



FERC, Facing Rare Loss of Quorum, Delegates Additional Authority to Its Staff, but Uncertainties Remain

On February 3, 2017, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued an order delegating additional authority to FERC staff in the absence of a quorum.¹ The Delegation Order follows the announcement by Commissioner Norman C. Bay, issued shortly after he had been replaced as Chairman of the agency by Cheryl A. LaFleur (now Acting Chairman), that he was resigning from FERC effective February 3, 2017. FERC cannot take certain actions without a quorum. With Commissioner Bay’s departure, FERC is left with only two members, leaving it one short of the three members required for a quorum.²

One of FERC’s central roles is to act on rate and rate-related filings by regulated entities, including filings by natural gas pipelines, oil pipelines, electric utilities, and other electric transmission providers. The governing statutes require that these types of filings go into effect automatically if FERC does not act on the filing within a defined time period.³ To address this scenario, FERC delegated to the Director of the Office of Energy Market Regulation (“OEMR”) the authority to accept and suspend such filings and to make them effective, subject to refund and further order of the Commission.⁴ The Delegation Order also empowers the Director of OEMR to accept and suspend such filings and to make

them effective, subject to refund, while setting them for hearing and settlement judge procedures.⁵

For an initial rate or rate decrease filed pursuant to Section 205 of the Federal Power Act, for which suspension and refund protection are unavailable, FERC delegated to staff the authority to institute a proceeding “to protect the interests of customers.”⁶ FERC also delegated to its staff the authority to: (i) extend the time for action on matters where such an extension is permitted by statute; (ii) take “appropriate action” on uncontested filings seeking certain types of waivers from a tariff, rate schedule, or service agreement; and (iii) accept uncontested settlements.⁷ These delegations are in addition to the other, more routine delegations of authority by FERC to its staff contained in the Commission’s regulations, which remain in effect.⁸ The new authority delegated to FERC staff will remain in effect until FERC once again has a quorum.⁹

Uncertainties remain after FERC’s Delegation Order. For example, nowhere in the order is there a delegation of authority to act on filings related to infrastructure projects, such as natural gas storage and pipeline projects, or hydroelectric projects. This presumably means that FERC staff will lack the authority to issue

substantive decisions on such matters until a quorum returns. Moreover, although the agency's Secretary already has the authority to issue "tolling" orders, which permit the agency to delay issuing an order on the merits of a request for rehearing (i.e., on a challenge to a prior order), the Delegation Order disavows any other delegated authority to act on a request for rehearing; such action must wait until FERC once again has a quorum.¹⁰ This will leave important proceedings unresolved for what may be a lengthy period, which could lead to court filings challenging the Delegation Order or the consequences brought about by the order.

When FERC issued a similar delegation order in 1993,¹¹ the agency ultimately never had to operate without a quorum.¹² This time, action pursuant to the Delegation Order is a virtual certainty; the President has not yet nominated a candidate to fill any of the vacancies at FERC, and it is not certain when such nominations will take place. While the lack of a quorum will bring more attention to the need to fill the vacancies at FERC, the vetting required for any candidate means that it will take some time before one or more candidates will be nominated and confirmed.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

James C. Beh

Washington

+1.202.879.3430

jcbeh@jonesday.com

Kevin J. McIntyre

Washington

+1.202.879.3917

kjmcintyre@jonesday.com

Kenneth B. Driver

Washington

+1.202.879.7629

kbdriver@jonesday.com

Andrew P. Mina, an associate in the Washington Office, assisted in the preparation of this Commentary.

Endnotes

- 1 *Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 (2017), corrected by Errata Notice, Docket No. AD17-10-000 (Feb. 3, 2017) ("Delegation Order").
- 2 42 U.S.C. § 7171(e) (2012). See also 18 C.F.R. § 375.101(e) (2016).
- 3 See 15 U.S.C. § 717c (2012); 16 U.S.C. § 824d (2012); 49 U.S.C. App. § 6(3) (1988).
- 4 Delegation Order at P 4.
- 5 *Id.*
- 6 *Id.*
- 7 *Id.* at PP 5-7.
- 8 *Id.* at P 2 & n.5. See 18 C.F.R. §§ 375.301-.315 (2016). "This includes the authority of the Secretary to toll the time for action on requests for rehearing." Delegation Order at n.5.
- 9 Delegation Order at P 2 (stating that the delegations will remain in effect until FERC regains a quorum and "takes action to lift the delegation," but in no event will the delegation "extend beyond 14 days following the date a quorum is reestablished").
- 10 Delegation Order at n.10.
- 11 *Order Delegating Authority to the Secretary and Certain Office Directors*, 63 FERC ¶ 61,073 (1993).
- 12 "Massey, Hoecker and Santa Sworn in as Members of FERC; Commissioners Terzic and Langdon Depart," *Foster Natural Gas Report*, May 27, 1993, at 3; "FERC Nominees Approach Confirmation After Friendly Senate Panel Hearing," *Southeast Power Report*, May 21, 1993.

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