

## President's Message



We are now at the half-way point in the EBA programming year, having just completed the Mid-Year meeting. (It seems strange to have a "mid-year" meeting in December, but the EBA calendar has been this way since "the memory of man (or woman) runneth not to the contrary," so I for one am not going to challenge it!)

Despite the still-anemic economy, many of you turned out for the Mid-Year Meeting on December 9, entitled "Staying Ahead of the Curve: Managing Energy Risk, Financing, and Technology in the 21st Century," and the Primer held on December 10 on Enforcement and Compliance in Energy Markets. The programs were first-rate, including a roundtable with General Counsels discussing how to manage the many risks facing participants in the energy industry, a panel on the future role of natural gas in our energy markets, and an ethics panel dealing with social media and e-discovery. FERC Commissioner John Norris gave the luncheon address, and

*continued on page 12*

## FERC Solicitor Robert H. Solomon Holds Forth on Appellate Advocacy

**Long-Time FERC Legal Craftsman Occupies What Some Call the Most Coveted Legal Job in Town**

*Gary E. Guy and Channing D. Strother*



**Bob Solomon holds up the pillars of justice every day!**

It was with great relish that your legal news beagles Gary Guy and Channing Strother (aka "Carl Stern and Fred Graham") were escorted by FERC Solicitor Robert Harris Solomon into the moot court room that also doubles as the law library for the Solicitor's Office. We saw the legendary lectern upon which the fate of so many of our cases has been dealt a fatal blow or given a winning refinement through the thorough preparation to which oral arguments are subjected within the agency. We learned that not just seasoned attorneys but also revered technical experts from among FERC's Offices are known to participate in drilling the Solicitor's Attorney, and getting the finer points honed down prior to going live at the United States Court of Appeals in whichever Circuit the case resides.

The steady, deliberative hand of Solicitor Solomon ("Captain Bob" – we

just made up this nickname, affectionately), is the driving force behind the highly successful win/loss statistics that FERC has enjoyed over the tenure of the current and immediate past FERC Chairmen under whom he has served.

After granting us entrée into the inner sanctum moot court room, Mr. Solomon graciously brought us into his own office, where he proudly displays his collection of historical campaign buttons. Perhaps keeping the Hatch Act in mind (not that it should apply to dead politicians anyway), he noted that he always makes sure the Commissioners understand that these political boosters are bi-partisan (yes, both Nixon/Lodge and Kennedy/Johnson supporters will see memorabilia for their sides).

We then began an interview that was among the longest and meatiest we have ever had the honor of conducting, requiring two video tapes, which are uncut and

*continued on page 8*

# News from the Charitable Foundation of the EBA

Freddi L. Greenberg

## FEBA 2010 Fundraising Campaign Results

The CFEBFA is pleased to report that our 2010 fundraising campaign raised approximately \$87,000. We appreciate the generosity of EBA members and friends who support our efforts during these difficult economic times. We couldn't do it without you, our donors! Please support the CFEBFA by including a donation when you renew your EBA membership. The CFEBFA allows all of us to make a difference in the lives of others, no matter how busy we are with our own work. You can support the CFEBFA with a donation and by volunteering at a Build Day or another hands-on activity. Thanks for another successful year!

## CFEBFA Gala and Paul E. Nordstrom Service Award

On December 9, 2010, over 200 people attended the CFEBFA's Eighth Annual Fundraising Gala, *Empower By Giving* at the Ronald Reagan Building and International Trade Center in Washington, D.C. The 2010 Gala set a record with revenues of approximately \$29,000.

During the Gala, Sheila Hollis, a past president of EBA, was presented with the second Paul E. Nordstrom Service Award. This award was established by the EBA and the CFEBFA in memory of Paul E. Nordstrom, a past president of the EBA and the first president of the CFEBFA. The award was presented to Ms. Hollis by K Henry, Paul Nordstrom's widow. The Paul E. Nordstrom Service Award honors EBA members who have demonstrated exemplary and significant service to the EBA and the community.

The festive evening included jazz by Victor Dvoskin, Lyle Link, Jon Schneider and Richard Seals. Thanks to EBA member Jon Schneider for donating his services for this event. Special thanks to CFEBFA's fourteen Gala sponsors. Guests enjoyed hors d'oeuvres and cocktails while bidding on a diverse array of silent auction items.

For the 2010 Gala, some donors formed teams to sponsor auction items, competing to sell their auction items for the highest price. The three winning teams – there was a tie – were the Midwest Chapter of EBA, the Day Pitney Team and the Foundation of the Energy Law Journal, each of which brought in \$300. Thanks to all three groups for supporting the CFEBFA by creating outstanding auction items!

The success of the Gala was attributable in large part to the efforts of Gala Committee Chair Katherine Zeitlin and Coordinator Michele Duehring, as well as Committee members, Evan Reese, Mike Stosser, Meredith Chambers and Linda Walsh. Thanks to all of you for once again helping CFEBFA set a fundraising record at its annual Gala. It gets better every year due to your hard work!

FERC Chairman Wellinghoff addressed Gala attendees and expressed his support for the charitable work of the CFEBFA. Also in attendance were FERC Commissioners LaFleur, Moeller and former FERC Commissioner Suedeen Kelly.

Also present at the Gala were representatives of two recent CFEBFA grant recipients -Mr. Rick LaRue from the Solar Electric Light Fund and Ms. Debra Parrish from Medical Missionaries. Ms. Parrish and Mr. LaRue each thanked the CFEBFA for supporting their organizations' work in post-earthquake Haiti.

## 2010 CFEBFA Annual Fundraising Campaign

### Benefactor Contributors

(Contributions of \$5,000)

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### Foundation Sponsor Contributors

(Contributions of \$1,000-\$2,499)

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*continued on page 3*

## CFEBA Update Continued

### CFEBA Habitat for Humanity Build Day – October 30, 2010

On October 30, 2010, CFEBA sponsored a service project (a "Build Day") with Habitat of Humanity of Northern Virginia ("HHNVA"). Approximately 10 EBA member volunteers, their family and friends gathered early in the morning at 2256 Berger Place in Herndon, Virginia and worked through the mid-afternoon installing a kitchen, renovating a bathroom, installing new trim woodwork, caulking and painting. This work was part of a HHNVA renovation of three existing properties under a Federal Government program for below-market price sale and use by low-income families of the Washington D.C. community. The three properties were expected to be completed by the end of 2010.

In Spring 2011, CFEBA expects to schedule another Build Day at HHNVA's Perry Hall Project, to assist with the renovation of a 12-unit apartment building in Arlington, Virginia about three to five miles from the District. CFEBA will sponsor this project, along with other organizations. The project has received all needed governmental approvals. Major structural work is being performed by a contractor. After that, interior work will be performed with volunteer assistance.

Watch for announcements of future CFEBA build days – new volunteers are always welcome! See page four for a first-hand description of participating in CFEBA's Habitat Build Day, provided by EBA Secretary and member Marcia Hooks.

### CFEBA Summer Law Student Intern Program

The Fall 2010 EBA Newsletter included reports on summer experiences from three law students who worked as CFEBA-sponsored interns during the summer of 2010. The following report is from CFEBA's fourth intern for the summer of 2010. The CFEBA was pleased to offer these law students work experience in the area of energy law, at FERC and other federal and state agencies, and plans to continue this internship program in the summer of 2011.

