

# Implications of a lost FERC quorum

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On Monday 6 February, with the early resignation of former chair Norman Bay, the US Federal Energy Regulatory Commission (FERC) will for the first time in its history have less than the three members needed to reach a quorum. Given the focus that President Donald Trump has put on development of energy infrastructure in the US during his presidency, this presents a unique challenge.

At the start of the Clinton administration in 1993, all but one of the commission members either resigned or threatened to quit. As a protective measure at the time, the commission used certain statutory sections within the Gas Policy Act, Natural Gas Act, Federal Power Act, and Department of Energy Authorisation Act.

Upon taking up her position as acting chair of the commission, Cheryl LaFleur said that she plans to follow the path laid out in 1993, when the FERC last faced the possibility of a loss of quorum by expanding staff authority so that much of the work that the agency is responsible for can move forward.

In a conversation with David Schwartz, head of the energy regulatory and markets group at Latham & Watkins, *IJGlobal* took a look into what the loss of quorum will mean for the energy infrastructure project space in the coming months.

## What cannot be done

According to Schwartz, there are essentially nine categories of tasks that cannot be completed without a quorum.

- The commission cannot make a determination in a contested merger case. This means that contested utility and generator facility merger and acquisition activity requiring section 203 approval under the Federal Power Act will come to a halt.
- The commission cannot issue orders on any rate cases that are being contested under the Natural Gas Act or Federal Power Act.
- The commission cannot authorise new pipeline and LNG terminal facilities under section 7 of the Natural Gas Act. As such, any new plans to build a new pipeline or to build a lateral off an existing pipeline that is FERC jurisdictional would be put on hold until a quorum is reestablished.
- The commission cannot take actions on settlements involving rate cases or impose penalties in enforcement proceedings.
- The commission cannot issue rehearing orders.
- The commission cannot issue declaratory orders.
- The commission cannot take actions following an administrative law judge initial decision.
- The commission cannot issue rulemakings. Even without quorum, this would be a challenge given President Donald Trump's stipulation that the government not issue any new regulations.

## What can staff do?

As noted by LaFleur in her FERC interview, staff has about five times the workflow as the commission, and that will not be impaired. According to Schwartz, there are a few things that staff can do to ensure that the work of the FERC doesn't come to a halt.

- Staff can make determinations on uncontested rate and merger cases.
- While the commission cannot hold a vote on contested cases, staff can still work through the cases and prepare them for vote before the commission when a quorum is reestablished.
- Staff is able to issue deficiency letters on filings that are not prepared properly. This includes gas and electric rate filings, electric mergers and acquisitions and the requested approval of securities issuances under the Federal Power Act. On these, staff can issue letters and raise issues and concerns. Staff also has the authority to reject filings that do not meet statutory or regulatory requirements.

### **Automatic approval**

A side-effect of the loss of quorum is that, with the commission unable to take action on certain applications and filings including new rate case filings, some things will happen automatically by statute.

Gas pipeline rate cases would go into effect 30 days after filing without action. Electric rate cases would go into effect within 60 days. Filings under section 203 for transfer of control over jurisdictional facilities would take effect 180 days after filing.

"If a pipeline or a transmission-owning utility files a rate change, and it's not found to be deficient, regardless of whether it's contested, it will go into effect FERC takes action, either on a complaint or of its own initiative," Schwartz said.

At that point, "the burden changes as well, since the standard for a utility changing its rate is that it be just and reasonable. If a party files a complaint, the burden is to show it is unjust and unreasonable or unduly discriminatory or preferential, and that the proposed change to the rate is just and reasonable. That's a higher burden than the original burden by the transmission owner."

### **The stall option**

One way that the FERC can put a stay on new rate cases would be to enact an automatic suspension of tariff and rate filings for a maximum five-month period, and an automatic tolling of rehearing timeframes.

"If FERC delegates authority to its staff to impose the maximum suspension period for gas and electric rate cases, it would suspend the effectiveness of the new rate though the rate change would still be accepted automatically," Schwartz said. "The effective date would be up to five months from the date of filing."

This could give the FERC some breathing room, as long as Trump acts immediately. It is generally accepted that the process to appoint and confirm a new commissioner to the FERC should take about two to four months to carry out.

In the meantime, it is likely that any delegations of authority to staff are likely to receive a fair amount of scrutiny, and actions that are averse to any party are likely to receive a long, hard look from the market, and potentially, legal challenges.

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