

President's Message



Adrienne E. Clair

On behalf of the EBA Board and Staff, welcome to this Fall issue of our newsletter. We are now halfway through the Bar year and in my admittedly biased opinion, the EBA has achieved more in six months than some might in a year!

At the national level, many of you attended our Mid-Year Meeting in Washington, D.C. on October 23 and 24. This year's Mid-Year Meeting reflected a number of new approaches, based in large part on input from the membership. We issued the first-ever call for program ideas for the Mid-Year Meeting, which resulted in a diversity of topics for the sessions. We also responded to members' calls for a greater opportunity for networking during the meetings. The "get acquainted" lunch offered an opportunity to meet new colleagues and learn something new about existing friends. Thank you to all who helped make the Mid-Year Meeting a success.

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FERC Chair Wellinghoff Reveals Strategy from His Incoming Days: Lift Up New Players and "Bring Down" the "Biggest People in the World" for Misbehavior

Identifies Formidable Task to be Addressed Beyond his Term

Gary E. Guy and Channing D. Strother



For the third time in 6 ½ years, a videotaped *EBA Update* interview, which can be viewed at www.eba-net.org, was had by feature story writers Gary Guy and Channing Strother (aka "Max Kampelman and Peter Lisagor") with FERC Chairman Jon Wellinghoff. The first interview in the spring of 2007 was when Mr. Wellinghoff was a new FERC Commissioner; the second interview was in the spring of 2009, when he had newly taken over as Chairman, and this third interview took place in September 2013, as he enters the waning days or months of his tenure pending either Senate confirmation of his nominated successor, or the end of the current Congress, whichever occurs first.

Having covered human interest aspects of our interviewee in our prior visits with him at the FERC headquar-

ters, we dispensed with the preliminary lighter side questions and went right to the heart of the matter. We asked him to tell us what his accomplishments have been. We asked about the precedent-setting enforcement actions that have taken place under his stewardship. We covered the controversial subject of base ROE determinations. We touched on the current controversy that has taken place about the policy-setting role of a FERC Chairman that has been precipitated by the editorial press of late. And we obtained from the Chairman some sage advice as to what is looming ahead for tackling by regulators and the industry alike beyond the Wellinghoff years. Here now is a brief recounting of the candid, insightful, and sometimes surprising comments he gave us.

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Charitable Foundation of the Energy Bar Association Update

Three Grants Given To Worthy Community Organizations

The CFEBA Board voted unanimously to fund three exciting grant proposals that advance CFEBA's mission to promote "worthwhile energy-related charitable projects." The recipients are:

- Solar Liberty Foundation for equipment to complete a solar installation at a health clinic in Tanzania. Solar Liberty, a solar company headquartered in Buffalo, NY, will donate the installation labor. The Foundation obtained donated solar panels. CFEBA's grant will provide the last element to allow completion of the plan. Once installed, the 4 kw project will provide power for a night time birthing center, water filtration, refrigeration and lab equipment.

- Arlington Thrive (formerly known as AMEN), a local charity in Arlington, Virginia that provides same day emergency assistance for residents in crises, will use the CFEBA grant to fund utility bills of their clients. Arlington Thrive is a partner in the Energy Masters program of Arlington that provides weatherization assistance to low income apartment dwellers. Energy Masters won a Green Giant Award from Washingtonian Magazine in summer 2013.

- Friends of Buea School for the Deaf, Inc. in Cameroon to fund electrical wiring and installation for the first floor of a dormitory to be constructed in 2014. This grant is contingent upon the school raising enough funds for the construction of the first floor of the dormitory. A past CFEBA grant recipient, Friends of Buea School for the Deaf enjoys a strong relationship with persons associated with the Gallaudet University community.

The CFEBA Board voted to fund four summer internships for law students. Three students will work at state commissions and one student will work at FERC. Please encourage potential candidates of your acquaintance to apply. Application instructions will be circulated as soon as they become available.

The funding for these worthwhile programs was made possible by the generous contributions of CFEBA gala sponsors and individual donors. The Gala, held during the mid-year meeting on October 24, 2013, was an amazing success, raising over \$50,000 in total Gala revenue for these and future charitable endeavors. There is still time to donate. Please visit the [CFEBA website](#) to add your contribution.

CFEBA Intern Reflects on His Summer Work Experience

Matthew Tieslau, Research and Emerging Issues Group of the Colorado PUC

This summer, through the generosity of the Charitable Foundation of the Energy Bar Association, I was afforded the opportunity to intern for the Research and Emerging Issues Group of the Colorado PUC. While at the PUC I was exposed to the wide range of activities that the PUC regulates, and learned much of the nuts and bolts that keep the Commission running.

My main research for the summer revolved around interim rates in Colorado. In 2010 Colorado passed a new provision governing interim rates as part of a larger bill called the Clean Energy Clean Jobs Act. This provision arguably lessened the burden for utilities to qualify for interim rates, but left wide discretion to the Commission in its interpretation of its authority to issue interim rates. As such I embarked on an extensive research project into the interim rate practices of states throughout the country. This ultimately culminated in a memorandum recommending how to proceed with interim rates in Colorado, which I was able to present and discuss with the Commissioners, as well as circulate to office staff. Being able to present my findings and recommendations to the Commissioners was a remarkable experience where I was pushed to defend my positions, and in which I learned a great deal. The tough questions I was asked showed me the depth of knowledge each Commissioner possesses, and forced me to consider the situation from new angles.

In addition to my research project I was able to attend weekly Commission meetings and PUC hearings held by the Commissioners and Administrative Law Judges. Through these meetings I learned a great deal about utility regulation, and was able to network with many people in the energy field. I leave the PUC with an in-depth understanding of electric utility regulation that has been augmented by hands-on experience.

I am very grateful that the Charitable Foundation of the Energy Bar Association made this experience possible for me. Additionally, I am grateful for the welcoming attitude of everyone at the Colorado PUC, all of whom made sure to expose me to new opportunities each week. My experience this summer will undoubtedly contribute to my future as I pursue a career in energy law.

Stay tuned to next edition of the *EBA Update* for a full Gala recap and photos!

For more information on the CFEBA, please visit:

www.cfeba.org.