#### Report From **Conor J. Bennett-Ward, CFEBA Summer 2010 Intern**

This past summer, I was fortunate to work with the attorneys in the Office of the General Counsel at the Federal Energy Regulatory Commission. The internship provided me with an opportunity to gain experience on a variety of energy-related matters. For example, I spent a considerable amount of time analyzing issues involved in the Commission's market-based rate regime. I also worked on matters related to proposed settlements and transfers of jurisdictional assets and on a rulemaking concerning the Commission's Electric Quarterly Report requirements.

In addition to my assigned projects, there were numerous opportunities to improve my legal skills and increase my knowledge of the energy industry. There were several formal training sessions, organized by experienced FERC staffers, in which they shared their expertise with the Commission's interns and newer attorneys. Several scholars also traveled to Washington to give presentations throughout the summer. However, the learning opportunities were not limited to formal training sessions. Senior attorneys were always available to guide my work on more difficult assignments. Chairman Wellinghoff, as well as OGC's senior staff took time to sit and speak with me and my fellow interns about their own professional careers and the Commission's work. They offered advice that will prove invaluable as we begin our legal careers. Finally, we received performance reviews in the middle and at the end of the summer, which helped identify our strengths and those areas that needed improvement.

The intern coordinators planned countless social events so we could get to know attorneys in OGC. In addition to attending a Nationals' game, I visited a hydroelectric facility,  
*continued on page 4*

## 2010 Annual Fundraising Campaign Individual Contributors

*(Contributions of \$1,000 or more)*

Donna M. Attanasio  
Richard P. Bonnifield  
Meredith Berger Chambers  
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**Save the Date**  
**CFEBA's**  
**Seventh Annual Fundraising**  
**GOLF**  
**TOURNAMENT**  
**Friday, May 6, 2011**  
**Westfields Golf Club**  
**Clifton, Virginia**  
**Sponsorships**  
**Available for \$500**  
**Please Contact**  
**Michele Duehring**  
**at (202) 223-5625**

## CFEBA Update *Continued*

went bowling, and ran in the annual Lawyers Have Heart 10K race. I also was able to attend EBA-sponsored events, where I met attorneys and other interns working in different areas of energy law.

I am extremely grateful to the CFEBA for granting me this opportunity. Not only was the work intellectually stimulating, but the OGC attorneys and intern coordinators ensured that every assignment, meeting and training offered a greater understanding of the energy industry.

### CFEBA Grants Update

#### National Foundation for Energy Education

A grant of \$750 was made to the National Foundation for Energy Education (“NFEED”), a Virginia-based 501(c)(3), which was founded in 1998, for energy education programs/science kits associated with its “The Great American Energy Debate” program. NFEED’s mission is to “develop balanced and comprehensive programs that will help primary and secondary school educators meet the energy education components of state and national education standards.” The Great American Energy Debate has the goal of quadrupling the level of energy knowledge of every American. One of the ways it is working to achieve the goal is by hosting workshops in secondary schools to promote debate among students. One such workshop was held in Alexandria, Virginia, on December 9, 2010 and was attended by students from 13 schools in D.C., Virginia and Maryland.

#### Aid to Distressed Families of Appalachian Counties

A grant of \$15,000 was made to Aid to Distressed Families of Appalachian Counties (“ADFAC”). The grant was made in connection with ADFAC’s new direct assistance program that coordinates educational weatherization workshops for low income families.

This new weatherization program is an addition to ADFAC’s other programs, which include its utility assistance programs. ADFAC added \$10,000 to the CFEBA grant to reach the \$25,000 needed to fund the weatherization program.

The weatherization program funding will be used as follows:

- \* Weatherization kits (\$7,500)
- \* Repairs (\$7,500)
- \* Weatherization Workshops (\$8,000)
- \* Administration (\$2,000)

### Spring is On the Way - Join CFEBA For Golf on May 6, 2011

The CFEBA will hold its annual golf tournament at Westfields Golf Club on May 6, 2011, the day after the EBA 2011 Annual Meeting. Save the date and join colleagues from the Washington area and elsewhere to support CFEBA. This yearly event is a wonderful way to spend some time with friends and colleagues, so mark your calendar now!

## A First for Me – Reaping the Benefits of a CFEBA Habitat Build Day

*Marcia C. Hooks*

On Saturday, October 30, 2010, I awoke with great anticipation, but also a little apprehension as I prepared myself to participate in Habitat Humanity Build Day with my EBA colleagues. Mind you, this venture was all very new to me, because in my lifetime, I had never performed even minor home repairs. When I was growing up, I never gave it a second thought to get involved in such sweat equity, but was well content to leave those matters to my now deceased father or my sister, Valeria, who seemed to have a natural talent and affinity for such pursuits. In my adult years when home repairs were needed, I always followed my first inclination and hired a contractor and since marrying, I have considered that absolutely my husband’s bailiwick. But since viewing Jack Nicholson and Morgan Freeman in the 2007 hit movie, *The Bucket List*, I decided to make a list of worthwhile challenges that I had never done in life and now want to pursue. Hands on house renovation made my list, and the Charitable Foundation of the Energy Bar Association (CFEBA) Habitat Humanity Build Day offered me the perfect opportunity.



**Marcia Hooks takes a moment to pose as she cuts the template for installing the microwave.**

I left home with some assurance, because my husband, Fred Hooks, decided to participate in the Build Day, and his company was much appreciated on the thirty-minute drive from our home in the inner city of Washington, DC to a townhome in Herndon,

*continued on page 5*

## A CFEBA Habitat Build Day *Continued*

Virginia, the Habitat site location. Upon arrival, we were greeted by Attorney Walter Hall, a member of the CFEBA Board, who had coordinated the event, Habitat's site coordinator, Mr. Robert Akines, and other EBA colleagues who were participating, Attorney Stephen Huntoon of Florida Power and Light, his daughter Ginny Huntoon and a friend of hers Jenny Davis, Attorney Tom Blackburn of Bruder Gentile & Marcoux, L.L.P. and Attorney Kelly Daly of Stinson Morrison Hecker LLP. Three other Habitat regular volunteers also were there to mentor and assist us.



**Kelly Daly dons a great smile with paint brush in hand.**

Mr. Akines explained that Habitat not only builds new homes, but also renovates houses. This particular townhome was a HUD foreclosure that Habitat had acquired and will sell below market value to an eligible family. Located in a quiet suburban neighborhood, the townhome has on the first floor a kitchen, powder room and dining/living room area, which has sliding glass doors leading to a comfortable patio. The upstairs boasts two nice size bedrooms, a master bedroom with a bathroom, and there is a finished basement.

I had the pleasure and the privilege of working with Jay, one of the Habitat volunteers, who had retired from the Navy after more than 20 years of service and retired later from a job with a major area consultant firm. It was obvious to me that Jay loved volunteering for Habitat and he was a great instructor.

The first major task for me was reversing the refrigerator doors, so they opened up the opposite way. That called for removing the refrigerator and freezer doors by applying a little pressure using different sizes and types of Philip screw drivers, the torx and flat ones, and then using the same to install the doors on the opposite side.

