FERC Could See Substantial Changes Under President Trump

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The Federal Energy Regulatory Commission (FERC) is a somewhat obscure and highly technical agency that was not discussed specifically during President Donald Trump's campaign. Its regulatory footprint is, however, substantial: The electric utility and natural gas pipeline industries FERC regulates, taken together, account for about 4 percent of the U.S. gross national product. The actions FERC takes under the Trump administration therefore have the potential to be significant. The agency's direction will have more to do with its new chairman than anything else. Because FERC is an independent agency, policy direction will come mostly through appointments, not the White House. History has shown that, even within the same administration, FERC's policies can shift based on the personal preferences of different chairmen.

As of January 27, 2017, the White House had not yet nominated a new FERC chairman or any additional commissioners. On January 26, 2017, President Trump named Commissioner Cheryl A. LaFleur as acting chairman, displacing Commissioner Norman C. Bay. Several hours later, Commissioner Bay resigned from FERC, effective February 3, 2017. That will leave FERC with only two commissioners, below the three needed to provide a quorum required for certain agency actions under the most commonly held view of the governing legal requirements. While FERC will probably seek to use delegated authority to conduct most of its day-to-day business, more important disputed cases may need to await the addition of at least one more commissioner. That may expedite the nomination and confirmation of one or more individuals to serve on FERC. Commissioner Bay's resignation is unusual; the traditional practice at FERC and other agencies is for an outgoing administration's appointees to remain in place long enough to maintain a quorum until the new administration's nominees can be confirmed by the Senate.

Governmentwide Changes Affecting FERC

As a candidate, President Trump spoke often about rolling back federal regulation. While FERC probably will look for ways to implement that mandate, it may not have many opportunities to do so. Much of FERC's responsibility involves run-of-the-mill regulation dating back to the 1930s, such as deciding whether electric utilities and natural gas pipelines are charging "just and reasonable" rates — a task that will continue. FERC may start off being less inclined to push the boundaries of its statutory authority. However, under past Republican administrations, FERC has not been shy about exploring these limits — often successfully. It thus remains to be seen whether FERC will become more conservative about exploring new frontiers of authority. At a minimum, however, FERC probably will become more reluctant to impose additional regulatory requirements and probably will look to remove some existing ones, turning a skeptical eye to whether the benefits of regulation are worth the costs.

Power Markets

During the campaign, President Trump frequently mentioned reviving the coal industry, and his transition team focused on preventing the shutdown of nuclear generation. But FERC has relatively few tools to advance those goals. Many of the struggling coal-fired and nuclear units are under severe economic pressure from fundamental market forces, including cheap shale gas and stagnant demand, along with mandated environmental and other upgrade costs. Even relatively efficient natural gas-fired generating resources are encountering financial difficulties, and FERC has no control over the market fundamentals at play.

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Organized Markets

As a result, FERC's most important role probably will be changing the rules that govern so-called "organized markets." Those markets run complex auctions for various electrical products in broad swaths of the country, covering about 60 percent of the country's demand for electricity. The rules of those markets thus govern the revenue stream for many of the existing generating units that face difficult economic conditions.

Toward that end, FERC could focus on "price formation" in organized markets — determining whether the auction mechanisms used in those markets are setting prices at efficient levels that reasonably compensate existing generation, and support the construction of new generation, when and where it is needed. While FERC already has been working on price formation issues, it may redouble those efforts under the new administration. For example, FERC may explore market-oriented approaches that place more value on the contributions that traditional generating resources make to reliable power grid operations. FERC already has taken some steps in that direction, but they were highly controversial and have not yet reversed the negative economic tide for a number of existing generators.

One targeted tool the administration might consider using, if it wants to keep a specific generator from retiring, is to have the secretary of Energy issue an "emergency" order under the Federal Power Act. The executive branch has broad, but rarely used, authority to require a generator to continue selling and a grid operator to accept delivery. That would, however, require defining a loss of generation fuel diversity as an emergency, a step that would be controversial and probably litigated. FERC has authority to determine reasonable compensation if the buyer and seller cannot agree, and could — again, with litigation risk — set that compensation at levels sufficient to keep the generating station financially afloat.

State Subsidies

FERC also may face considerable controversy regarding assertions that resources subsidized by states will artificially suppress organized market price outcomes, harming unsubsidized existing generating resources. At the state level, proponents of such subsidies argue that they counteract wholesale market flaws and also advance a variety of social goals, such as maintaining jobs, benefiting the environment, supporting particular fuel types and maintaining reliability. The Trump transition team stated its aim to avoid subsidizing any particular resource type. It remains to be seen, however, how FERC will respond if opponents of particular state subsidy programs seek to block them at FERC — particularly if the resource type is one the administration wants to survive. Disputes about state subsidies already have landed in federal court; the U.S. Supreme Court decided one case last term, and another case currently is pending in federal district court. It therefore is possible that FERC will seek to avoid acting and leave the question for the courts to decide.