OALJDR Explained, Courtesy of the Practice & ALJ and ADR Committees

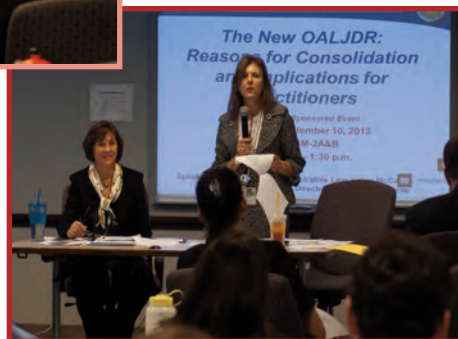
*FERC Practice & ALJ Committee – Co-Chairs: Scott Daniel Johnson & Christopher Nalls
Vice-Chair: Jennifer Rohleder*

*Alternative Dispute Resolution Committee – Co-Chairs: Jeffrey DiSciullo & Duncan MacKay,
Vice-Chair: Bruce L. Birchman*

On September 10, 2013, EBA's Practice & ALJ Committee and ADR Committee co-sponsored a "brown bag" luncheon to discuss the recent creation/consolidation of FERC's Office of Administrative Law Judge and Dispute Resolution ("OALJDR"). Approximately forty registrants attended the program in person; eight people registered for teleconference participation. The hour-long program, which was hosted at FERC's offices, was preceded by a 30-minute networking session.

The program discussion was led by Bobbie J. McCartney, FERC Deputy Chief Administrative Law Judge, and Deborah Osborne, Director of the Dispute Resolution Division of the newly-consolidated OALJDR. Judge McCartney provided an overview of the organizational changes, explaining that the new office retained all of the services previously provided, but with enhancements designed to improve the visibility and accessibility of these services. Judge McCartney then responded to a series of questions prepared by the co-sponsoring committees. Ms. Osborne elaborated on the functional capabilities and broad spectrum of services available through OALJDR; both Judge McCartney and Ms. Osborne offered specific examples of recent cases resolved through mediation. Several participants also weighed in with similar dispute resolution "success stories."

Written presentation materials were made available to participants at the program. Among other things, these materials outline the reasons for the office consolidation, the implications for FERC practitioners, and the potential advantages of dispute resolution as an alternative to litigation. Participants were encouraged to follow-up directly with Ms. Osborne with any questions, comments or feedback concerning the presentation.



YLC Co-Sponsors Inaugural Energy Law & Policy Institute

Young Lawyers Committee – Sandra Safro, Chair; Delia Patterson, Vice-Chair

On August 1st and 2nd, the University of Pittsburgh School of Law held its inaugural Energy Law and Policy Institute, co-sponsored by EBA and coordinated with the assistance of the YLC, with exceptional work done by Pittsburgh YLC member, Ed Humes of Everpower. Institute speakers included senior staff from the Federal Energy Regulatory Commission, the Department of Energy, the Pennsylvania Public Utilities Commission, PJM Interconnection, the Marcellus Shale Coalition, various members of industry, a number of law firms, and several YLC members. The panelists addressed a variety of energy related topics including tax incentive financing; pipeline planning, permitting, construction, and operation; the expansion of electricity transmission lines; distributed generation and net metering; fossil fuel exports; and changing laws and best practices in shale gas development. Overall, the event was a great success and we look forward to the next Institute! Materials from the Energy Law and Policy Institute are available [here](#).



Energy Law Journal: Excerpts from Past Issues

Ten Years Ago

“FERC should have chosen between the approaches advocated by Commissioners Hebert and Massey instead of attempting to split the difference. Had the FERC chosen Commissioner Hebert’s approach and given more than mere rhetoric to letting market forces set prices, market participants, investors, and legislators would know that the FERC was genuinely committed to letting markets work in California and elsewhere. Had the FERC chosen Commissioner Massey’s approach and spoken the language of cost-based ratemaking, the FERC and the courts that will inevitably review its orders, would have had clear metrics by which to ensure that rates would be adequate to ensure much needed investment. While people might have doubted the FERC’s commitment to market-based ratemaking, at least one would have reason to believe that when the FERC says ‘markets,’ it means ‘markets,’ and not a regime in which certain market outcomes simply are not permitted, regardless of whether those outcomes are consistent with the outcome a competitive market would produce or be expected to produce.”

Michael J. Gergen, George D. Cannon, Jr., and David G. Tewksbury, *Market-Based Ratemaking and the Western Energy Crisis of 2000 and 2001*, 24 ELJ 321, 348 (2003)

Twenty Years Ago

“The history of the electric power industry in Mexico reveals an ambivalent attitude toward foreign investment over time: encouragement and expansion of foreign investment in the early decades after independence, in an effort to encourage urbanization and industrial development in a resource-rich land, followed in this century by contraction and eventual withdrawal of that investment in a nationalistic effort to preserve the fruits of Mexico’s natural resources for Mexicans. Today, the pendulum has begun what appears to be a major and, perhaps, sustained swing in the other direction. Thus, from the dominance of foreign utility interests in the early twentieth century, to their withdrawal in 1960 with the completion of the acquisition by the government of the electric power industry, to the current shift toward more liberal foreign investment policies, Mexico has demonstrated deftness and flexibility in its response to the changing needs of its citizenry for electric power, as political and economic circumstances have evolved.”

John P. Mathis and Miguel S. Escobedo, *Mexico’s Open Door to Cogeneration and Independent Power*, 14 ELJ 285, 285-86 (1993)

Thirty Years Ago

“By far the best technique – and indeed the best way to prove anything in an administrative hearing – is to have one of the proponent’s witnesses proffer the materials [obtained in discovery] as an exhibit to that witness’ direct testimony or rebuttal testimony. This technique is preferable for several reasons. In the complex administrative hearings involving issues of rates or public utility practices, virtually all of the witnesses are expert witnesses. Evidentiary materials have more impact when they are sponsored by an expert in his field as probative of a fact in issue. Further, the expert is available to the forum to explain and illuminate the significance of, and inferences reasonably to be drawn from, the discovered materials. Any other mode of presentation merely provides the raw materials themselves without the patina of explanation and elucidation. In addition, as virtually any experienced administrative law judge will concede if asked, the case-in-chief evidence of the parties tends to be consulted more often, and given more weight, than their cross-examination when the initial or recommended decision is prepared. The reasons for this lie in the inherent risks and difficulties involved in attempting meaningful cross-examination of professional expert witnesses.”