Then I turned to the task of installing a microwave below the kitchen cabinets and above the stove. First, I had to measure the area where the microwave would be installed in order to cut the template to use for locating where the holes should be drilled. I immediately flashed back to the home makeover television shows

where the carpenter always says, "measure at least twice before you cut," and Jay instructed me likewise. After measuring and cutting the pattern for the template successfully, we could see where the holes should be drilled. We used a small tool to locate the 2 by 4 stud where I drilled the hole, so it would be added support for the microwave. Also, we needed to make sure all the electricity was shut off in the townhouse for safety and again we had a special tool to determine that. To complete the installation I had to steady my hand to use the high pressure power drill to make the holes in the wall and then use it to install the screws through the microwave and wall. Additionally, I had few minor jobs like installing plates over the lights and plugs and gluing the edges to the counter top in the kitchen.



**Walter Hall busily caulks the floor trim of the town home.**

My other EBA colleagues were also very much engaged--Walt, Tom and my husband were tearing out walls and a fireplace mantle, Kelly was busy working on the basement steps, Steve was adeptly using a machine to measure, cut and install molding along the basement wall and his daughter Ginny and her friend Jenny were doing a great job of painting the basement.

I gained a lot from this volunteer experience, learning about various tools and actually performing the physical labor. Furthermore, I felt a real measure of satisfaction, knowing that one day soon a family would be living in a home that I had helped to renovate. Although I can cross this item off my bucket list as accomplished, I definitely want to continue to be a part of such efforts. I want to encourage you and your family to join the CFEBA for future Habitat Build days--as it was for Steve, his daughter and her friend and my husband and me, it can be also a great family affair.

# 2010 CFEBA Gala: Empower By Giving



# CFEBA Provides Efficient HVAC System to Complete Expansion of DC'S Oldest Domestic Violence Shelter

A. Karen Hill

The CFEBA's generous contribution funded the new, efficient heating and cooling system for My Sister's Place, Inc. ("MSP"), which finally came to fruition in time for a Thanksgiving celebration for the local women and children survivors of domestic violence who call the shelter home. Initially committed in 2005 the \$95,000 was held in escrow by the CFEBA pending successful collection of the remaining funds needed for the \$4 million expansion of Washington, D.C.'s oldest and only confidential domestic violence shelter. In the meantime, private and public funding commitments were imperiled by the economic recession, budget cuts and shifting priorities. Finally, District and Federal grants were secured and the project was able to go forward. The CFEBA awarded the \$95,000 check to MSP at the 2009 Gala and celebrated the opening of the renovated and expanded shelter, Sanctuary Plus, at the 2010 Gala. This expansion more than doubled its capacity to 45 emergency shelter beds for battered women and their children.

Domestic violence pervades the Washington, D.C. area and the nation and its effects are felt across socio-economic boundaries. This dire public health concern has increased in recent years due to the faltering economy. In response to this need, MSP launched its Sanctuary Plus Shelter Expansion and Renovation Initiative to ensure that women and children fleeing from domestic abuse can rely on the promise of safe sanctuary, instead of returning to a violent home or living on the streets.

Ms. Lauren C. Vaughan, Executive Director of MSP, states, "On behalf of MSP's Board of Directors and dedicated staff, I would like to thank the CFEBA Board and all the EBA members who contributed to MSP for this generous donation for the HVAC systems at the new Shelter." There are 11 separate energy efficient units so that family suites and common areas can be separately regulated.

The completed 9,000 square foot, state of the art, dormitory style architectural design for the renovated and expanded shelter addresses the need for a safe, secure, homelike environment, a requirement for women and children escaping domestic violence. This aesthetic is continued throughout Sanctuary Plus and is reflected in the suite-like bedroom configurations, computer equipped resource library and large children's playroom/computer room that has direct access to a secure, outdoor playground. A full time chef prepares meals onsite in a fully equipped commercial kitchen to ensure safe and healthy food provisions. There are private rooms available for group therapy sessions and individual case-management sessions. The new facility also houses the District's only 24-hour domestic violence emergency hotline. For more than three decades, MSP has provided holistic and comprehensive programs and services to enable survivors to live independent lives, free from domestic abuse. The expansion and renovation of the emergency shelter will ensure that MSP can continue to provide a safe sanctuary and empower survivors of domestic violence in the District of Columbia.

For more information on MSP and to learn how you can help please go to <http://www.mysistersplacedc.org>.

Contact: Lauren C. Vaughan, (202) 529-3328, [LVaughan@mysistersplacedc.org](mailto:LVaughan@mysistersplacedc.org)



# Interview with FERC Solicitor Continued

available for your viewing pleasure at your very own EBA web site, [www.eba-net.org](http://www.eba-net.org).

## Petitioners v. FERC: Solomon keeps it Civil Just the Same

We began by asking the veteran Solicitor how it feels to have somebody suing him in every case his Office handles. He said he looks very fondly on the energy bar and views it as important to have a good relationship with its members (pointing out that he has been an EBA member since 1985, when he became a lawyer, and recalling that his father was President of EBA in 1985, although it was then the “Federal Energy Bar Association”). He believes that the petitioners are generally professional and reasonable to his Office and that they receive the same treatment in return. In particular, he wants counsel to be “forthright, candid, and upfront with me and the attorneys in the office,” and *vice versa*. He stresses these points when he is asked to speak at EBA programs, a frequent occurrence. Government counsel has a higher responsibility than to “bludgeon opposing counsel into submission in order to win a case,” as he puts it, but rather aims to “see that justice is done.”

This means advocating “zealously” for his Commissioners but always “honestly and ethically.” He expects both sides in these petitions for review to adhere to standards of ethics and civility; showing professional decorum to one another, and to not litigate “to the teeth” over things like reasonable extensions of time “to secure some fleeting advantage.” With few exceptions, Mr. Solomon does not see “hardball tactics” employed in FERC appeals.

Most of the FERC court review matters are initiated by private practitioners who handle cases before FERC, Mr. Solomon has observed, and “they know that they are going to see me again” on other cases with other issues and “work very nicely with me and my Office.” When, as in a utility bankruptcy, enforcement, or District Court case, petitioners may be bringing their “one and only case” against FERC and “want nothing to do” with FERC over the long run, he finds a greater tendency for less decorum and collegiality on behalf of the opposing side.

Indeed, Mr. Solomon welcomes the involvement of attorneys representing intervenors in support of FERC. But he cautions that their interests may not be exactly the same as those of the FERC, in that FERC government attorneys want to “win” in a

broader context that covers FERC’s position generally with other cases in mind, whereas a particular intervenor may be looking for a narrower “win” without regard to the broader implications of the arguments it may make. He is “happy” to confer with intervenors in support of the respondent, but disagrees with the suggestion often made by an intervenor that the two “coordinate” their briefs so that FERC’s brief makes certain arguments and the intervenor cover other arguments.

Typically, he believes that the intervenor can provide some “practical, real-world” input on the effects of FERC policy. He invites intervenor attorneys, or any attorney to a case, to phone, email, or write his Office. In fact, the Solicitor states that communications with petitioners can sometimes result in his Office knowing whether they are anxious to obtain a quick Court decision or whether they are filing protective petitions and will be satisfied to see the matter left undisturbed pending further actions elsewhere. Cases on review settle frequently but, he adds, this is usually done between the private parties, with FERC being asked to approve the agreement and the Court asked to remand the case for the limited purpose of FERC addressing a proposed settlement.



