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Implications of Chairman Norman C. Bay's Resignation from the Federal Energy Regulatory Commission

By Jay T. Ryan, Jerrod Harrison, and Kyle H. Henne*

This article discusses the practical implications that Norman C. Bay's resignation will have on the Federal Energy Regulatory Commission and its ability to fulfill its statutory obligations.

Norman C. Bay, Chairman of the Federal Energy Regulatory Commission ("FERC") submitted his resignation to President Donald Trump on January 26, 2017. Bay's final day with the Commission was February 3, 2017. Mr. Bay served as a Commissioner on the FERC from August 4, 2014 through April 14, 2015 and as Chairman from April 15, 2015 through January 23, 2017. Prior to Bay's departure, on January 23, 2017, President Trump appointed Commissioner Cheryl A. LaFleur as Acting Chairman of the FERC. LaFleur previously served as Acting Chairman from November 2013 to July 2014 and as Chairman from July 2014 until April 2015. This article discusses the practical implications that Bay's resignation is having on the FERC and its ability to fulfill its statutory obligations.

BAY'S RESIGNATION EXPANDS TRUMP ADMINISTRATION'S WIDE LATITUDE TO SHAPE THE FERC

Following Bay's resignation, there are now only two Commissioners serving on the five-member FERC—Acting Chairman LaFleur and Commissioner Colette D. Honorable, both Democrats appointed by former President Barack Obama. Two vacancies on the FERC had previously been created with the retirements of Republican Commissioners Phillip D. Moeller and Tony Clark in October 2015 and September 2016, respectively, which went unfilled through the end of the Obama Administration. In addition to these three unfilled seats, Commissioner Honorable's term will expire in June 2017. This gives President Trump a unique opportunity to significantly change the makeup of the FERC during his first year in office.[1]

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[1] The current term of Acting Chairman LaFleur, who began serving on the FERC in July 2010, will expire in June 2019.

NEAR-TERM DISRUPTION OF THE FERC'S ACTIVITIES RESULTS FROM LOSS OF A QUORUM

A more pressing matter, however, is that the already unfilled seats, combined with Bay's resignation, have significant effects on the regulated community. Section 401(e) of the Department of Energy Organization Act, which created the FERC, requires that a quorum for conducting business consists "of at least three members present."[2] Thus, without the presence of three Commissioners, the FERC cannot conduct business as usual. Given the number of Trump Administration nominees currently pending before the Senate, including the recent nomination of Neil Gorsuch to the Supreme Court, it could take several more weeks or months for a new FERC Commissioner to be nominated and confirmed.[3]

In the absence of the FERC's ability to issue orders and conduct other official business, in theory the agency could fail to meet key deadlines established by federal statutes. For example, under the Natural Gas Act ("NGA") and Federal Power Act ("FPA"), regulated companies are required to file changes to rates and tariffs 30 and 60 days, respectively, prior to the date upon which they become effective.[4] However, if the FERC fails to act within the time that those rates or tariffs go into effect, the changes become effective automatically,[5] without the imposition of a refund obligation or suspension of the rate,[6] and if the FERC wishes to order further changes, it would have to do so under

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[2] 42 U.S.C. § 7171(e).

[3] As of the time of this article's submission, no new FERC Commissioners had yet been nominated or confirmed to reconstitute a quorum.

[4] NGA § 4(d), 15 U.S.C. § 717c(d); FPA § 205, 16 U.S.C. § 824d(d).

[5] *See Florida Power & Light Co. v. FERC*, 617 F.2d 809 (D.C. Cir. 1980); *Valley Gas Transmission, Inc.*, 24 FERC ¶ 61,168, at 61,402 (1983).

[6] 18 C.F.R. § 2.4(a) ("The Commission cannot suspend a rate schedule after its effective date."); *id.* § 2.52 (applying the suspensions policies set forth for public utilities under the FPA in § 2.4 to natural gas companies under the NGA); *accord*, *Cooperative Power Association*, 733 F.2d 577, 580 (8th Cir. 1984), *reh'g denied*, 739 F.2d 390 (8th Cir. 1984); *Illinois Power Co.,* 73 FERC ¶ 61,348, at 62,058 (1995); *Kentucky Power Co.,* 64 FERC ¶ 61,112, at 61,922–23 (1993); *Lawrenceburg Gas Transmission Corp.*, 45 FERC ¶ 61,480, at 62, 498 (1988); *see also Cities of Campbell and Thayer, Missouri v. FERC*, 770 F.2d 1180, 1184–85 (D.C. Cir. 1985); *Cities of Carlisle & Neola, Iowa v. FERC*, 704 F.2d 1259, 1263 (D.C. Cir. 1983), *on reh'g*, 741 F.2d 429 (D.C. Cir. 1984) ("[T]he power to suspend rates is granted to the agency to preserve its jurisdiction in ratemaking decisions."). *But see Xcel Energy Servs. Inc. v. FERC,* 815 F.3d 947 (D.C. Cir. 2016) (finding that the FERC may exercise remedial authority under the FPA to correct any legal errors committed in accepting a rate filing and failing to subject it to suspension and a refund obligation).