Isaac D. Benkin, *The Inconstant Lady: Discovery in Administrative Adjudications and the Evidentiary Use of its Fruits*, 4 ELJ 201, 204-5 (1983)



JUDGE'S CORNER

The FERC Practice & Administrative Law Judges Committee proudly presents Federal Energy Regulatory Commission Administrative Law Judge Jennifer Whang, our next "Judge's Corner" author.

Judge Whang began her service as a FERC ALJ on September 24, 2012. She was previously an ALJ with the Office of Disability Adjudication and Review at the Social Security Administration for over three years in three different offices, including the hearing offices in Wilkes-Barre, Pennsylvania and Baltimore, Maryland, and at the National Hearing Center in Baltimore, Maryland. And she had earlier experience working with ALJs as an Attorney-Advisor in the Office of Administrative Law Judges at the United States International Trade Commission.

Her Honor has significant complex trial experience as a former trial attorney in the Civil Trial Section within the Tax Division of the Department of Justice. She brings a grounding in tax and accounting to the FERC ALJ bench as a former Tax Consultant and Tax Compliance Specialist in the Seattle, Washington offices of Ernst & Young. She is also licensed as a certified public accountant (inactive) in California.

Judge Whang holds a Bachelor's Degree in Economics from the Wharton School of the University of Pennsylvania, concentrating in Accounting and Multinational Management, and a Law Degree from the University of Arizona School of Law.

Therefore, it is with great pride that we devote this space for her to bring us the following illuminating observations and insights:

**By Guest Columnist,
The Honorable Jennifer Whang
Administrative Law Judge, Federal Energy Regulatory Commission**



So you think you want to be an Administrative Law Judge?

The position of federal administrative law judge (ALJ) has been touted as being "one of the best jobs in government." I couldn't agree more! I have had the privilege of working for the government for almost fifteen years and spent the last four years as an ALJ. While I have enjoyed all of my years of government service, the last four years have been the most rewarding of my career, and I hope to have many more.

So how did I get this position? I definitely would not be where I am today without the mentoring of my former supervisor, the Honorable Charles E. Bullock, who showed me what it takes to run a courtroom and encouraged me to pursue a career as an ALJ. I also would never have been selected to be an ALJ if I didn't know how to navigate the ALJ hiring process. For anyone who is interested in becoming an ALJ, I hope this article will answer some of your general questions.

Introduction to the ALJ Hiring Process

Federal ALJs are appointed solely based on merit. The Office of Personnel Management (OPM) administers the federal ALJ recruitment process. The minimum qualifications include seven years of experience as a licensed attorney practicing in either litigation or administrative law. Whereas most federal attorney positions are excepted service, ALJ positions are considered competitive civil service, meaning they require applicants to take OPM's competitive examination and require employers to take into account an applicant's Veterans' Preference.

When an agency looks to fill an ALJ vacancy, it can either hire a candidate who is not yet an ALJ off the OPM "register" or hire a sitting ALJ from another agency. The register is "a list of candidates eligible for selection used to make referrals to agencies for employment consideration when they have entry level ALJ vacancies to fill." Ever wonder why so many FERC judges come from the Social Security Administration

(SSA) and the Office of Medicare Hearing and Appeals (OMHA) at the Department of Health and Human Services (HHS)? There are over 1,800 federal ALJs in the United States. Approximately 90% of those ALJs work for either the SSA or the OMHA, whereas the remaining ALJs work for one of another two dozen federal agencies. The SSA has hired over 1,200 ALJs over the last twelve years to deal with the incredible backlog of disability cases. The OMHA was created in 2005, which transferred Medicare appeals from the SSA to the OMHA; therefore, all OMHA ALJs were hired, or transferred from other agencies, within the last decade. The SSA and the OMHA typically hire ALJs from the OPM register, whereas most of the other federal agencies hire sitting ALJs. The remainder of this article focuses on the process of getting onto OPM's register.

The ALJ hiring process is a long process—one I would describe as a marathon rather than a sprint. It took almost a full year from the day I submitted my initial application to the day I was appointed as an

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Judge's Corner Continued

ALJ. During that year, I sat for a Written Demonstration (WD), had a Structured Interview (SI), received my Notice of Results (NOR), placing me on OPM's register, was placed on the SSA's certificate, and had an interview with the SSA, all before receiving an offer as an ALJ. There have been multiple iterations of the examination administered by the OPM in the last twenty years and the examination process that I went through just five years ago is different from the currently ongoing examination process. I will attempt to point out differences as I go along.

Vacancy Announcement

The initial step in the ALJ hiring process is finding out when a vacancy announcement is posted. In the past, OPM has posted job announcements on USAJOBS, so if you are interested in finding out when an announcement is posted, set up an automatic search on USAJOBS to receive notification when the next vacancy is posted. OPM posts vacancy announcements infrequently, which is why it is important to monitor for the next vacancy announcement. OPM posted the most recent announcement in March 2013, whereas it posted the previous three announcements in November 2009, July 2008, and May 2007, so there is no consistent pattern for announcements.

In the past, such as when I applied, the open period to apply was a very short window—only a few days—because the OPM put a cap on the number of applications it would consider. This disadvantaged many individuals who did not know when the announcement would be posted. Numerous interested applicants were left unable to file their materials before the deadline passed because of the mad dash of applicants submitting their applications once the job announcement was posted. After what I imagine were many complaints about this process, in OPM's most recent job announcement, the OPM fixed a ten-day period during which applicants could apply. In addition to USAJOBS, another way to gather information on the ALJ examination is through an unofficial internet discussion board entitled "ALJ Discussion Forum," where both sitting and hopeful ALJs anonymously discuss topics related to being an ALJ and to the hiring process.

Application and Examination

The next step after finding an OPM posting is to go through the application and examination process. When I applied in 2008, this involved filling out an online application, which included an assessment questionnaire. The questionnaire asked me to describe how I met the seven-year experience requirement, state whether I was a licensed attorney, and provide examples of how I demonstrated skills in six accomplishment record categories: (1) decision making; (2) interpersonal skills; (3) oral communication; (4) writing; (5) judicial analysis; and (6) judicial management. Once the OPM reviewed this portion of the application, applicants who scored high enough were invited to proceed to the remaining portions of the ALJ examination. Once an applicant completed the WD and SI, the OPM sent the applicant an NOR with a numerical score and placed the applicant on the ALJ register.

