markets. That is
2253 well and good and those are objectives that we share that the
2254 FERC shares as well and we just use different tools to do

2255 that. If we were forced somewhat akin to a square peg into a
2256 round hole, I am very concerned that the products themselves
2257 wouldn't survive. Alternatively, there would be sort of
2258 qualification given to such a degree that I am not sure
2259 anything will have improved or changed. We have got what we
2260 have got today. It is workable. I think that is the answer
2261 to the question.

2262 Mr. {Markey.} Great, thank you, Mr. Duane, very much.

2263 My time has expired. The gentleman from Michigan, Mr.
2264 Upton, if recognized.

2265 Mr. {Upton.} Thank you, Mr. Chairman. I just want to
2266 say as I listened to the testimony of all five witnesses, it
2267 really does seem like we are at Fox News, fair and balanced.
2268 Everyone was on the same page, including Mr. English, former
2269 Ag Committee member, right, correct? Have you talked to
2270 Chairman Peterson about this? Has anyone here?

2271 Mr. {Markey.} The CFTC, by the way, has its own channel
2272 one floor down that it can turn to.

2273 Mr. {Upton.} Yeah, has anyone here, I should ask, has
2274 anyone here in the audience from the Ag Committee? Going
2275 once, no hands, okay.

2276 Mr. {English.} Well, Mr. Upton, as I pointed out I have
2277 high praise for Chairman Peterson.

2278 Mr. {Upton.} I know you do. I know you do.

2279 Mr. {English.} There is just this one little narrow
2280 area. It is not much, just a little tweaking here and there
2281 would take care of the problem.

2282 Mr. {Upton.} Yeah, you know, Mr. Wellinghoff, Chairman
2283 Wellinghoff in one of his answers talked about uncertainty
2284 creates more risk and clearly I think that is what this 3795
2285 really does. It does need to be maybe a little more than
2286 tweaked but it needs to be fixed. There is an old saying if
2287 it ain't broke, don't fix it but in fact, I think this would
2288 really send us back and the bottom line would be that the
2289 extra burden would probably increase rates for most America.
2290 I know PJM, I thought stood for Michigan in this thing but
2291 that is all right. But it would, the burden would in fact
2292 have the potential of increasing rates for all consumers is
2293 that--does anyone disagree with that? So and, you know, the
2294 electric industry is unified, right? Is there anyone else
2295 that is not on the same page, any major organization that is
2296 not with your testimony, right?

2297 Mr. {Shelk.} And as you know that is a unique
2298 development in our system, the fact that we are unified.

2299 Mr. {Upton.} We are still working on cap and trade to
2300 make sure we get people back in the corral but we will see
2301 what happens. But yeah, I just want to say I appreciate your
2302 testimony and I look forward to working with Chairman Markey

2303 and Waxman and Barton to fix this problem before it gets to
2304 the House floor because it will increase rates and that is
2305 the last thing that, you know, as I look at Michigan's
2306 economy and the nation as well. We don't need this. We
2307 really don't need this.

2308 Ms. {Moler.} Mr. Upton, several earlier participants
2309 have mentioned an analysis that Exelon has done by looking at
2310 what would happen if our types of transaction were required
2311 to be cleared and our analysis shows a rate increase of
2312 between 5 and 15 percent. With your permission, I would like
2313 to put an example or two in the record that shows how we came
2314 up with those numbers based on some real typical kinds of
2315 power transactions.

2316 Mr. {Markey.} Without objection, so ordered, thank you.

2317 Mr. {Upton.} Thank you and I have no further questions.
2318 I yield back.

2319 Mr. {Markey.} The gentleman yields back his time.

2320 And the chair recognizes the gentleman from Michigan
2321 once again, Mr. Stupak.

2322 Mr. {Stupak.} Thank you, Mr. Chairman. Sorry I missed
2323 the testimony. I had to take another meeting but I have been
2324 asking the last time I asked about the swap clearing for end
2325 users so let me ask this question this way. Bona fide
2326 hedgers are participating in derivatives markets for

2327 commercial purposes and really are not the cause of our
2328 excessive speculation as I call it in the energy markets.
2329 Electric utilities are not the cause of our current financial
2330 crisis, however in the legislation exemption from a swap
2331 clearing for end users also allows large financial
2332 institutions that serve as your counterparties to also remain
2333 off the hook for stricter oversight. So my question was this
2334 and whoever wants to chime in, please do, would you support a
2335 change in the legislation that allows a bona fide hedger,
2336 including electric utilities to remain exempt from clearing
2337 requirements but mandating that tier one financial companies
2338 clear their swap transactions on a regulated market? All
2339 right, Glenn, it looks like you are ready to go.

2340 Mr. {English.} Our concern still is the fact, you know,
2341 we are very small and certainly whenever you look at the size
2342 of these markets you can't hardly see us with a magnifying
2343 glass but these are very important markets to us to hedge our
2344 risk. We don't have the kind of capital at hand to be able
2345 to handle a great deal of risk and it really puts us in a
2346 bind for this. Anything that would increase those costs, I
2347 think are going to push our people out of those markets and
2348 it increases risk to our members considerably.