statutory provisions that place a heavier burden on the agency.[7]

The lack of a quorum also impacts the FERC's oversight and enforcement activities, since the FERC is unable to issue orders approving audit findings, settlements of investigations, and orders to show cause. However, some activity in this space will certainly continue. Enforcement staff has the ability to request information in limited preliminary investigations and market surveillance matters, investigations may still be pursued by the FERC's staff using any investigative powers granted in the FERC's order authorizing the investigation, and audits can continue. Other oversight functions, including hydroelectric dam inspections and liquefied natural gas safety reviews, are also expected to continue largely uninterrupted.

Finally, one of the more significant effects of the lack of a quorum is in delaying the approval of any natural gas pipeline projects currently pending before the agency. The FERC has exclusive authority to approve the siting and construction of interstate natural gas pipelines under Section 7(c) of the NGA.[8] The FERC staff can continue to prepare environmental documents and otherwise develop the record in major pipeline construction project proceedings. However, only the Commissioners, acting on the authority of the FERC, can currently approve those projects. This constraint is particularly relevant for a number of major natural gas pipeline projects that are currently pending before the FERC. Given the need for expanded gas infrastructure and the narrow construction window many projects face, this could be a major issue. In some cases even a small near-term delay will result in much more extensive delays in the future, up to a full year.

THE FERC EXPANDED EXISTING DELEGATIONS OF AUTHORITY TO LIMIT DISRUPTION

While the absence of a quorum will impair the FERC's ability to resolve proceedings, it will not grind to a halt. The FERC's staff is currently empowered to take certain actions, such as approving uncontested rate and tariff filings under the FERC's existing regulations,[9] and issuing tolling orders granting requests for rehearing of FERC orders for the sole purpose of further

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[7] NGA § 5, 15 U.S.C. § 717d; FPA § 206, 16 U.S.C. § 824e; *see FirstEnergy Operating Cos.*, 86 FERC ¶ 61,152, at 61,544, n.12 (1999) ("Once a rate goes into effect without suspension, the Commission must act pursuant to Section 206 of the Federal Power Act in order to change that rate.").

[8] 15 U.S.C. 717f(c); *see, e.g.*, *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F. Supp. 2d 570, 579 (D. Md. 2013) (town ordinances affecting the siting and construction of an interstate pipeline preempted by the NGA).

[9] 18 C.F.R. §§ 375.301–375.315.

consideration.[10] Further, on February 3, 2017, prior to losing a quorum, the FERC issued an order delegating additional authority to its staff.[11] In large part the 2017 Delegation resembles a similar delegation made in 1993, the last time FERC was faced with the possibility of losing a quorum.[12]

Specifically, the FERC's 2017 Delegation will enable FERC staff to preserve the agency's ability to review rate and tariff filings by granting delegated authority to issue suspension orders applicable to all submitted filings until the FERC once again has a quorum.[13] Under the 2017 Delegation, FERC staff may suspend tariff and rate schedule filings under the NGA and FPA and make them effective subject to refund and further order of the FERC or hearing and

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[10] *Id.* § 375.302(v). Any requests for rehearing of the FERC's orders under the NGA and FPA that are not acted upon by the FERC (or the Secretary of the FERC acting through delegated authority) within 30 days are automatically denied by operation of law. NGA § 19(a), 15 U.S.C. § 717r(a); Natural Gas Policy Act of 1978 § 506(a)(1), 15 U.S.C. § 3416(a)(2); FPA § 313(a), 16 U.S.C. § 825*l*(a); 18 C.F.R. § 385.713(f); *see, e.g.*, *Dominion Transmission, Inc.*, 153 FERC ¶ 61,284, at P 2 (2015); *Cameron Gas & Electric Co.*, 150 FERC ¶ 61,101, at P 5 n.7 (2015).