As noted above, in the most recent job announcement, which was posted from March 5–15, 2013, the OPM no longer put a cap on the number of applications it would consider. The OPM also introduced a few new elements into the testing process, including: the Situational Judgment Test (SJT) and writing sample, which is part of the "online" component; and the Logic Based Measurement Test (LBMT), which is part of the "proctored" component. The experience assessment (online component), written demonstration (proctored component), and structured interview (in-person component) appear similar to previous examinations. In the most recent examination, applicants who successfully submitted an application during then ten-day time frame were preliminarily screened to see if they met the seven-year experience and bar licensure requirements. Then the OPM invited candidates who passed the preliminary screening to take the online component. After the OPM scored the online component, for those applicants whose "assessment [was] within the range for the higher-scored sub-group of all the eligible applicants," the OPM extended further invitations to take the proctored and in-person components.

The latest vacancy announcement describes the SJT as presenting applicants "with a set of work-related problems or critical situations and ask[ing them] to indicate which of the multiple-choice response options they would most likely and least likely take to handle the situations. The SJT is administered online, is timed, and involves text-based scenarios as well as video-based scenarios with closed captioning." The OPM provided applicants with sample SJT questions before administering this portion of the online assessment.

The OPM describes the LBMT as presenting applicants "with a set of scenarios and multiple-choice response options. Only one response option in each scenario is logically accurate, while the remaining options are logically inaccurate." Although the OPM did not provide any sample LBMT questions in its job announcement, I imagine that the questions are similar to the questions administered by other federal agencies that require applicants to take logical reasoning tests.

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Judge's Corner Continued

After taking the online component, proctored component, and in-person component, the OPM provides successful applicants with a numerical score, which places them on the OPM ALJ register. The OPM noted a change in scoring in the most recent vacancy announcement, stating that “[i]f you do not receive the required minimum score on the WD [or SI], you will not receive a final numerical rating and will not be placed on the ALJ register.” In the past, the OPM did not require a minimum score on the WD or SI to be placed on the ALJ register.

The OPM is currently in the process of administering the proctored and in-person components in the Washington, DC, area; there, applicants take the proctored component on one day and then take the in-person component the next day. Candidates who reside outside the Washington, DC, area are responsible for their own travel expenses. This is a change from past examinations where the proctored component and in-person component were not scheduled on consecutive days. This created an additional burden for applicants who needed to travel to the Washington, DC, area twice.

Agency Certificate

The next step in the ALJ hiring process is getting on an agency certificate. When an agency seeks to hire ALJs, it requests a certificate from the OPM. Typically, if an agency has an opening for one ALJ position in a particular location, the OPM will provide the agency with the names of the three highest scoring applicants that have included that particular city on their geographic availability list (GAL). As noted above, the two largest agencies that hire directly off the register include the SSA and the OMHA. The SSA typically hires ALJs in large numbers, such as thirty to ninety ALJs at a time for multiple cities. This is done, in part, to facilitate the SSA's six-week training of new ALJs. If the SSA informs the OPM that it intends to hire ninety ALJs, the OPM will provide the SSA with a certificate of 270 names. Then the agency that requested the certificate will go through its own hiring process, consisting of interviews and reference checks.

Agency Hiring Process

After getting on an agency certificate, applicants must go through the agency hiring process. At the SSA, this included an in-person interview at the SSA headquarters in Falls Church, Virginia. When you interview at the SSA, you are not told for which geographic location you're being considered. During SSA's ALJ hiring process, you are permitted to pare down your GAL to a more limited range of cities than your original list. You may not, however, widen your GAL to include more cities. When I filled out my OPM application, I listed that I was available to go to any city within the continental United States. Faced with the reality of a possible cross-country move, I pared this list down to a more realistic list of cities. According to the SSA, if an applicant eliminates a city from their GAL, the SSA will notify the OPM, and the OPM will take that applicant's name off the list for that city for future positions.

Offer of Employment

The last step in the ALJ process is securing an offer of employment. When I got an offer, I was told that the offer was for the SSA hearing office in Wilkes-Barre, Pennsylvania, with a start date in one month. There was no choice of location. I could either accept going to Wilkes-Barre or decline. Obviously, I chose the former and I don't regret having made that choice, despite sacrifices made by my family, including selling our house in Maryland and renting apartments in two different cities before later settling back down in Maryland. I was fortunate to secure a transfer back to Maryland within a year of relocating to Pennsylvania thanks in part to a change in SSA policy that allowed ALJs to transfer between offices after ninety days, rather than the long-standing policy of requiring two years of service before being considered for a transfer.

Conclusion

A 2010 Government Accountability Office (GAO) report found that, as of September 2008, 51% of ALJs were eligible to retire and that, by 2013, 79% of ALJs will be eligible to retire. The current average age of federal ALJs is in the late 50s; until the ALJ examination was reopened in 2007, the average age was 63. Retiring ALJs in the next decade will create many opportunities for aspiring ALJs, so get ready now for the next time the OPM posts a vacancy and good luck!

To read a full copy of this article, which includes footnotes, please visit: <http://eba-net.org/sites/default/files/FallNewsletter2013-JudgesCorner.pdf>.



FERC Commissioners and Industry Leaders Discuss Electricity and Natural Gas Coordination

On October 8, 2013, the Electricity Regulation Committee (ERC) and the Natural Gas Regulation Committee sponsored a seminar to address the numerous near- and long-term efforts that are underway to improve coordination between the gas and electric markets and to address reliability challenges as electricity generation becomes increasingly dependent on natural gas. Notably, the second panel of the event included two sitting Commissioners from the Federal Energy Regulatory Commission (FERC), Commissioners Philip Moeller and John Norris. The well-attended seminar, as well as the networking reception that followed, were hosted by Cadwalader, Wickersham & Taft LLP at its Washington, DC offices.

Following opening remarks by Channing Strother, the Chair of the ERC, Greg Lawrence, of Cadwalader, introduced the seminar and moderated the first panel, which consisted of Dan Dolan, President, New England Power Generators Association; Raymond Hepper, General Counsel, ISO New England, Inc.; and Joan Dreskin, Vice President and General Counsel, Interstate Natural Gas Association of America. This panel explored, among other things, the impacts of recent FERC proceedings on market coordination this upcoming winter and beyond, including recently docketed complaints. The panelists identified New England as an important focal point for electricity and natural gas coordination concerns and the discussion extensively analyzed the challenges in that region. The panelists also discussed differences in operations and planning in the electric and natural gas industries and the role those differences have played in the issues that have arisen.