## FERC-Speak v. Plain Talk

As for the more typical FERC case, Mr. Solomon sees a combination of specialized appellate practice attorneys and specialized FERC practitioners. He has seen mixed results, in that some appellate specialists do a “tremendous job” in arguing arcane FERC law, while others are less effective, and some FERC practitioners prove to be equally adept at appellate practice while others prove to be somewhat less stellar in this forum. He believes that the judicial panel and their law clerks are a very different audience from the FERC Commissioners and FERC Staffers who are the usual targets of briefing by FERC lawyers.

As a consequence, Mr. Solomon admonishes lawyers in his Office that the briefs to the Courts should be “as much unlike a FERC brief as possible.” The “phraseology” in a FERC brief can be geared toward the expertise within FERC while a “plain spoken, plain English” style is needed for the more generalists Circuit Courts. As to oral argument, he advises listening to the Judges’ questions and being sure to respond fully; and having the wisdom to sit down when you are finished even if time is remaining, which

*continued on page 9*

## Interview with FERC Solicitor Continued

always pleases the Court. He is not fond of “slicing” time increments with intervenors because of the need to be flexible enough to have the time spent on an issue that tracks the questioning of the panel.

He keeps up on how the Courts handle other agency appeals, such as FCC and SEC cases, and concludes that there have not been many groundbreaking rulings on administrative law generally since the *Chevron* due deference ruling.

**Briefs submitted to the Circuit Courts should be “as much unlike a FERC brief as possible.”**

### Getting Past Go: Appeals Dismissed for Lack of Aggrievement/Ripeness

The petitions come into Cynthia Smallwood, the chief paralegal in the Solicitor’s Office, who packages them for Mr. Solomon to initially review as to whether the case is unripe or otherwise deficient for appellate review in the current posture of the case. Aggrievement is the operative consideration, with 60 days the time limit to file a petition for review. But “there can be any number of impediments to the kind of finality that I like to see and the Courts like to see before a case is ready for judicial review,” he explains. He looks first to see if anything is pending before FERC that is related to the appeal that justifies holding it in abeyance and perhaps consolidating petitions at a later stage after FERC action. The issue is whether there is a need for immediate judicial review, and if not, then such review should await the final resolution of the related FERC action (and the same is true with respect to a related judicial review in another Circuit Court, whereby it should either rule first or there should be a consolidation in one or the other Circuits for joint consideration).

“Lawyers always think if they wait to file, I will say, ‘Aha! They should have filed earlier!’ ” remarks Solomon. He tries to work out something consensually in which the parties agree that the case should now be dismissed or held in abeyance, and that the right to file later will not be impacted.



### Problem Cases: Overturned IDs; Dissenting Commissioners; and “Smarting” Rulings

“We should win most of our cases . . . because the agency is presumed to have acted with reasonableness. . . . The judgments of the agency are entitled to judicial deference in the absence of abuse of discretion.” The lawyer appealing a FERC order should know that the odds are against winning, he points out. Hopefully, “we will have contributed a little bit to improve the odds of winning,” adds Solomon, in mock humility.

FERC appellate counsel is left to defend “what is found on the pages” of a FERC order and cannot add to the rationale, he acknowledges, but on the flip side, he continues, the petitioner cannot raise a new challenge not previously asserted at FERC, thus balancing out the equities of the legal duel. “It is a total crap shoot” as to what order will eventually be appealed,

and the agency and the bar both value timely decision-making, so the Solicitor’s Office is not always consulted on how best to fashion an order from a judicial review perspective. Nor, states Mr. Solomon, does his Office always know the extent of the full record evidence as do the order writers who comb through the docketed materials, including all the pleadings.

**FERC is left “to defend what is found on the pages” of a FERC order.**

“Mere opposition does not necessarily connote that an impediment” lies in an order, he maintains. But he recommends that orders “candidly acknowledge” the strengths and weaknesses of the opposing views, and state a reasoned balancing of interests rather than reject out of hand all alternative approaches. He also finds it easier to defend a FERC order that upholds an ALJ Initial Decision, finding it potentially difficult if the Commission overturns a finding of fact by the Presiding Judge who heard the evidence first-hand and observed the demeanor and credibility of the witnesses.

Commissioner dissents can be “tricky” for the Solicitor, as he views all the Commissioners as his client, and because the petitioner will stress the dissent in order to undermine the argument that the Court should defer to the expertise of the Commission. Mr. Solomon will never “trash” a Commissioner’s dissent, but instead will assert that the majority decision should be upheld as reasonable despite whatever reasonableness may also be contained in the approach taken by the minority among the Commissioners.

“Even though we are stuck with the record,” he explains, the experts within the agency are consulted about things like

*continued on page 10*

## Interview with FERC Solicitor Continued

how the order is even more compelling when looked at in the context of what the Commission has ruled elsewhere on a related matter. One of the chief roles of his Office, he maintains, is to “make sense” of what the experts are saying by “translating” it to the reviewing authorities.

His Office is “reactive” to the appeals in that the cases are already filed in whichever Court the petitioner chooses with the option of going to the D.C. Circuit or a Circuit where the petitioner resides. He states that FERC has very little cause to move to transfer a petition to another venue; he feels equally confident about success in one Court as in another. The one difference between the Circuits that he has observed is that the D.C. Circuit is much more inclined to dismiss cases for the kinds of lack of standing and ripeness grounds discussed above.

He also expressed a greater appreciation for the understanding of FERC’s processes shown by the D.C. Circuit Clerk’s Office, which provides for a more realistic Scheduling Order.

In terms of FERC appeals, the second most active Circuit “by far,” after the D.C. Circuit, is on the other side of the continent, in San Francisco, namely, the Ninth Circuit. “Then there is everybody else.” Mr. Solomon volunteered that he has had “some problems” with those other Circuit Court decisions, naming specifically what he called the “Judge Posner decision in the Seventh

Circuit” remanding for further review FERC’s ruling on the cost allocation of investment in new high voltage transmission investment in the PJM Regional Transmission Organization. He states that he is “still smarting” over both that decision and the Fourth Circuit Court decision in the *Piedmont* case concerning the Commission’s backstop transmission siting authority under the Energy Policy Act of 2005.

### Who’s Who in the Solicitor’s Office

There are only ten attorneys in the Solicitor’s Office, with each attorney having about three or four oral arguments a year, given the 30 to 40 appeals that reach that stage annually. Mr. Solomon takes pride in the “bang for the buck” that his small Office provides. He characterizes his team as a “special breed,” given their desire to stand before a judicial tribunal to “get yelled at” about the perceived deficiencies in orders that are the fault of someone else to the extent of any such perception. “This is something we enjoy doing; everyone here looks forward to” making oral argument before the Judges. “I really do feel that we have the best small energy practice.” (He calls the Office of General Counsel the best “large energy practice.”) His view of the Solicitor’s Office is shared by many others who have worked there among many other prestigious places. For example, Susan J. Court told us when

*continued on page 11*

### Many Facets of Bob Solomon

**Spare Time Activities:** Spend it with his family, which includes three children, the oldest of whom is off to college. (He and his wife recently returned from hiking in England.) He also enjoys biking (and, in longer day-light seasons, actually bikes to FERC from his home in Wheaton, Maryland, a 27-mile round trip commute!).

**Night Stand Reading:** Magazines and several newspapers. Reads sports, and follows the *Washington Nationals* (a “character building” activity).

**Other Interests:** “Schlocky” music from the 40s, 50s, 60s, 70s, and 80s. (Prides himself on naming titles and artists “quicker than anybody else.” We could not trip him up.)

