

FERC Faces Unprecedented Lack of Quorum After Commissioner's Departure

Commissioner resignation leaves agency without quorum necessary to issue major orders including approvals of natural gas pipeline permits and contested mergers.

Key Points:

- Federal Energy Regulatory Commission is without quorum for indeterminate period of time, severely restricting ability to issue substantive orders.
- Certain types of matters may experience delays.
- Authorities delegated to Commission staff to act on common and non-controversial matters have been expanded.

The departure of Commissioner Norman C. Bay on February 3, 2017, will leave the Federal Energy Regulatory Commission (FERC or the Commission) without a quorum for the first time in the agency's history. Until the US Senate confirms at least one new appointee, FERC's ability to issue orders will be restricted to authorities delegated to Commission staff that generally involve relatively common, uncontroversial matters. As a result, matters such as contested mergers and authorizations to construct natural gas pipelines, among other things, are likely to be affected.

FERC's Composition

FERC is an independent regulatory commission within the US Department of Energy that oversees the interstate transmission of electricity, natural gas and oil and whose authority includes reviewing proposals to build interstate natural gas pipeline projects and liquefied natural gas facilities, as well as the licensing of nonfederal hydropower projects.

As set forth in the Department of Energy Organization Act (DOE Act), the Commission is composed of up to five Commissioners appointed by the President with the advice and consent of the Senate.¹ The President designates one of the five Commissioners as the chairman, and not more than three Commissioners may be members of the same political party.² Each Commissioner serves a five-year term and may only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office."³ A Commissioner may continue to serve after the expiration of his or her term until his or her successor is in place so long as such extension does not extend beyond the end of the session of Congress in which the term expired.⁴

The DOE Act requires that at least three Commissioners be present “for the transaction of business.”⁵ Without a quorum of three or more Commissioners, FERC’s ability to act on matters that require Commission approval will face unprecedented restrictions.

Bay’s Departure

Prior to Commissioner Bay’s departure, two vacancies had already resulted from the departures of Republican Commissioners Philip D. Moeller and Tony Clark in October 2015 and September 2016, respectively. Those two vacancies were not filled during the prior administration. Commissioner Bay’s departure will leave only two active Commissioners — Acting Chairman Cheryl A. LaFleur and Commissioner Collette D. Honorable — both of whom are Democrats. To complicate matters further, Commissioner Honorable’s term expires later this year on June 30, which means the new administration will have yet another seat to fill this year at FERC if she is not reappointed and does not continue to serve beyond the expiration of her term.

So far the new administration has yet to nominate any individuals to fill the three vacancies left by Commissioners Moeller, Clark and Bay. Once nominated, the potential appointees then must be confirmed, first by the Senate Committee on Energy & Natural Resources and then by the full Senate (notwithstanding the possibility of an appointment during a Senate recess). The nomination and confirmation process could thus leave FERC without a quorum for several months to come.

What FERC Can and Cannot Do Without a Quorum

While FERC will be severely limited in the kinds of actions it may take without a quorum, its hands will not be completely tied. FERC staff work on a broad range of matters, moving processes forward prior to Commission decision, and all of that work will continue. However, issuing orders will be limited to those authorities that have been properly delegated to Commission staff. As described below, authorities delegated to staff generally involve common and uncontroversial matters. In other instances, a lack of action by FERC could result in certain types of filings being automatically accepted or approved. Such acceptance could then have the result of shifting the burden of meeting the applicable standard of review from the filing party to FERC or an affected third party.

Automatic Approvals

The Natural Gas Act and Federal Power Act both provide that certain types of filings be accepted or approved automatically if FERC is unable to take action within a time specified by statute. For example:

- Gas pipeline rate changes under section 4 of the Natural Gas Act become effective 30 days after filing unless FERC orders otherwise⁶
- Electric rate changes under section 205 of the Federal Power Act become effective 60 days after filing unless FERC orders otherwise⁷
- Requests for approvals of mergers or other changes of control under section 203 of the Federal Power Act are deemed granted if FERC does not act within 180 days⁸

Requests for rehearing are automatically denied under FERC’s regulations if FERC does not act within 30 days of filing.⁹ However, FERC’s rules already delegate to the Secretary the ability to issue orders that toll the time by which the Commission must take action on a request for rehearing.¹⁰ As a practical matter, this rule effectively removes the specific deadline by which FERC must act on a request for rehearing.