Nicholas Gladd, of FERC's Office of the General Counsel, moderated the second panel, which included FERC Commissioners Philip Moeller and John Norris; Richard Kruse, Vice President of Regulatory Affairs and Chief Compliance Officer of Spectra Energy Corp.; and Stephen Whitley, President and CEO of New York ISO, Inc. This panel examined the scope of FERC's technical conferences and rulemaking activity on electricity and natural gas coordination, as well as potential innovations in pipeline infrastructure expansion. The panelists first discussed FERC's Notice of Proposed Rulemaking on the Communication of Operational Information between Natural Gas Pipelines and Electric Transmission Operators (Docket No. RM13-17-000), with each panelist giving his insight into whether and why the proposed rule is the logical starting place for FERC's efforts. The conversation then shifted to other actions the respective industries and FERC might take to further address these issues, including a discussion of the role of centralized capacity markets in addressing the need for additional natural gas pipeline infrastructure. On that topic, the panelists specifically discussed FERC's September 25, 2013 capacity market technical conference (Docket No. AD13-7-000), including the need for capacity markets to send accurate price signals and the importance of strengthening those price signals by ensuring accurate scarcity pricing in the energy markets.

Written materials from this seminar are available [online](#).

Don't Miss the first program in the EBA Primer Series



Electricity and Electric Rate Regulations: An Introduction

December 9-10, 2013

The Brown Palace Hotel and Spa, Denver, CO

CLE Approval Pending

The goal of this primer is to provide an overview of electric regulation at the federal and state levels. The course will begin with an overview and then cover key legal milestones in electric regulation. The course explains how state and federal jurisdiction over different segments of the industry emerged and will cover alternative regulatory regimes, development of competitive wholesale and retail electric markets, enforcement, the role of the Regional Transmission Organizations and so much more. This is an excellent course for those new to energy law...and those seasoned attorneys who would like a deeper understanding of electric regulation.

View the course schedule and further details [online](#).

Make your hotel reservation online now.



President's Message Continued

The EBA is also continuing with implementation of its 2013-2015 Strategic Plan, which has four key goal areas: educational programming, networking opportunities, information resources and membership growth. To that end, we recently unveiled the newly-redesigned EBA website. In the coming months, please check the website as we proceed with updating and adding more content of the site.

In the past several months, our Committees have held programs on trending issues. Upcoming events include a program on Federal Power Act Section 203 and a dual-agency program, DOE and EPA: Energy Efficiency Enforcement. A detailed list of upcoming programs is included in this Newsletter. I encourage you to participate in a program and contribute your ideas for a future event. Each Committee's leadership and member roster is available on the website and in the EBA Directory, which was recently issued to all current members.

At the Chapter level, each of our seven Chapters has focused on programs of relevance in their respective region. The Chapters also have provided support through their programs and donations to our Charitable Foundation. On December 9-10, I will travel to the Rocky Mountain Chapter region for the inaugural program in EBA's Primer Series. This initial primer program will focus on electricity rates and regulation.

As always, it is an honor to serve the Association. I hope that each of you continues to enjoy the benefits of your membership in the Association; your membership is a continued benefit to us. I hope to see you soon at an EBA event.



EBA President Adrienne Clair with Paul E. Nordstrom Award winner Bill Mogel (left) and CFEBAs President Evan Reese (right) at the CFEBAs Gala on October 23, 2013.

Interview with Chairman Wellinghoff Continued

"The undue discrimination part of the law does not crash up against the just and reasonable part of the law."

Carving Out His Role from the Beginning

Fascinatingly, Chairman Wellinghoff told us that when he assumed the Chairmanship, he received advice to the effect that statutory just and reasonable, and not unduly discriminatory, ratemaking prescriptions essentially call for ignoring requests by new market entrants for separate treatment that takes into account their specialized entrepreneurial status. In other words, some said "we have to treat a coal plant just like a wind system" in order to be non-discriminatory. Chairman Wellinghoff rejected this view, and presented to his Staff a different approach.

"Within the ambient" of legislative directives to set just and reasonable rates and protecting against undue discrimination, he said he does not believe that all forms of energy need to be treated the same because this means "you are in essence treating them as the lowest common denominator or as a historical legacy resource and not taking into account the characteristics of new kinds of energy such as on the demand side and gas storage. They have different characteristics," he elaborated, "but can provide the equivalent quality of service to the grid. So that if we treat them the same all the way down the road as far as interconnection and everything else, we will ultimately exclude resources and drive down efficiencies, which depend on having more competing resources overall." He concluded by saying, "Ultimately, undue discrimination means treating resources in an approximately equivalent manner to insure that they can deliver value to the market." He believes in taking into account differences in operational characteristics and needs for financing of new market players "as unique and distinct as long as we can integrate them into the market and make them part of a full market solution and make sure it is a more robust and efficient market." "The undue discrimination part of the law does not crash up against the just and reasonable part of the law," is how he puts it. "You can't have rates that are just and reasonable without efficient markets, and to have efficient markets you can't treat all resources exactly the same in all aspects" because otherwise you keep some resources out of the market and defeat the goal of increasing market efficiency, as is needed to make prices just and reasonable. With this mindset, Chairman Wellinghoff went to work with a passion and changed the energy world.

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Interview with Chairman Wellinghoff Continued

Blazing New Trails for the Energy Industry

He further told us that he “developed a strategic plan” when he became Chairman, consisting of broad principles of achieving efficiency both on the operational side and the market side of the wholesale gas and electric systems.” He then said that this strategy was implemented through the issuance of a variety of proposed rulemakings and inquiries. They were initiated from within FERC, not by Congress, as part of FERC’s existing “broad legislative authority to see that rates are just and reasonable.” “I can’t believe that rates are just and reasonable unless and until we drive as much efficiency into the market as possible,” he explained. He called this the “overall theme” of the actions that were initiated during his Chairmanship in remaking transmission planning and market structures.

This is in sharp contrast with many prior Commissions that have been deeply involved in enacting rules and regulations in response to timelines set by statute, such as the Energy Policy Act of 2005, or in deciding cases brought by applicants, as with the by-now legendary rate design and cost allocation methodologies named after the pipeline rate cases in which they emerged in decades past.