**Favorite Sound:** Any of his favorite music, and kind, soft words of civility. (He wants a calm existence, no increase in blood pressure.)

**Dream Job:** Professional Baseball Player, Rock Star, or Federal Judge deciding appeals. He really aspired to be the FERC Solicitor, “the best job in legal Washington.”

**Favorite Word:** “Thank you” or other words of etiquette. (Professionally, he would say, “Petition denied.”)

**Least Favorite Word:** Any words of incivility. (Professionally, he would say, “Petition granted.”)

**Turn-On:** Calm, civil, appreciative, thankful, and kind words.

**Turn-Off:** Loud, abrasive, argumentative people. (There are only a few in the energy bar.)

**Advice to Young People:** Strive to find a mentor. Government practice is very practical and rewarding, your perspective becomes broader and your impact is more profound if you have been in government.

## Interview with FERC Solicitor Continued

we interviewed her during her tenure as Director of the Office of Enforcement, that the Solicitor's Office is the "best law firm in town." She once worked there so she would know. The three FERC General Counsels we interviewed for this newsletter were also uniform in their praise of the Solicitor's Office, most recently Thomas R. Sheets, who alluded to his strong desire to win that has been largely fulfilled by the Solicitor's Office.

In that regard, Mr. Solomon was very strong in his praise of the "top notch" attorneys within the Solicitor's Office. He provided us with the names of all his attorneys and legal assistants because he believes that they all deserve recognition for their superior service. Many of these names are familiar to those who have had cause to be involved in appeals of FERC cases. The superlative Legal Staff of the Solicitor's Office are the following individuals: Senior Attorneys Lona Perry, Beth Pacella, and Judy Albert; Attorneys Holly Cafer, Carol Banta, Bob Kennedy, Sam Soopper, Kay Henry, and Jennifer Amerkhail; and Paralegals Cynthia Smallwood, Betty Tillery, Diane Naca, Renee Wright, Pat Morton, and Denise Nicholls.

We learned that the attorneys do not specialize in particular kinds of FERC cases, but are as diversified as is the agency itself. To the extent that a particular attorney has an affinity for a particular matter, that is accommodated but, for example, there is no LNG or certificates lawyer. Some attorneys come to the Office with a more general appellate practice background, while others come with more of a FERC background.

### Standing on the Shoulders of Legal Giants

Mr. Solomon himself came to the agency with a far greater familiarity with FERC, and its predecessor, the Federal Power Commission, than do most before coming into this area of practice. This is because his father, the late Richard A. Solomon, was (1) the General Counsel in the early 1960s, (2) the President of our Association in the mid-1980s, and (3) legendary both in his own time and now. There are countless Dick Solomon stories, and we got his son to tell the one about a Court of Appeals Judge calling his father up to the podium to join into the oral argument on a particular point of law even though he was not even representing any party to the case, and had simply been sitting in the audience for the oral argument. He also spoke of being told about how his father would walk into a FERC hearing room, deliver a devastating cross examination of a witness on the spur of the moment, and then discover he did not even represent a client in that particular case. We can attest to equally extraordinary occurrences involving Dick Solomon. (His successor as (F)EBA's

President, Jack Holtzinger, said in his Annual Meeting Dinner remarks that being insulted by Dick Solomon has become a badge of honor!)

Despite his father's devotion to energy law, his son denies that he ever saw it as his "destiny" to also be a high level official in the agency. "I assumed I would be doing anything but FERC law when I was growing up!" He notes that people think he was genetically engineered to practice FERC law and his bedtime reading consisted of the *Permian Basin Area Rates* cases. In fact, he knew his Dad did important and difficult things but he was inclined to avoid going into what "Mom calls the family business." He found it harder to break out of this line of work because as a summer intern he found himself gravitating to regulatory law and ultimately to energy cases.

His close friend, former EBA Board Member and current California Public Utilities Commission General Counsel Frank R. Lindh worked in the FERC Solicitor's Office, and told him that this was "where the action is." Mr. Solomon left private practice to join Mr. Lindh there in 1988, under then-Solicitor Jerome Feit, a treasured mentor, who Mr. Solomon states he tries to emulate today. Mr. Feit was a "terrific wordsmith," who in those pre-computer days, literally cut and pasted the factual and legal portions of briefs to perfect the flow.

He moved within FERC, leaving the Solicitor's Office after three years to join the electric advisory staff for ten years, where he worked for Dan Larcamp, the Assistant General Counsel for Electric Rates and Corporate Regulation, who he praises highly as the mentor who "gave me a greater understanding of the entities that we regulate" than anyone else. He then became an Assistant to Commissioner Vicky A. Bailey and later performed the same role for Commissioner, later Chairman, Curtis Hébert, Jr., a job that he considers "the equivalent of clerking for a Federal Judge." He credits these Commissioners with having given him a sense of the significance of "how what we do really affects individuals and companies, and the important public policy nature" of FERC. He calls it "refreshing" after being in a government office working with dozens and dozens of people to then "go to work for one person in a really small office." As he elaborates, "your frame of reference moves from the agency as a large institutional body to one particular Commissioner trying to make the best decision possible" from a public policy and legal perspective. He remains very close to these two former Commissioners, "very different people" from each other and from him, and whom he hated to leave, but who, after all, left him in the sense that their terms of office expired.

*continued on page 12*

**"I assumed I would be doing anything but FERC law when I was growing up!"**

## Interview with FERC Solicitor Continued

After dealing with policy matters within the Commissioners' offices, at a particularly controversial time given the California energy crisis, Mr. Solomon expressed how pleased he was to return to a completely legal issues office by rejoining the Solicitor's Office in 2001. Dennis R. Lane, the then Solicitor who hired him to be Deputy Solicitor for five years, had worked for Dick Solomon in private practice. Shows, he says, "how everything works full circle." He feels that he was able to learn from Mr. Lane just as Mr. Lane had at one time learned from the elder Mr. Solomon. He told us that Mr. Lane was very good at determining what arguments to highlight in the pre-briefing stage, the area that Mr. Solomon states is where he is most active in cases assigned to his Staff. He believes that attorneys should use their own writing style, while he looks to make sure that the array of arguments being put forth in all the FERC briefs are consistent.

When he first was in the Solicitor's Office in the late 1980s, natural gas restructuring cases dominated the appellate docket, he recalls. In recent years, the electric restructuring cases dominate the case load, along with EPCRA 2005 related appeals arising out of new FERC authority and the rulemakings that they precipitated. In between, the California energy crisis had brought about significant appeals, but that era appears to have passed.

Mr. Solomon recalls his father and Mr. Feit, in particular, as much more "gregarious" and "intimidating in their ways" than he is. While both were thoughtful and respectful before the Court, it was in a "different way" than how he sees himself. Specifically, the younger Solomon has a less demonstrative manner of delivering to the Courts "a deliberative and thoughtful analysis." He observes that these two mentors, along with other Solicitors, such as Jerome Nelson and Howard E. Shapiro, had had broader careers outside of FERC whereas nowadays there is typically more specialization in FERC practice among the top officials. But, he points out, the Solicitor's Office is as diversified as the agency because it tracks everything that FERC handles, what he calls a key attraction of his Office. One might even say that Mr. Solomon has the last word on behalf of the agency. So far, he has blessed FERC with an outstanding scorecard--for those who count!