Automatic acceptance or approval of rate and merger filings would effectively shift the burden of meeting the applicable standard of review from the filing party to either the Commission — once a quorum is restored — or an affected party. Not only does this shift the burden, but the standards of review differ such that the Commission or affected party would have to file a complaint and thus face a more difficult statutory standard. Specifically, a party seeking to change its own electric or gas rate schedule under the Federal Power Act or the Natural Gas Act, respectively, must show that the change is “just and reasonable,”¹¹ while the Commission or affected party would have to show that the effective rate is “unjust, unreasonable, unduly discriminatory or preferential.”¹²

Pre-existing Delegations of Authority to FERC Staff in FERC’s Rules

To address the flow of common, uncontroversial filings, FERC has delegated certain authorities to Commission staff through the rulemaking process.¹³ These delegated authorities range from procedural processes such as issuing notices to the issuances of orders in specific contexts and include the following actions that would not be affected by a lack of quorum:

- Approving uncontested mergers and transactions involving changes of control over jurisdictional entities or facilities under section 203 of the Federal Power Act¹⁴
- Accepting uncontested electric or gas rate filings (with some exceptions regarding gas filings) that comply with applicable requirements¹⁵
- Rejecting an electric or gas rate filing that “fails patently” to comply with applicable requirements¹⁶
- Approving uncontested applications to issue securities or assume obligations and liabilities by public utilities under section 204 of the Federal Power Act¹⁷
- Issuing deficiency letters with respect to certain filings under the Federal Power Act and Natural Gas Act¹⁸
- Approving certain applications involving pipeline services, but not facilities, under section 7 of the Natural Gas Act¹⁹
- Accepting or rejecting certain filings under the Natural Gas Policy Act of 1978 or the Interstate Commerce Act²⁰
- Tolling the time by which the Commission must take action on requests for rehearing²¹

Expansion of Delegated Authorities during a Lack of Quorum

Recognizing that “it will lack a quorum for an indeterminate period” and that certain filings under the Federal Power Act and Natural Gas Act would take effect in the absence of action, FERC [issued an order on February 3, 2017](#), expanding the authorities delegated to staff while FERC is without a quorum.²² The order in some respects is similar to one issued by the Commission nearly 25 years ago when it last faced the possibility of being without a quorum.²³ However, unlike the present situation, that event never occurred because new Commissioners were nominated and confirmed in time to avoid the loss of a quorum.

These new, expanded delegations will be effective February 4, 2017, and will continue until FERC takes action to lift the delegation once it regains a quorum or in any event no longer than 14 days following the date that a quorum is reestablished.²⁴

The authorities specifically delegated to staff in this order are as follows:

- With respect to rate or other filings made under (1) section 4 of the Natural Gas Act, (2) section 205 of the Federal Power Act, and (3) section 6(3) of the Interstate Commerce Act:
 - Accept and suspend such filings, and to make them effective, subject to refund and further Commission order, or
 - Accept and suspend such filings, and to make them effective, subject to refund, and to set them for hearing and settlement judge procedures
- Institute a complaint proceeding under section 206 of the Federal Power in the event that an initial rate or rate decrease filed under section 205 of the Federal Power Act becomes effective because suspension and refund protection is unavailable under statute
- Extend the time for action on matters where such extension of time is permitted by statute
- Take action on uncontested filings “seeking waivers of the terms and conditions of tariffs, rate schedules and service agreements, including waivers related to, *e.g.*, capacity release and capacity market rules” made pursuant to section 4 of the Natural Gas Act, section 205 of the Federal Power Act, and section 6(3) of the Interstate Commerce Act
- Accept uncontested settlements²⁵

Under section 4 of the Natural Gas Act and section 205 of the Federal Power Act, FERC may suspend certain rate filings for up to five months.²⁶ This new delegation thus allows staff to suspend the effectiveness of such rate filings for up to five months whereas such filings would have become effective after 30 days’ notice (under the Natural Gas Act) and 60 days’ notice (under the Federal Power Act) if FERC took no action.

The ability to extend time for action could also apply to applications under section 203 of the Federal Power Act given that FERC (and now Staff) is able to extend the 180-day deadline an additional 180 days in the event that the application requires further consideration based on “good cause.”²⁷

FERC’s ability to expand such delegations through order, as opposed to through rulemaking process with public notice and comment, is not without question. FERC acknowledges that it is not utilizing a traditional rulemaking process, stating that “an immediate plan for the orderly delegation of agency functions to the Commission’s staff is required” and that public notice and comment would be “impracticable” given the timeframe.²⁸ The Commission states that decisions made by staff pursuant to delegated authority “may be challenged on rehearing ... and authority to act on requests for rehearing is not being delegated” such that such requests “will be addressed when the Commission again has a quorum.”²⁹ This suggests that the Commission may use rehearing orders after a quorum is restored as a mechanism to effectively ratify and justify staff decisions issued pursuant to this newly delegated authority.