In that connection, without getting into the controversy over former Colorado Chairman Ron Binz’s nomination to be the next FERC Chairman due to editorial and Senator critiques maintaining that he has overreached his Commissioner role by attempting to implement public policy choices over optimal fuels, we instead asked Chairman Wellinghoff to define the proper role of a Chairman or a Commissioner. He responded that it is inherently both quasi-legislative and quasi-judicial, and he believes that he, his colleagues, and his predecessors have not taken action that is beyond the scope of those responsibilities.

When we asked Chairman Wellinghoff about the many self-initiated matters he has led the Commission in addressing, he modestly began, by saying, “first and foremost,” he credits the accomplishments during his Chairmanship to the “excellent team we assembled” at FERC. He calls it “head and shoulders above any staff” that he has come across anywhere before at all levels of government at which he has been involved, federal, state, and local. He predicted that the FERC Staff will continue in that vein in the years ahead. With those appropriate courtesies duly noted, here then, is Chairman Wellinghoff’s accounting of the

“I can’t believe that rates are just and reasonable unless and until we drive as much efficiency into the market as possible.”



key accomplishments of FERC during his stewardship.

Planning Reforms Through Order No. 1000

Reforms in the planning of wholesale electric transmission was achieved primarily through Order No. 1000, which he calls “one of the seminal orders that FERC has issued in the last twenty years” and predicting that it will “serve us well.” He sees this rulemaking as allowing all kinds of resources to interconnect with the Nation’s electric grid. In particular, he described how renewables that are remotely located have presented “a new paradigm” much like we had with natural gas in the 30s and 40s, when there was a pocket of low cost supply in the Permian Basin and Texas and Oklahoma that was needed by the rest of the country. He explained that it had to be developed and moved to where it could be used through a robust interstate natural gas pipeline network. He stated that we now have a parallel situation where new technologies have been developed, such as wind turbines that can efficiently and effectively harvest wind energy that is concentrated from the Dakotas down to Texas at considerable distances from the load centers. “We need to start looking at transmission infrastructure that can take advantage of these resources and deliver it to customers throughout the country, and that is part of what Order No. 1000 will do,” he explained.

In addition, he told us that he believes Order No. 1000 will assist in improving the overall reliability and efficiency of the system by ensuring that those areas that have congested systems will have the ability to build robust new systems to provide low cost energy. He pointed out that the Order requires that planners look not only for transmission solutions but also generation solutions and the demand side, such as energy efficiency and demand response, and electric storage.

Another important feature of Order No. 1000 touted by Chairman Wellinghoff is the requirement to look at federal and state public policy drivers in addition to reliability and economic considerations. He recounted that there are renewable portfolio standards in 30-odd states plus environmental emissions requirements set at the federal level.

Finally, with respect to Order No. 1000, the Chairman stated that the removal of any federal right of first refusal will ensure

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Interview with Chairman Wellinghoff Continued

that there is competitive development of transmission. In that connection, he told us that recently he had a conversation with a representative of Trans Bay Cable, an independent transmission development company that successfully installed a cable from Pittsburgh, California across the bay to San Francisco, with capacity to deliver 400-some megawatts to consumers at reduced costs of \$170 million dollars annually. He said that this independent company is participating in the Order No. 1000 processes of the California ISO and proposing “various alternative proposals” in competition with the incumbents in ways that will improve efficiencies and lower costs. He is “very happy” with these fruits of Order No. 1000, and credits both the Commission Staff and his Commissioner colleagues with these achievements by being “unified” and instrumental in coming up with “brilliant ideas” for accomplishing Order No. 1000’s worthy objectives.

Market Reforms

On the market side, he is most proud of bringing the demand side into the markets. That whole effort was “very contentious” and is still under appeal, but Chairman Wellinghoff is “confident” that FERC will be upheld in court. He said that through a series of orders, FERC has created a number of market areas in which groups of businesses and entrepreneurs participate in markets in ways that “demonstrably drive down prices.” For example, he was informed by PJM that the 14,000 MW of demand response in that region assisted

“There is tremendous value to be extracted from the grid if we ensure we put in place rules and market structures that will encourage efficiency.”

greatly in contending with very high, humid temperatures experienced in mid-September by reducing outages and preventing them from becoming wide-spread. He pointed out that demand response is as reliable as a traditional generator and is a “full-fledged participant” that is entitled to the type of full locational marginal price compensation provided for in Order No. 745.

The ancillary services market also has been well served by demand response, according to the Chairman, with Order No. 755 regulation service requirements involving, among other things, batteries, fly-wheels, and water heaters. Larger scale 80- to 100-gallon water heaters can effectively move power onto the grid using electronic communications signals available on PJM. He explained that these facilities can reach the grid more quickly than can traditional resources, and therefore he maintains they should be compensated accordingly.

“This demonstrates that there is tremendous value to be extracted from the grid if we ensure we put in place rules and market structures that will encourage efficiency.” He states that there is efficiency on the utility side of the meter that “needs to be mined on the customer side of the meter, such as energy efficiency in build-

ings and homes.” He states that “FERC has demonstrated this amply in ways that have never been demonstrated before. I am very proud of that accomplishment.”

Interestingly, but not surprising, he also told us that he follows the role of renewables at the retail level that is beyond the jurisdiction of FERC as a matter of personal interest in his spare time. His family chides him for foregoing reading books in favor of reading white papers and monographs on net metering and specially generated distributed solar photovoltaic (behind the meter) equipment that have retail impacts. He reads all sides, even what he deems to be “yellow journalism” attacks on renewable projects and their supporters. The Chairman is intrigued by how to get full and fair value out of distributed generation at all jurisdictional levels, and how to see that it is fairly compensated in a way that does not subtract from the cost recovery that legitimately should go to the local distribution company to support its infrastructure -- raising issues of load loss and stranded costs.

Enforcement as Part of an Overall Market Efficiency Strategy

We commented to Chairman Wellinghoff that while he stressed his inherent ratemaking authority for the initiatives he made in planning and market structure areas, a commonly expressed perception is that FERC has become more of an enforcement agency than a ratemaking agency. He responded that the two go

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Connecting with the Chairman

Last Book Read: A New York Times bestseller his daughter gave him called, “Wheat Belly.” It caused him to stop eating wheat, and consequently he has lost about 20 pounds.

Where He Would like to be Able to Spend Some Spare Time: “On a beach or a mountain.” Enjoyed spending the previous weekend with friends at Red Fish Lake outside of Stanley, Idaho. Get your bookings in early!