## President's Message Continued

did not disappoint, calling on his past restaurant experience to share his views on a "menu" of energy issues. We also recognized retiring FERC Administrative Law Judge Bruce Birchman, and gave John Estes III an award for recruiting the most new EBA members during our membership drive. (John was honest enough to admit that his assistant did most of the work!) Among the highlights of the primer was a panel discussion by senior regulatory agency staff featuring Norman Bay of FERC, Vincent McGonagle of CFTC, Patricia Galvin of FTC and Rob Park of DOJ, as well as a breakfast address by Dan Berkowitz, the CFTC's General Counsel. The Program Committee and the subject matter committees that assisted in developing and delivering these two excellent programs deserve our gratitude and thanks for their labors.

But these meetings provide more than educational opportunities and CLE credits—they also provide our members with a great opportunity to renew ties with colleagues they already know and to meet new ones. We now conduct so much of our work lives by email, telephone and increasingly, social media, that we can forget the value of face-to-face contacts, and the exchange of the venerable, yet still much used, business card. I for one saw many people I rarely see at other times of the year, and it was great to be able to catch up with them.

And I would be remiss if I did not mention the Eighth Annual Fundraising Gala—*Empower by Giving*, put on by the Charitable Foundation of the Energy Bar Association on the evening of December 9. The setting in the Rotunda Room of the Ronald Reagan Building and International Trade Center was ideal, and showcased a veritable cornucopia of silent auction items. Bidding on many items was fast and furious. The Gala raised approximately \$29,000, a record for recent years, which is a testament to the hard work and creativity of the CFEBA Gala Committee. CFEBA was pleased to present Sheila Hollis, the first woman president of what is now the EBA, with the Paul E. Nordstrom Service Award, and even more pleased that Paul's widow, K Henry, could attend the Gala to make



**To the left, the 2010 Paul E. Nordstrom Award recipient, Sheila Hollis, poses with EBA President Sue N. Kelly and CFEBA President Paul M. Breakman**

*continued on page 15*

# JUDGE'S CORNER

The FERC Practice & Administrative Law Judges Committee has invited Federal Energy Regulatory Commission Administrative Law Judge Steven A. Glazer to share his thoughts on a topic of his choosing, or to choose from among the questions we have compiled from you, our members, and he has graciously accepted. (Keep emailing questions to Committee Vice Chair Sarah R. Thomas at [srt@cpuc.ca.gov](mailto:srt@cpuc.ca.gov), with a cc to [michele@ebanet.org](mailto:michele@ebanet.org).)

Here now, we proudly present the seventh in this fascinating series:

Judge Steven A. Glazer became an Administrative Law Judge for the Commission in September 2006. He is a graduate of Massachusetts Institute of Technology (B.S. in Economics and B.S. in Civil Engineering, 1974) and New York University School of Law (J.D. 1977).

He began his career as an attorney for the U.S. Department of Energy Office of Hearings and Appeals, and thereafter engaged in private practice in several fields, including energy law, communications, real estate law, antitrust law and litigation. Prior to his judicial appointment, Judge Glazer served at the U.S. International Trade Commission (USITC) from 1991 through 2005 as a Staff Attorney with the Office of Unfair Import Investigations and as an Attorney-Advisor with the Office of Administrative Law Judges. At the USITC, he specialized in intellectual property litigation, with a focus on patents and trademarks, in unfair import proceedings before Administrative Law Judges pursuant to Section 337 of the Tariff Act of 1930. Judge Glazer is registered as a patent attorney with the U.S. Patent and Trademark Office.

In 2005, Judge Glazer was first appointed as a Supervisory Administrative Law Judge for the Office of Medicare Hearings and Appeals of the U.S. Department of Health and Human Services.

Judge Glazer is a past President of the Federal Administrative Law Judges Conference, a professional association for the administrative law judiciary.

By Guest Columnist, The Honorable Steven A. Glazer

Administrative Law Judge, Federal Energy Regulatory Commission

Of 33 years of practice in Washington, my most intense legal training was in the field of patent litigation as a Staff Attorney and judicial law clerk for the U.S. International Trade Commission. Patent cases are hard-fought battles involving enormous product revenues. Like the Grand Old Duke of York, patent cases tend to march up all the way up to the top of the appellate hill and then, on remand, march down again. Discovery controversies and motions practice are extensive; many of the rules of civil procedure and evidence come into play. I learned from that experience not to place too much personal stake in whether my positions were right or wrong in a case; rather, I consider them to be only one step in a long process of the development of law. Hence, while I avidly track the subsequent stages of cases after issuing Initial Decisions, I view those stages as the gestation of legal principles rather than as critiques of my own point of view.

I also learned a lot from my stint as an in-house lawyer for two real estate companies. In-house counsel learn rapidly that their client's motivations are vastly different from their own or those of their outside attorneys. Once a corporate officer responded to my explanation of the issues in a case and query to him about which way we should go with, "Steve. Who has the money? Do we have the money or do they have the money? If we do, delay. If they do, fight like hell." Now, as an Administrative Law Judge, I am keenly aware that the likelihood of a settlement or protracted litigation in any case may depend more on the price of pork-belly futures on a given day than on the nuances of a particular point of law.

I actively question witnesses in hearings. I do not do so, however, for the purpose of showing my leanings or inclinations on the ultimate issues in the case. I do so to fill in gaps that I perceive exist in the case that the parties have not addressed, to clarify facts, or to improve my understanding of the testimony.

I am not a big fan of deciding cases solely on a "paper record." In litigation, that translates into motions practice, which is not pursued at FERC very much. When I worked at USITC, motions practice was extensive, making the resolution of issues on a paper record

*continued on page 14*



## JUDGE'S CORNER *Continued*

routine. I would not recommend it, however, because the availability of paper hearings tends to generate too many paper hearings, swamping judges with too many premature decisions to make that are better left to a hearing on the merits.

We are often asked if Administrative Law Judges rely heavily on trial staff recommendations and input in their cases. Having been a Commission Staff Attorney at the USITC for nearly a decade, I am very conscious of the experience and authority that Staff brings to a case. Their most important contribution to a case is their institutional memory of Commission precedents that they apply through their witnesses to the facts at issue. Frequently, Staff positions are the progenitors of future Commission policy. While I do not always agree with Staff's positions and recommendations, I weigh them equally heavily with those of the private parties in my Initial Decisions.

When I write an Initial Decision, I literally begin on the day that Chief Judge Wagner gives me the case. My law clerk and I set up the basic format of the document as soon as we can. As testimony comes in, I read it carefully, index it, develop queries about it that my law clerk and I bat around, research the legal standards to be followed, and get a handle on the controversies arising in the case. Many cases raise preliminary legal concerns that I have my law clerk research and report on. By the hearing, I have a solid idea of what the issues are and a few hypotheses and inferences from the facts of my own to try out on the witnesses. After the reply briefs come in, my law clerk and I make decisions, pull it all together and push out the final product. To me, an Initial Decision is the distillation of a conflict that starts with the broadest picture possible and drills down to the particular law and inferences that one can reasonably draw from the facts to reach a resolution.

It has not been my experience at FERC that Administrative Law Judges confer with one another extensively about their rules of conduct in proceedings. We certainly look at each others' rules and adopt or reject them for our own, but we do so more in light of our own experience and comfort level than by being convinced by another ALJ to do so. Occasionally, however, we have acted in concert on rules, such as on electronic discovery and copyright impacts. I have also found that Chief Judge Wagner's institutional memory of past practices and procedures is very helpful when unfamiliar circumstances not covered by my rules come up.