2349 Mr. {Stupak.} But if we exempt you out and let your
2350 counterpart though it would still regulate that.

2351 Mr. {English.} That the key word here is what kind of
2352 impact is that going to have on you, yeah.

2353 Mr. {Shelk.} Mr. Chair, we support Mr. Stupak's
2354 interest in transparency. The question is how do you do it
2355 and the concern with the tier one provision is as Chairman
2356 Gensler indicated most of our counterparties are the larger
2357 banks so they can be.

2358 Mr. {Stupak.} Counterparts.

2359 Mr. {Shelk.} So under the version that you have
2360 suggested essentially the tier one bank wouldn't post the
2361 collateral, we would have to post the collateral as the
2362 counterparty to the tier one institution and as I indicated
2363 earlier, the problem with that is it would tie-up, and the
2364 examples we have come up with about an average a quarter of
2365 the capital of the end user so we fully agree with your
2366 comments that the electric utilities and other generators
2367 didn't cause the problem. We think the way to get to your
2368 transparency goal which we share because we are in the market
2369 too, is to have a data repository so that information on
2370 these trades would be available to the CFTC and others, and
2371 the problem with electricity is it is very customized. These
2372 products are traded over hundreds of different nodes around
2373 the country so it doesn't really lend itself, the CFTC
2374 doesn't lend itself to the corn example, and the T-bill

2375 example and kinds of commodities that the chairman indicated.

2376 Mr. {Stupak.} You know, we will try to get to these
2377 large pools coming in and driving up those prices and even if
2378 they are your counterpart, they still fluctuate.

2379 Mr. {Shelk.} That is why we agree with you. You can
2380 help us so we would like to see the data repository as the
2381 way to put on the bulletin board to the CFTC so they would
2382 know what is happening in these markets whereas Chairman
2383 Gensler said today, they don't. I think that would get at
2384 what you are trying to accomplish.

2385 Ms. {Moler.} Mr. Stupak, there are lots of estimates
2386 floating around about how much this costs but if you require
2387 these transactions to be cleared on exchange, they have
2388 margin requirements, and we are talking billions of dollars
2389 of additional cost to our sector. And you can't just exempt
2390 Exelon, or PECO, or Com-Ed, or DTE, or anything but not their
2391 counterparty because if their counterparty has to go through
2392 the clearing process then drags the reluctant counterparty
2393 with them. Both parts, if one is subject to it, then both
2394 parts of the transaction get subject to it and that is where
2395 the costs come from. So yes, I understand it may not be
2396 popular to think about exempting some of the large investment
2397 houses but they are our counterparties and we need these
2398 markets to be robust. Deep liquid is the phrase that our

2399 guys always use but that is the way we save our customers
2400 money.

2401 Mr. {Stupak.} But also led to our financial meltdown.

2402 Ms. {Moler.} Not with these kinds of products. They, I
2403 mean the housing derivatives and mortgage securities, et
2404 cetera, et cetera, but I don't think that you find that
2405 transactions for FERC RTO markets and hedging instruments
2406 used by our sector have been part of that problem.

2407 Mr. {Stupak.} Well, I think Mr. Waxman might disagree
2408 with you on that after the California electric debacle and
2409 again, I am not saying you caused it but when you got that
2410 much money moving around and as quickly as it is moving
2411 around that is where your excess speculation comes in, and so
2412 how do we do it that keeps you, a bona fide hedger, you are
2413 bona fide. These other folks come in with this money, they
2414 are not bona fide. They are just in there to make money and
2415 as long as if they are not cleared anywhere and even
2416 depositories is the place to look at. I am not quite sure
2417 but I am still saying making them clear. I am still trying
2418 to--I am still wrestling with that one.

2419 Mr. {McCullar.} If I could have a comment that may give
2420 some comfort here.

2421 Mr. {Markey.} Please do it quickly because our roll
2422 calls are about to.

2423 Mr. {McCullar.} We work in the light in our industry.
2424 It is very open and it is very transparent, and when we have
2425 these counterparties, we require them to come into the light
2426 with us and especially public power systems or community-
2427 owned systems. We would not participate as a counterparty in
2428 something that was not in the light and transparent and I
2429 think that should give comfort.

2430 Mr. {Markey.} Gentleman's, the former police officer
2431 from Michigan's time has expired, a former state trooper. He
2432 prefers that everything be in the light as a former state
2433 trooper. It works better for crime prevention and detection.

2434 The gentleman from Louisiana, Mr. Scalise, is
2435 recognized.

2436 Mr. {Scalise.} Thank you, Mr. Chairman.

2437 I would just ask for the whole panel if, I know a few of
2438 you made some different remarks about this in your statements
2439 but if you could each say first if you do think there would
2440 be any increases to consumers by this legislation and if so,
2441 what rough percentage, and if you can just go across starting
2442 with Ms. Moler.