Interview with Chairman Wellinghoff Continued

together. “You cannot have an efficient market if it is not fair because if someone is manipulating the market in ways that are inappropriate and in some ways illegal the market will not function but will be used to extract prices without providing value back.” Hence, he embarked on an aggressive approach to make sure that the efficiencies he is striving for are kept from “collapsing” through the new enforcement tools that Congress provided to the agency.

Specifically, EPAct 2005 gave FERC “specific authority to go after fraud and manipulation, and we never had that authority before,” he stated. Before that recent legislation, he explained FERC had to rely on general authority that did not specifically address fraud and manipulation. Also, he pointed out that the “anemic \$10,000 a day penalty” authority that FERC used to have was “barely a slap on the wrist if you were making a couple million dollars a week manipulating the market; it was less than a traffic ticket.” The new \$1 million dollar a day penalty per violation gives FERC real clout and Chairman Wellinghoff showed no hesitancy in using it where he saw wrongs that needed to be righted.

Of JP Morgan, for example, Chairman Wellinghoff said that there were over \$410 million extracted both from disgorgement and penalties, plus the company declined to seek the opportunity to realize \$150 million that they claimed, and exited the energy trading market completely. According to the Chairman, JP Morgan understood that it would be “continually subject” to stiff fines and penalties if it continued operating in this business as it had been. He said that “we have had to ramp up” the enforcement authority with a full analytics division of “geeks and quants who spend all day looking at numbers and relationships between numbers of trades to see if there are any anomalies that seem to be out of the ordinary.” If so, then the matters are turned over to the 200-persons investigative staff headed by a former U.S. Attorney, who also has a former counsel to the FBI as the No. 3 official in the office. He states that the office has the quantitative, legal, and investigative skills “to take on the biggest people in the world, including JP Morgan, and bring them down when necessary.”

“We have restored confidence in the markets,” he maintains, following the early days of this century when “we had Enron running roughshod over the markets in California and other places.” While acknowledging that there will always be people who think they are the smartest in the room and will try to go outside of the box, he believes that “we now have a fairly well defined box and if they do step out they will be put in the penalty box, which can be very severe for their business.”



FERC is able to “take on the biggest people in the world, including JP Morgan, and bring them down when necessary.”

Getting it Right on Return on Equity

On base ROE, some proposals have begun to be submitted in filings at FERC and in the industry literature although no particular case ripe for decision has been before the Commission as of yet. We asked the Chairman how he foresees this subject playing out. “I believe we have to insure that there is a fair and adequate return for investors, particularly in transmission infrastructure in this country,” he replied. He pointed out that the 2005 Energy Policy Act has a specific provision for FERC to provide incentives for building transmission under certain circumstances. He maintains that FERC has properly implemented Congressional policy, and observed that interest rates have come down since the legislation took effect and was implemented by Commission action. He said it may be appropriate to look at whether the returns should be adjusted “at some level” while making sure that the returns are “adequate and sufficient to attract capital” to build transmission by which to move remote power resources to loads and to improve reliability and economy and ensure that public policy is carried out.

Unfinished Business: The Looming Physical and Cyber Threats to National Security

“A continuing concern not yet adequately addressed in this country is the security of the grid,” he warned us. He said this applies to cyber security “to some degree” but that he is actually even more concerned about physical security. As to both, he maintains, “we do not have the necessary legislative authority in place to address known threats and vulnerabilities.” While noting that it took him his first year at FERC to fully appreciate the full severity of this matter, he said that, “I have been harping on this for 6 of the 7 years I have been on the Commission.” This includes testifying before Congress and talking to a number of people within the Administration. And, of course, he created the Office

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Interview with Chairman Wellinghoff Continued

of Energy Infrastructure within FERC, headed up by Joseph McClelland. That office uses “what little authority” FERC has presently under the existing law to “work on a collaborative basis with our jurisdictional utilities to mitigate known threats and vulnerabilities and we have a whole list of them.”

He could not have been clearer in telling us that “we face potentially disastrous threats.” He is adamant that “we need to be able to order people to do things to prevent immediate threats” beyond the long term NERC 30-month reliability processes designed “for such things as tree trimming,” and beyond the cyber rules. In his view, “we need to be able to take action” under new powers to be provided by Congress when we know that there are actors in a region that have to be dealt with right away.

“We face potentially disastrous threats....We need to be able to order people to do things to prevent immediate threats.”

Having heard in our last interview with NARUC President Philip Jones that he learned particularly of the dangers to physical security from Chairman Wellinghoff to be added to concerns about cyber security, and having heard these admonitions from the Chairman himself, we have detected a broad agreement among regulators, including in our previous interviews with NERC General Counsels Charles Berardesco and David Cook, and our interview with FERC Commissioner Tony Clark that this is a matter that needs Congressional action.

Clearly, Chairman Wellinghoff has accomplished many important objectives that he set for himself with the support of his colleagues; and clearly he sees significant tasks ahead for FERC and others to address. We expect to see him remain engaged, to the benefit of us all.

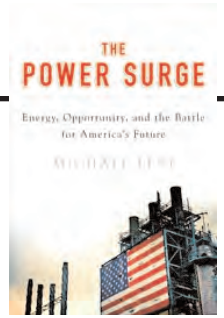
Power Generation & Marketing Committee hosts *Microgrids – 101*



On Wednesday September 25, the Power Generation & Marketing Committee presented “Microgrids – 101,” a brown bag lunch and teleconference. The event drew more than 25 people in person at Latham & Watkins’ offices in Washington DC as well as in person attendees at Stroock & Stroock & Lavan in New York and at Robinson & Cole in Hartford and a large phone audience. Microgrids 101 was moderated by Michael Gergen of Latham & Watkins and featured the following panelists: Michael Burr of The Microgrid Institute; Jon Mostel of Stroock & Stroock & Lavan; Joel Rinebold of The Connecticut Center for Advanced Technology; and Clarke Bruno of Anbaric Power. The panel reviewed the concept of, and attempted to define, what constitutes a microgrid, the benefits and challenges of such facilities, and how such facilities are currently, and should in the future, be regulated. As part of this review, the panelists discussed the statutory framework underlying microgrids and similar facilities in various regions of the country and the state and federal regulatory regimes that support that framework. The panelists also discussed the latest developments in this space, including with respect to federal, state and local governmental entities seeking to encourage or support the development of such systems through legislation or other means.