Chief Judge Wagner reported in the Summer 2009 issue of *EBA Update* that our caseload is down. In my view, that is so because of the bad economy. This usually happens in all government practice during recessions. In the energy field, fewer utilities see the point of filing for rate increases now; fuel prices are down; no one wants to jeopardize their established ROEs; lending is tight and, hence, new construction of additional transmission facilities is off. I do not attribute the decline to settlement procedures, because they are now routine parts of FERC litigation and as much a part of the caseload as hearing procedures. There would be more settlement proceedings too, if the economy were up. Inevitably, that will come to pass.

I enjoy being an Administrative Law Judge immensely and I would highly recommend it to any attorney as a career choice. It is very gratifying to have a small part in calling the shots, being part of the process of deciding cases and advancing the development of law.



**FERC ALJ Judge Glazer second from the left takes a moment to pose and greet others.**



**FERC ALJ Steven A. Glazer spoke at a "Meet the Judge" brunch sponsored by the FERC Practice & ALJ Committee.**

# Energy Law Journal: Excerpts from Past Issues

## Ten Years Ago

“It appears that the FERC’s initial assertion of jurisdiction over the ‘buy’ side of California’s buy-sell requirement – ‘the five-year provision can only be implemented if we agree to it’ – was an anomaly. In light of the FERC’s subsequent conclusion that the ‘buy’ requirement lay at the root of California’s problems, it is not surprising that the FERC, in undoing that requirement, neglected to mention that the FERC itself had previously asserted jurisdiction over – and approved – the very same provision.”

Nicholas W. Fels and Frank R. Lindh, *Lessons from the California “Apocalypse:” Jurisdiction over Electric Utilities*, 22 ELJ 1, 21 (2001)

## Twenty Years Ago

“At long last, social Darwinism seems to have arrived at the doorstep of the once staid world of deregulated electric utilities. Deregulation, open access, hostile takeovers, poison pills, and white knights now rule the previously tranquil world of the regulated monopoly dinosaur. But today, as utilities warily eye one another in their strategic consideration of whether to acquire or be acquired, perhaps the single greatest truism is uncertainty. Utilities seeking partners to compete better in this brave new world must approach their regulatory overseer with trepidation.”

John S. Moot, *Electric Utility Mergers: Uncertainty Looms over Regulatory Approvals at the FERC*, 12 ELJ 1, 2 (1991)

## Thirty Years Ago

“The FERC’s discovery procedures, after a promising start in 1947, have stagnated due to a lack of necessary revision over the years to keep pace with the ever-changing nature of the Commission’s regulatory responsibilities. Considerable modifications must now be made in order to be responsive to the present type of legal practice before the Commission. Well conceived discovery regulations can play an important role in advancing the Commission’s urgent need to expeditiously process matters before it and lighten its caseload. The observations and suggestions herein are offered in the hope that they significantly assist this effort.”

Peter C. Kissel and Laurence Roscher, *Availability and Use of Discovery at the Federal Energy Regulatory Commission: The Need for Modernization*, 2 ELJ 79, 105 (1981)

# President’s Message Continued

the presentation. Finally, I want to thank FERC Chairman Jon Wellinghoff and the other FERC Commissioners who attended for their continuing support of the CFEBA and its work.

The fact that the Mid-Year Meeting is now over does not mean that EBA educational programming will slow down—far from it. The 2011 EBA calendar is already filling. The New Orleans Chapter is planning a brown bag on January 27 dealing with the BP oil spill and the legal issues it has raised for that region. The Western Chapter will be holding its Tenth Annual Meeting in San Francisco on February 24-25, and has an excellent program planned, including an address by FERC Chairman Wellinghoff. The Midwest Chapter will be holding its Fourteenth Annual Meeting on March 15 in Indianapolis, and has also planned an optional tour and a primer at the offices of the Midwest Independent Transmission System Operator, Inc. on the afternoon of March 14. And this does not even include the upcoming programming that the various committees are planning. There will be many opportunities for education and networking between now and the EBA Annual Meeting to be held on May 5. I urge you to take advantage of them, to get the most out of your EBA membership.

Speaking of which, it is now time to renew your membership, so watch for your renewal in the mail. (If you renew by January 31, you can request free in-person or telephonic attendance at a brown bag of your choice in 2011.) If you have not been active in any of the EBA Committees or Chapters in 2010, make a resolution to get involved in 2011. We need you and your ideas, and you may be surprised how much you get out of it in return for the investment of time you make. Working with your peers in a collegial, non-adversarial atmosphere can pay dividends you did not anticipate.

# Speakers Present A Great Overview of Title VII of the Frank-Dodd Act

*Janice Moore*

The Energy Bar Association's Finance and Transactions Committee, Generation and Marketing Committee, and Legislation Committee hosted the first in a series of brownbag discussions regarding the impact of the derivatives legislation in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (titled "Wall Street Transparency and Accountability Act of 2010" and referred to here as "Dodd-Frank"). The first lunchtime session on November 16, 2010 was hosted at Winston & Strawn in Washington, D.C., and included nearly 100 participants attending in person and by teleconference. This session focused on Title VII's impact on hedging by energy companies and how the energy industry can influence various rulemakings by the Commodity Futures Trading Commission ("CFTC"). As Chair of the EBA's Finance and Transactions Committee and partner in the Washington office of Pierce Atwood, LLP, I moderated a distinguished panel comprised of Dr. Sharon Brown-Hruska, Vice President, NERA Economic Consulting, and former Commissioner (2002) and acting Chairperson (2004-2005) of the CFTC and Dr. James Overdahl, Vice President, NERA Consulting, and former Chief Economist and Director of the Office of the Chief Economist of the CFTC.

Dr. Overdahl kicked off the discussion by laying out the federal rulemaking process through which Title VII of Dodd-Frank is being implemented. (<http://www.eba-net.org/docs/financial-reform-legislation-16112010.pdf>) He explained that several financial regulatory agencies ranging from the Securities and Exchange Commission to the Office of Financial Research have been tasked with crafting the rules and regulations to implement the reformed regulatory structure promulgated by Dodd-Frank. Those agencies have significant challenges before them given that Dodd-Frank requires the adoption of nearly 250 rules and regulations. Dr. Overdahl proposed that the Dodd-Frank rulemakings are likely to be contentious with much of the negotiation over final rules occurring within the regulatory agencies, though Mr. Overdahl suggested that a "second round of battles may ensue if adopted rules are challenged in court." He then explained how the Administrative Procedures Act requirements and existing case law will influence the discussion and implementation of Dodd-Frank and the role that economic analysis will play in the adoption of new rules, because of recent court decisions that emphasize the importance of economic support and cost-benefit analyses for agency rulemaking positions. He concluded by

exploring specific ways in which the Dodd-Frank rulemakings are likely to affect energy companies, including the prohibition against disruptive trading practices and the definitions of terms such as "major swap participant."

Dr. Brown-Hruska followed with an equally impressive and educational presentation focused on key provisions of Title VII. (<http://www.eba-net.org/docs/financial-reform-legislation-16112010.pdf>) She discussed the manner in which Dodd-Frank fundamentally restructures the over-the-counter market as it "removes or alters prior regulatory exemptions for OTC derivatives, including energy derivatives [and] [p]rovides CFTC authority to impose a regulatory framework on OTC derivatives similar to exchange-traded assets." She then explored the Dodd-Frank provisions applicable to energy market derivatives; specifically examining clearing and exchange-trading, margin and capital requirements, business conduct standards, and new anti-manipulation authority. Her presentation made clear that much is left to be decided when it comes to regulatory and practical implementation of Title VII and it behooves us to stay involved in the CFTC's rulemaking process by providing feedback and guidance throughout the prescribed comment periods.