2443 Ms. {Moler.} Yes, and our best estimate is somewhere
2444 between 5 to 15 percent to have a clearing requirement.

2445 Mr. {Scalise.} Thanks.

2446 Mr. {McCullar.} Thank you and from our point of view it

2447 would be at least a 5 percent increase in cost of operations
2448 and those costs would have to be passed onto the consumers.

2449 Mr. {English.} In looking at the issue that we are
2450 talking about today, we have a major concern over the law of
2451 unintended consequences and any time you leave a hole open
2452 with this kind of a question, you are likely to have
2453 increased costs and unintended consequences.

2454 Mr. {Shelk.} The short answer is yes for all the
2455 reasons you have heard.

2456 Mr. {Duane.} From the RTO perspective, it would
2457 frustrate programs that are essential to the delivery of
2458 services to our customers. That would increase cost and
2459 perhaps take away the programs altogether.

2460 Mr. {Scalise.} Okay and then earlier we talked to you
2461 about capital and how this may tie-up capital that would make
2462 it more difficult for companies to become more energy
2463 efficient. Can each of you just briefly touch on that, as
2464 well?

2465 Ms. {Moler.} I agree with Mr. Shelk's earlier
2466 observations on that subject. We are like all businesses
2467 these days we are very careful where we put our capital. If
2468 we have to put it all on margin requirements, we won't be
2469 able to do other new projects, transmission projects, new
2470 generation. We are building a solar project in South

2471 Chicago. The money there wouldn't be there.

2472 Mr. {McCullar.} I agree with Ms. Moler's statement. It
2473 is a capital-constrained environment now for all the reasons
2474 we know. This would only aggravate that situation.

2475 Mr. {English.} And I also agree but I also think that
2476 it could have the additional complication of the flow of
2477 power in this country.

2478 Mr. {Shelk.} On the point of the capital it is not only
2479 the amount, it is the uncertainty because you have to post
2480 margin in the beginning and as the transaction continues over
2481 time so it is not just the amount which in and of itself is
2482 significant but it is also the fact that it would change over
2483 time. Again, we think unnecessarily so we can accomplish the
2484 transparency goals that Mr. Stupak understandably wants to
2485 achieve without having to tie-up roughly a quarter of each
2486 company's capital in the clearinghouse to get the
2487 transparency that you should want.

2488 Mr. {Duane.} And again, from the RTO perspective and
2489 the FTR, the FTR is essential to assist people in long term
2490 contracting. Long term contracting provides a stream of
2491 revenue necessary to support capital formation and investment
2492 of any technology so yes, again, if the program is threatened
2493 the whole unintended consequence flows through the whole
2494 system.

2495 Mr. {Scalise.} Thanks and then I will just throw this
2496 one out there for anybody that wants to take it. Do you
2497 believe that some market participants would cease hedging
2498 exposure if clearing were mandatory due to the increased cost
2499 associated with exchange trading and if that were the case
2500 would that even bring more risk into the market if anybody
2501 wants to?

2502 Mr. {English.} Yes, as far as electric cooperatives are
2503 concerned, we wouldn't have a choice.

2504 Mr. {McCullar.} Yeah, the capital constraint, public
2505 power systems would basically be priced out of using those
2506 tools and it would impact our customers.

2507 Ms. {Moler.} We use hedging to level out the prices we
2508 charge our customers. If we can't hedge, we are going to
2509 charge them more, and we will also be less likely to enter
2510 into long term contracts.

2511 Mr. {Shelk.} The short answer is yes, it would.

2512 Mr. {Duane.} The only point I will add is to remind
2513 everyone here that electricity is an extraordinary volatile
2514 commodity and the ability to hedge that price volatility is
2515 essential.

2516 Mr. {Scalise.} And, of course, benefits consumers to I
2517 appreciate all of your candor and I yield back.

2518 Mr. {Markey.} The gentleman's time has expired.

2519 The chair recognizes the gentleman from Michigan, Mr.
2520 Dingell. You, Mr. Chairman, would be the last member
2521 recognized to ask questions. I thank the chair for that and
2522 I want to thank all of our witnesses for their testimony
2523 today. The hearing has underscored the need for the
2524 derivatives bill reported out of the House Agriculture
2525 Committee to be modified so it does not interfere with the
2526 ability of the Federal Energy Regulatory Commission to
2527 oversee electricity and natural gas markets. We have heard
2528 about the potential for the bill to disrupt the RTOs as well
2529 as mechanisms used by many RTOs. These include Financial
2530 Transmission Right used to hedge the volatility of
2531 transmission prices forward capacity markets use to ensure
2532 that there is sufficient generation capacity and potentially
2533 demand side energy management programs. We have also heard
2534 about the potential for this legislation to exacerbate an
2535 existing dispute over the reach of the FERC's antifraud and
2536 anti-manipulation authorities. Clearly, we need to correct
2537 these problems and work with the members who have come here
2538 today on a bipartisan basis and with the witnesses who have
2539 been gracious enough to come here today to testify as expert
2540 witnesses so we thank you all.

2541 And with that and the thanks of this committee, this
2542 hearing is adjourned.

2543 [Whereupon, at 3:45 p.m., the Subcommittee was
2544 adjourned.]