Energy Bar Association Book Club Newsflash



Presenting the 4Q 2013 EBA Book Club Book of the Quarter:

The Power Surge: Energy, Opportunity, and the Battle for America's Future

A special 'Thank You' to the author, Michael Levi for serving as a panelist in General Session II: *The Geopolitical Implications of Energy Discoveries in Unexpected Places* by Unexpected Players during the recent EBA Mid-Year Meeting!

From the Book Jacket:

"Everything we once knew about American energy seems to be changing," writes Michael A. Levi, CFR senior fellow and director of the program on energy security and climate change, in *The Power Surge: Energy, Opportunity, and the Battle for America's Future*. The United States can strengthen its economy, improve national security, and confront climate change if it intelligently embraces the historic gains unfolding all across the energy landscape.

In his new book, Levi offers an intricate portrayal of the rapidly evolving American energy landscape—one defined by surging oil and gas production, a thriving renewable energy industry, and falling oil consumption—and illuminates the consequences of these changes for the economy, national security, and the environment.

The book includes on-the-ground reporting and eye-opening analysis of the country's energy choices, cutting through heated claims made by all sides in America's energy fights. On natural gas, Levi writes: "People who claim that natural gas can propel the U.S. economy in the twenty-first century, if only pesky environmentalists and other concerned citizens lay off, are exaggerating the benefits of the shale gas bonanza. But one needn't exaggerate on this front to conclude that shale gas is a big deal. Indeed the potential consequences go well beyond economics."

Levi's book debunks the idea that the fight over America's energy future is a zero-sum game between old and new sources of energy. "The right strategy for the United States would embrace opportunities in old and new energy alike," he concludes.

(Available in hard copy, e-Book, and audible formats. Note that EBA does not make any representations regarding the books selected for EBA Book

Thank you to all the EBA Book Club participants in the 3Q 2013 Quarter!

The 3Q 2013 EBA Book Club Book, *Energy for Future Presidents: The Science Behind the Headlines*, sparked some online discussion and a lively in-person happy hour meeting at Fire & Sage on September 12. Author Richard Muller took a scientific approach to analyze energy catastrophes and opportunities for the purpose of guiding the future president – the reader – on energy policy.



Join EBA Book Club:

Every EBA Member is invited join for any or all quarterly sessions of the EBA Book Club. Let this be your inspiration to read industry-related literature at your own pace and discuss, ask questions, share perspectives and debate the book's themes and conclusions with other EBA Members.

The EBA Book Club has both virtual and physical platforms to interact with other members. Details follow:

Virtual EBA Book Club:

Virtually, the EBA Book Club will meet under "Energy Bar Association Book Club" at Bookclubit.com (free registration required). Once you create an account, look for "Energy Bar Association Book Club" and request to join.

EBA Book Club Live: Stay tuned!

The 4Q 2013 in-person meeting will take place in early January at DC's PhilanthroPub, The Cause <http://www.causedc.org/>.

Coming Attractions:

Look for the 1Q 2014 Book of the Quarter in the winter edition of *EBA Update*! Book recommendations are welcome – please email any suggestions to the Book Club Moderator at: EBABCModerator@gmail.com.



Upcoming EBA Events

EBA Primer Series - Electricity and Electric Rate Regulation: An Introduction

**December 9, 2013
The Brown Palace
Hotel and Spa
Denver, Colorado**

**Rocky Mountain Chapter
Networking Reception**

**December 9, 2013
Holland & Hart LLP
Denver, Colorado**

**Thirteenth Annual Western
Chapter Meeting**

**February 20-21, 2013
Hyatt Regency San
Francisco
San Francisco, CA**

**Seventeenth Annual Midwest
Chapter Energy Conference**

**March 10-11, 2013
Hilton St. Louis at the
Ballpark
St. Louis, MO**

EBA Annual Meeting & Conference

**April 8-9, 2014
Renaissance Hotel,
Washington, DC**

Check the EBA Calendar for more information on any of these events or if you have any questions please contact Associate Administrator Michele Duehring at 202.223.5625 or michele@eba-net.org.

EBA's 2014 Annual Meeting & Conference Schedule Highlights:

**April 8-9, 2014
Renaissance Hotel
Washington, DC**

Tuesday, April 8th:

•8:00 am - Conference and Programs begin

•5:30 pm - Administrative Law Judges Cocktail Reception - separate registration required.

•7:00 pm - Conference Speakers Dinner - Invitation Only

Wednesday, April 9th:

•8:00 am - Conference and Programming Day 2

•5:15 pm - EBA Annual business meeting

•5:30 pm - Cocktail Reception

•6:30 pm - Annual Meeting Dinner and Entertainment

Additional information will be posted as available. Registration will open in the spring of 2014.

Interested in Sponsorship? Please contact Lisa Levine at llevine@eba-net.org or 202.223.5625.

ABOUT THE ENERGY BAR ASSOCIATION: EBA is a non-profit voluntary association of attorneys, non-attorney professionals and law students whose mission is to enhance the professional excellence and ethical integrity of its members in the practice, administration, and development of energy laws, regulations and policies. Established in 1946 as the Federal Power Bar Association, the Association generally was focused on those lawyers practicing energy regulatory law at the federal level. In 1977, the organization changed its name to the Federal Energy Bar Association to reflect the name change of the Federal Energy Regulatory Commission. Today, the Energy Bar Association is an international, non-profit association of attorneys, non-attorney professionals and law students active in all areas of energy law. It has over 2500 members, throughout the United States, Canada and Internationally with seven formal chapters in Houston, New Orleans, Midwest, Southern, Western; Northeast and Rocky Mountain regions of the U.S.

DIVERSITY POLICY STATEMENT: The Energy Bar Association is committed to the goals of fostering an inclusive and diverse membership and increasing diversity across all levels of the Association, so as to reflect the diversity of the energy industry and the Nation as a whole. Attorneys, non-attorney professionals in the energy field and law students are welcome to join our ranks regardless of race, creed, color, gender, ethnic origin, religion, sexual preference, age, or physical disability and are encouraged to become active participants in the Association's activities.

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**As of January 1, 2014,
EBA is relocating its
office to:**

2000 M Street, NW,
Suite 715
Washington, DC 20036

Our phone number will remain the same, 202.223.5625.

Website: www.EBA-Net.org

