

Carbon Reduction and Environmental Justice Drive Energy Policy

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04 / 30 / 21

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As we anticipated, under President Biden the Federal Energy Regulatory Commission (FERC) has begun addressing ways to reduce carbon emissions and add new transmission capacity. (See our *2021 Insights* article “[Under Biden, Energy Policy May Shift to Carbon Reduction](#).”) It has announced support for utilities that operate a portion of the bulk power grid taking steps to integrate the cost of carbon into their economic and operational decisions, so carbon-emitting generators run less frequently and low- or zero-carbon-emitting generators run more often. And FERC appears poised to take several actions designed to promote the addition of transmission lines to bring new renewable energy resources to the grid.

A third trend is emerging: FERC appears to be looking for opportunities to promote environmental justice. It already has [ordered briefing](#) on issues regarding a natural gas pipeline facility in New England. Questions concerning environmental justice have been raised increasingly over the past few years in cases considering whether FERC should approve the construction of new pipelines. In the New England case, however, the agency authorized the pipeline facility years ago, the decision was affirmed on judicial review and the facility already has been built. Thus, finality principles seem to stand firmly in the way of FERC taking any action in response to the briefing it ordered. The commissioners may simply be calling attention to the fact that a majority of them have announced their strong interest in fully considering environmental justice issues when they arise.

FERC also sets rates for the wholesale sale and interstate transmission of electricity, and the interstate transportation of natural gas, which Congress has determined is affected with “a public interest.” Each relevant statutory provision requires the agency to ensure that the rates it sets are “just and reasonable,” as well as “not unduly discriminatory.” These words have for many decades been interpreted principally in an economic sense. In fact, about 50 years ago, none other than Thurgood Marshall presented oral argument before the U.S. Supreme Court, contending that this language required the agency to enforce prohibitions against racial discrimination. The Court rejected that argument. By that point, Justice Marshall had been nominated and confirmed to his seat on the Court (though he did not participate in the Court’s decision.)

A majority of the commissioners may seek to distinguish or otherwise avoid that decision and attempt to broaden FERC’s considerations in setting rates to include environmental and racial justice elements. But FERC does not set retail rates for consumers of either electricity or natural gas — that function resides with the states. So even if FERC has the authority to set electric and gas rates that provide “justice” for consumers, it appears to have limited ability to do so.

FERC action in these areas will be controversial. Dissenting opinions already have been issued in the carbon pricing inquiry and the New England gas pipeline case. That highlights an additional notable trend we expect will both continue and proliferate. Since President Biden named Richard Glick FERC chairman, Commissioner James Danly, the former chairman, has dissented over a dozen times. Many of these dissents contend that the order in question violates the governing statute and seem to be geared toward guiding a reviewing court to reverse the commission on judicial review. It appears inevitable that the courts will eventually be asked to weigh in on the most controversial initiatives FERC is pursuing. As a result, agency action itself is unlikely to be the last word.