Demand Response

Another set of organized market issues FERC may address involves "demand response." Demand response uses pricing incentives to encourage retail consumers to reduce their power consumption, particularly during peak periods. FERC has adopted several rules allowing demand response resources to participate in organized market auctions on terms that critics contend create inefficient subsidies. The Supreme Court affirmed one such rule last term. Nevertheless, FERC may pare back, if not eliminate, those rules, which would create the anomalous situation of an agency rescinding or changing a rule after winning affirmance from the Supreme Court. Because the Court found FERC had authority and discretion to act — not that it was required to act — FERC may, under President Trump, conclude it has the ability to reverse course, in whole or in part.

Renewable Resources

While FERC has adopted some policies that benefit renewable resources, most government support for renewables comes from other sources. A number of states require utilities to purchase large portions of their power supplies from renewable resources. Such resources also receive federal tax credits, which are beyond FERC's ambit. However, FERC could attempt to roll back subsidies for transmission infrastructure built to allow load centers to access distantly located renewable resources, which would require states that want to buy renewable energy to pay for transmission themselves.

In addition, FERC probably will be asked to address issues surrounding "net metering." Under net metering, state regulators allow the output of smaller-scale solar resources, often on residential rooftops, to be offset against retail power consumption, meaning that those resources effectively are compensated at the level of retail rates. Opponents of net metering argue that FERC should assert jurisdiction and rule that compensation equal to retail rate levels is too high. According to opponents, that compensation level inefficiently subsidizes solar resources, harming both those retail consumers who cannot afford to install them and utility companies that are not fully compensated for standing by to provide retail power when the sun does not shine. Proponents of net metering conversely argue that lowering compensation of small solar resources would fail to recognize the value those resources bring, including to the environment and to the reliability of the power system. Complicating the picture politically, some libertarian and conservative factions support net metering, viewing it as a question of individual freedom of choice and self-reliance regarding energy consumption decisions. Those views could collide with some proposals for addressing net metering issues, which arguably call for FERC to extend federal regulation to individual homeowners who install solar facilities — hardly a reduction in federal regulatory reach.

Battles over the issue of net metering and governance have been waged, often bitterly, at the state level. FERC previously ruled that, if states adopted net metering, it had no authority over the level of compensation any generating resource subject to that treatment received. FERC probably will be asked to revisit that question and likely will be hard-pressed to avoid doing so. The resulting controversy could prove to be one of the most interesting cases decided by FERC or any other administrative agency under the new administration, pitting opposition to subsidies against at least some libertarian and conservative views regarding energy consumption decisions.

New Infrastructure

President Trump has spoken repeatedly of accelerating new energy infrastructure. FERC surely seeks to improve its approach to approving natural gas pipelines and liquefied natural gas terminals. Until recently, when the then-chairman of FERC was accused of embargoing approval for three major natural gas pipeline projects, FERC had been viewed as supportive of such projects. Any hang-up of approvals surely will stop. In any event, however, FERC is not the only variable; many federal agencies play roles in the environmental review and siting process. The Trump administration thus may take a page from President George W. Bush's energy policy playbook by reviving the interagency White House Task Force on Energy Project Streamlining. That interagency task force approach could allow President Trump to advance the installation of new infrastructure by reducing the environmental review time across multiple federal agencies, including FERC.

Enforcement

Some changes to FERC's enforcement procedures probably would have occurred regardless of which political party controlled the agency. There already has been an increased awareness, both inside and outside FERC, that portions of the agency's enforcement program are unnecessary. There is no good reason to require the subject of an investigation to engage in three rounds of written submissions with the enforcement staff. Nor is there a need for FERC to publicly name subjects of ongoing investigations (by issuing what FERC calls a "Notice of Alleged Violation"). FERC also will likely stop claiming it is exempt from the normal civil litigation process when it files cases seeking to impose civil penalties in federal district court — a view two federal district courts have rejected to date.

On substance, FERC may revise or eliminate its penalty assessment guidelines, which critics claim produce penalties too high to allow reasonable settlement. One individual involved in transition efforts at the Securities and Exchange Commission took the position, when he was a commissioner there, that large penalties on companies are misguided because they punish shareholders. If that view holds sway elsewhere in the federal government, it seems reasonable to expect the same at FERC, which then would focus its enforcement efforts more on compliance where companies are concerned, using civil penalties more frequently against individuals who intentionally violate clear rules known in advance.

In addition, while FERC will continue to aggressively pursue market manipulation cases, it may pare back on its expansive practice of claiming that companies violated the previously unexpressed "spirit" or "intent" of the market rules. Critics contend that sometimes the right approach, when rules have unintended consequences, is to change them and move on. FERC is more likely to take that approach in the future.