Potential Limitations Facing FERC

Despite the expanded delegations of authority to staff, there are still certain types of actions that FERC will be effectively prohibited from taking until at least one new Commissioner is sworn in, including the issuance of substantive orders involving the following types of matters:

- Contested mergers and transactions involving changes of control over jurisdictional entities or facilities under section 203 of the Federal Power Act
- Contested rate filings or related settlements under the Federal Power Act or the Natural Gas Act (other than to suspend the effectiveness of new rates)
- Applications for certificates of public convenience and necessary for new natural gas pipelines under section 7 of the Natural Gas Act and for LNG terminal projects under section 3 of the Natural Gas Act
- Proposed, contested settlements
- The imposition of penalties in enforcement actions
- Resolution of complaint proceedings
- Resolution of requests for rehearing (other than to “toll” the deadline for resolution)
- Resolution of petitions for declaratory orders
- Issuances of proposed rulemakings and policy statements
- Commission action on review of initial decisions issued by administrative law judges

While FERC has acted expeditiously to attempt to mitigate the repercussions of being left without a quorum, the Commission still faces unprecedented challenges. The agency will still be unable to take certain actions until a quorum is restored, which may take a matter of months.

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Endnotes

¹ 42 U.S.C. § 7171(b)(1).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ 42 U.S.C. § 7171(e).

⁶ 15 U.S.C. § 717c(d).

⁷ 16 U.S.C. § 824d(d).

⁸ 16 U.S.C. § 824b(a)(5). Under statute, FERC may extend this 180-day deadline an additional 180 days if the Commission finds that further consideration is required based on good cause. *Id.*

⁹ 18 C.F.R. § 385.713(f).

¹⁰ 18 C.F.R. 375.302(v).

¹¹ 16 U.S.C. § 824d(a); 15 U.S.C. § 717c(a).

¹² 16 U.S.C. § 824e(a); 15 U.S.C. § 717d(a).

¹³ See generally 18 C.F.R. Part 375, Subpart C.

¹⁴ 18 C.F.R. § 375.307(a)(2)(ii).

¹⁵ 18 C.F.R. §§ 375.307(a)(1)(i), 375.307(a)(7)(i).

¹⁶ 18 C.F.R. §§ 375.307(a)(1)(ii), 375.307(a)(7)(iii).

¹⁷ 18 C.F.R. § 375.307(a)(2)(i).

¹⁸ 18 C.F.R. § 375.307(a)(1)(v) (delegating authority to issue deficiency letters with respect to rate filings under section 205 of the Federal Power Act); 18 C.F.R. § 375.307(a)(2)(iv) (delegating authority to issue deficiency letters with respect to filings under sections 203, 204, 215, and 305(b) of the Federal Power Act); 18 C.F.R. § 375.307(a)(8)(xii) (delegating authority to issue deficiency letters with respect to filings under section 7 of the Natural Gas Act).

¹⁹ 18 C.F.R. § 375.307(a)(8).

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- ²⁰ 18 C.F.R. §§ 375.307(a)(9), 375.307(a)(10).
- ²¹ 18 C.F.R. 375.302(v).
- ²² *Order Delegating Further Authority to Staff in Absence of Quorum*, 158 FERC ¶¶ 61,135 (2017) (“Delegation Order”).
- ²³ *See Order Delegating Authority to the Secretary and Certain Office Directors*, 63 FERC ¶¶ 61,073 (1993).
- ²⁴ Delegation Order at P 2.
- ²⁵ *Id.* at PP 4-7.
- ²⁶ 16 U.S.C. § 824d(e); 15 U.S.C. § 717c(e).
- ²⁷ 16 U.S.C. § 824b(a)(5).
- ²⁸ Delegation Order at P 3; *see also* Delegation Order at n.8 (citing support for the ability of staff to act pursuant to delegated authority during times when an agency was without a quorum). Commissioner Bay announced his resignation on January 26, 2017, approximately one week before it became effective on February 3, 2017.
- ²⁹ *Id.* at n.10.