The program concluded with a brief question and answer session, including both telephone and other participants. Several attendees asked whether the end-user exemption included in Dodd-Frank takes away the need for energy companies to be concerned about compliance with Dodd-Frank. If not, what should an energy marketing company be doing now so that they will be able to ensure compliance as these rules unfold? The answer from the panel was that, until the regulations define the end-user exemption, it is not possible to determine how much compliance activity would be required, but it is already clear that even those companies who satisfy that definition are likely to have some new reporting responsibilities with respect to their swap transactions. For now, every company engaged in any swaps transactions should monitor the rulemaking process and, where feasible, participate in comments so that the CFTC has good information about the marketplace and those affected by the regulations.

The links included above direct you to Dr. Overdahl's and Dr. Brown-Hruska's presentations on the Finance and Transactions Committee webpage on the Energy Bar Association website.

# MINI-BOOK REVIEW

By Geg

*Energy and Environmental Project Finance Law and Taxation: New Investment Techniques*, by Andrea S. Kramer and Peter C. Fusaro, Eds.

Wow, do we have talent within our Bar Association! EBA member Andrea Kramer co-edited this 948-page treatise and co-authored some of its chapters, while EBA members Gregory K. Lawrence, Dirk Michels, Vanessa Tanaka, Phillip G. Lookadoo, and Marco A. DeSousa co-wrote other chapters.

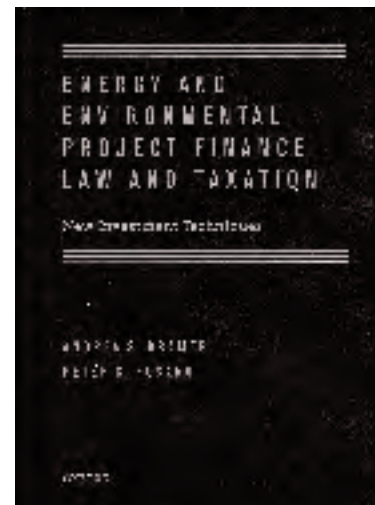
This massive publication covers all the latest financing strategies. Fifty-five top notch authors have written 32 high finance chapters relating to next-generation carbon projects; monetizing offsets; transmission and interconnection of renewable energy; distributed generation; performance contracts; bankruptcy risks; secured hedging; multi-tiered debt financing; derivatives; oil and gas future-flow securitization; international trade insurance; new generation of nuclear power; cross-border projects; tax credits; monetization; tax equity for wind and solar projects; photovoltaic projects; re-emergence of geothermal power; private investment funds, and much more.

It gives you the very latest developments in the law, such as Section 1256 special tax rules for a derivative, and the 2009 Recovery Act tax incentives for using a lease structure for a renewable energy project, whereby depreciation deductions and ITC grants can be allocated to one party or the other, or shared. There are great charts highlighting things like key terms of contract claims for increased performance costs, including a successful claim against a tenant of One World Trade Center, who the New York Court ruled “still owes rent even when the building is destroyed” on the basis of the *force majeure* clause.

The writing is anything but dry. Tax law is not only made understandable, but also interesting. And we are guided to a gold mine of provisions that can be easily missed given their sporadic placement within the Code. For example, we are told (in one of Ms. Kramer’s chapters) that, “Financial product tax rules . . . are randomly scattered throughout the I.R.C., with little or no cohesiveness between and among relevant I.R.C. sections.” She further explains that, “This scattershot tax approach exists between many financial product tax laws enacted in direct response to perceived taxpayer abuses. This knee-jerk, anti-abuse tax approach means that the U.S. Congress periodically amends the I.R.C. – or the U.S. Treasury and Internal Revenue Service (IRS) adopt regulations or issue rulings – designed to stop abusive transactions and activities.” Consequently, she concludes, “Many financial product tax provisions create ‘traps for the unwary’ because such tax provisions are often drafted broadly, sweeping in legitimate transactions.”

The foregoing caveat in this treasure-trove of a book demonstrates why the financial investment legal advisor had better grab it up so as not to be one of the unwary that gets trapped. Even novices (there is a subheading, “What is a REC?”) would be well advised to have this compendium of knowledge available for easy reference whenever any energy related matter comes up. For instance, we all have reason to keep up with efforts to either regulate or incentivize voluntary greenhouse gas reductions. Contained here is a useful discussion of those activities complete with drawings, like the “Kyoto Framework Map”, and diagrams depicting how carbon credits can be sold by entities in countries without emissions caps to entities in countries with emissions caps. There is real money to be made with these how-to guides! As another of Ms. Kramer’s chapters describes, the emergence of carbon dioxide as a fungible commodity “will create a world plethora of project finance opportunities.”

The bottom line is that, no matter who you are, as an EBA member or *EBA Update* reader, you must have a close enough affinity for one or more of the topics masterfully covered in this tome that it will be well worth your while to place your order with Oxford University Press pronto!



## Upcoming Events

### **EBA Houston Chapter Meeting**

**February 4, 2011**  
**Vinson & Elkins L.L.P.**  
**Houston, TX**

### **EBA Tenth Annual Western Chapter Meeting**

**February 24-25, 2011**  
**Hyatt Regency**  
**San Francisco, CA**

### **EBA Midwest Chapter Energy Conference**

**March 14-15, 2011**  
**Conrad Hilton Indianapolis Hotel**  
**Indianapolis, IN**

### **EBA Primer Meeting**

**May 4, 2011**  
**Ronald Reagan Building and**  
**International Trade Center**  
**Washington, D.C.**

### **EBA Sixty-Fifth Annual Meeting**

**May 5, 2011**  
**Ronald Reagan Building and**  
**International Trade Center**  
**Washington, D.C.**

*For more information on any of these events, please contact Michele Duehring at 202.223.5625 or [michele@eba-net.org](mailto:michele@eba-net.org).*

## A Meet & Greet for Commissioner Cheryl A. LaFleur

*Gary A. Morgans*

On October 18, 2010, Commissioner Cheryl LaFleur joined approximately seventy five members of the Energy Bar Association at Steptoe & Johnson LLP's offices for a "meet and greet" session hosted by the Electricity Regulation Committee that gave EBA members the opportunity to meet Commissioner LaFleur in an informal setting. Commissioner LaFleur mingled among the crowd, speaking one-on-one and with smaller groups of attendees, and also presented brief remarks to the group as a whole. In those remarks Commissioner LaFleur explained her background, including her experiences as part of National Grid's and its predecessors' senior management team, and, more recently, as Executive Director of an educational non-profit organization. She spoke of the challenges of her new position, including the need for good time management skills, but also of the skillful support of her staff, and the quality of advocacy of the energy bar. Among other things, she indicated that one area she intends to focus on is reliability. She also stated that she looked forward to future EBA events and the opportunity they provide to talk with EBA members.



**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 approximately 2,700 members, six formal chapters in Houston, New Orleans, Midwest, Southern, Western and Northeast regions of the U.S. and an increasing number of members across the United States and Canada.

**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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