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Under Biden, Energy Policy May Shift to Carbon Reduction

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Reducing carbon emissions will be a key objective for President Biden. Because the Federal Energy Regulatory Commission (FERC) has broad regulatory control over the electric industry, it may offer the Biden administration opportunities to advance its goal of achieving a carbon-free grid by 2035.

Democratic control of the Senate is unlikely to be a major factor in the administration's efforts. Aggressive legislation on carbon reduction, such as imposing a carbon tax, seems doubtful given the Democrats' narrow margin of control. Regulatory agencies therefore will, in the near term, serve as the administration's primary tool for reducing carbon emissions. Regulation, not legislation, seems set to become the main battleground. Virtually all FERC action, however, is subject to direct judicial review in a U.S. Court of Appeals. Thus, any steps FERC takes to reduce carbon emissions are likely to end up in court.

Senate control, however, will create an easier path for confirmation of presidential appointments. Currently, FERC has three Republican and two Democratic commissioners. The morning after his inauguration, President Biden named Richard Glick as chairman. Republican Neil Chatterjee's term will expire at the end of June 2021, and the Biden administration likely will nominate a new Democratic FERC commissioner to take that seat the moment it becomes available. At that point, the administration will have more complete control over the agency.

Until Commissioner Chatterjee's term expires, the Democrats will hold the power of the chair but remain in the minority when voting. That means the Biden administration will be able to direct the FERC staff and influence FERC's agenda but will not necessarily always have a voting majority to implement that agenda.

In substantive terms, the Biden administration likely will focus its action in two main areas. First, the new FERC probably will be aggressive in taking at least some steps to factor the cost of carbon into the price of electricity. Currently, utilities around the country decide what types of generating resources (*e.g.*, coal-powered or wind-powered generators) to operate based mainly on the incremental cost of running those resources, such as fuel costs. If FERC were to require some estimate of the cost of carbon to be factored into the economics of generating resources, it would sharply disfavor coal-fired resources, while promoting renewable and nuclear generation — all in a manner somewhat similar to a carbon tax, albeit one focused solely on the power industry.

FERC's statutory mandate to regulate the electric industry rests on a New Deal-era statute — the Federal Power Act. The statute is worded in broad and potentially elastic terms, but abundant case law stretching back 80 years might constrain FERC's authority. Under the Biden administration, FERC likely will press the boundaries of that authority in the name of reducing carbon emissions and test whether the courts will limit the ambit of its authority. In some regions, such steps probably will conflict with the views of at least some states. In addition, pricing carbon into the power generation process will be expensive, with the incremental new costs easily identified. If the Biden administration goes down this road, the journey is likely to be controversial and bitterly fought.

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Second, FERC probably will seek to add electric transmission facilities to connect new renewable generating resources to the electric grid so that those resources can move their output to consumers. The best places in the country to produce wind-powered and solar-powered generation typically are far from population centers, making transmission critical. While federal authority over the construction of electric transmission is limited, FERC does have substantial control over who will pay the many billions of dollars it costs to build new transmission. In general, adding new electric transmission becomes easier from an economic perspective if the cost of building the facilities is spread as broadly as possible.

The typical rule at FERC has been that the "beneficiaries" of new transmission must pay for the costs of those facilities. From the perspective of reducing carbon, FERC might conclude that the entire country benefits from any electric transmission line built anywhere in the country that increases renewable generation. Such a finding would increase the prospects for adding substantial renewable generation to the nation's resource mix. However, the work would be expensive, and power consumers in, for example, the Southeastern United States likely would object to paying some of the costs to build new transmission to bring renewable generation to, say, the Midwest. Any such decisions surely will be tested in court. But it seems likely that, under President Biden, FERC will test the limits of its statutory authority on judicial review rather than curtail its actions administratively.