[11] *Order Delegating Further Authority to Staff in Absence of Quorum,* 158 FERC ¶ 61,135, at P 2, n.7 (2017) ("2017 Delegation"). On March 6, 2017, The Wyoming Pipeline Authority filed a request for rehearing challenging the legality of the 2017 Delegation as well as other delegations to FERC staff. *See* Request for Rehearing of the Wyoming Pipeline Authority, Docket No. AD17-10-000 (Mar. 6, 2017).

[12] *Order Delegating Authority to the Secretary and Certain Office Directors*, 63 FERC ¶ 61,073, at 61,316 (1993). In 1993, shortly after President Bill Clinton took office, then-Commissioners Jerry Langdon, Charles Trabandt, Branko Terzic, and Martin Allday all announced their intention to resign, potentially leaving only newly-appointed Chairman Elizabeth Moler as the sole Commissioner on the five-member body. Fearing the ramifications of an extended lack of a quorum, while four Commissioners remained the FERC issued an order delegating significant authority to its staff "[t]o meet its responsibility to protect the public interest." *Id.* at 61,316. Ultimately the delegation order was not necessary, as President Clinton obtained Senate confirmation of four new FERC appointees before a quorum was lost.

[13] 2017 Delegation at P 4, 2, n.5 (noting that existing delegations, including the authority to toll the time for action on requests for rehearing, also remain in effect). A suspension order temporarily renders a rate or tariff change ineffective until the end of the suspension period. It also places an obligation upon the pipeline to refund any amounts collected under a changed rate in excess of the rate that the FERC ultimately determines to be just and reasonable. A tolling order issued in response to a request for rehearing temporarily grants the request for the limited purpose of allowing the FERC to consider the request further. If no tolling order is issued, the request for rehearing is automatically denied. *See* n.10, *supra*; *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988) (upholding the FERC's practice of issuing tolling orders under the FPC); *California Co. v. FPC*, 411 F.2d 720 (D.C. Cir. 1969) (upholding the practice of the FERC's predecessor, the Federal Power Commission, of issuing tolling orders under the NGA).

settlement procedures.[14] In the case of initial rates or rate decreases, which are not subject to suspension and refund, FERC staff may institute a proceeding under Section 206 of the FPA "to protect the interests of customers."[15] The 2017 Delegation also provides the FERC's staff delegated authority, wherever statute allows, to extend the time for action on matters, and to approve uncontested[16] settlements.[17] Finally, it grants FERC staff the authority to "take appropriate action" on uncontested requests for "waivers of terms and conditions of tariffs, rate schedules and service agreements, including waivers related to, e.g., capacity release and capacity market rules."[18]

The FERC's 2017 Delegation does not include the authority to approve major natural gas pipeline projects or contested rate and tariff filings. Presumably this is in recognition of the difficultly, both politically and legally, of delegating such fundamental authority. As the FERC stated recently, delegation is designed for routine matters " 'which in many cases represent nothing more than a ministerial judgment by the office director concerning procedural matters,' " reserving "complex and controversial tasks" for the FERC itself.[19] The current FERC was likely hesitant to depart from this precedent, particularly given the increased controversy surrounding pipeline development in recent years.

CONCLUSION

In the days preceding Commissioner Bay's departure, the FERC worked overtime to issue orders on important issues and to delegate as much authority as possible to staff until a new Commissioner can be confirmed by the Senate to reconstitute a quorum for the agency to engage in official business. Although the FERC staff will be able to keep many proceedings going forward on its own, without the FERC to issue orders ruling on substantive issues, the ability of the agency to fulfill its statutory responsibilities is significantly limited until a new Commissioner takes office.

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[14] 2017 Delegation at P 4.

[15] *Id.*

[16] A matter is "uncontested" for the purpose of FERC's delegation of authority to its staff when "no motion to intervene, or notice of intervention, in opposition to the pending matter, has been received by the Commission." *Southern California Edison Co.*, 41 FERC 61,340 (1987) (citing 18 C.F.R. § 375.301(c)).

[17] 2017 Delegation at PP 5, 7.

[18] *Id*. at P 6.

[19] *Delegation of Authority for FERC Form No. 552*, 153 FERC ¶ 61,335, at P 2 (2015) (quoting *J.R. Ferguson and Assoc.*, 20 FERC ¶ 61,132, at 61,291 (1982)).