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Commissioners' No Votes Speak Volumes About Upcoming Issues Facing FERC

The Federal Energy Regulatory Commission held its first monthly meeting of 2021 on January 19, welcoming new Commissioner Mark Christie to his first meeting and taking on a packed agenda. Some attention has already been paid to the orders voted out at this meeting, including orders addressing PJM's minimum offer price rule, directing a technical conference focused on hybrid resource issues in markets operated by regional transmission organizations or independent system operators (RTO/ISO), and issuing a notice of inquiry into FERC's practices for requiring financial assurance measures in hydroelectric licenses. But much can also be learned from the commissioners' discussions of an unusually large number of draft orders that remained on the agenda but failed to garner sufficient votes for commission action. Particularly in light of the elevation of Commissioner Richard Glick to FERC chairman on January 25, these discussions provide some insight into topics likely to fill FERC's plate in the coming year.

FERC action on reform to its pipeline certificate policies, including consideration of landowner, environmental justice, and GHG emissions issues, is likely in the near term. Commissioners Neil Chatterjee, Allison Clements, and Glick voted against draft orders on several pipeline certificate items based on concerns regarding landowner rights, environmental justice, and safety. Draft orders regarding whether Sabal Trail Transmission, LLC and Algonquin Gas Transmission could place in service certain compressor facilities that had been certificated previously were voted down due to insufficient consideration of environmental justice and safety issues raised by stakeholders. Commissioner Glick focused primarily on environmental justice, expressing the view that pipeline development often disproportionately impacts disadvantaged communities, a factor he wants FERC to focus on more in its environmental reviews under the National Environmental Policy Act. Sounding a similar note, Commissioner Clements described the certificate process as "broken," lamenting drawn out proceedings and frequent starts and stops to construction that create uncertainty for developers, stakeholders, and FERC itself. She called on the commission to review FERC's existing pipeline certificate policy statement, which she noted was issued in 1999 when natural gas made up a relatively small share of the electric generation fuel mix and before fracking made the shale gas boom possible.

In a similar vein, Commissioners Chatterjee, Glick, Clements, and Christie voted against a draft order that would have expanded categorical exclusions under FERC's NEPA review. All four opposed the draft order primarily due to timing, as the order came up for a vote the day before Inauguration Day. Commissioner Clements advocated a holistic review and assessment of categorical exclusions as well as FERC's certificate policies. Some also noted the NEPA regulations and guidance from White House Council on Environmental Quality would be revised in the near term.

This expectation was well-founded in light of the executive order issued on January 27, 2021, titled "Tackling The Climate Crisis At Home And Abroad." The executive order warns that "we face a climate crisis that threatens our people and communities, public health and economy, and, starkly, our ability to live on planet Earth." It also serves as a call to action for the heads of federal agencies to address climate change:

We must listen to science -- and act. We must strengthen our clean air and water protections. We must hold polluters accountable for their actions. We must deliver environmental justice in communities all across America. The Federal Government must drive assessment, disclosure, and mitigation of climate pollution and climate-related risks in every sector of our economy, marshaling the creativity, courage, and capital necessary to make our Nation resilient in the face of this threat.

Based on the discussion at the January 19 meeting, and with Chairman Glick at the helm, it is likely that certificate policy reform will return to the fore at FERC.

The ongoing debate over RTO/ISO capacity market structures, state subsidies for clean energy, and related FERC/state jurisdictional issues is likely to accelerate in the coming year. Commissioners Chatterjee, Glick, and Clements voted against a draft order focused on a footnote in an October 15, 2020, order that addressed application of PJM's Minimum Offer Price Rule (MOPR) and certain compliance filings with other orders in the proceeding. In the October 15 order, FERC had accepted PJM's proposal to exclude independently evaluated, non-discriminatory, fuel-neutral, competitive state-directed default service auctions from application of the expanded MOPR, but in a footnote asserted that the acceptance of the exclusion did not constitute a ruling on whether any particular state-directed default service auction would actually fall into the exclusion. All three commissioners would have vacated the footnote as creating uncertainty and appeared to back the proposition that state-directed default service auctions should not be covered by the MOPR. Commissioner Clements and Commissioner Christie (who did not vote on this agenda item) expressed a desire to engage with states and other stakeholders in the coming year to examine more broadly the jurisdictional issues raised by RTO/ISO capacity market structures.

FERC may take a broader view of its jurisdiction over LNG terminals under Section 3 of the Natural Gas Act going forward. Commissioners Chatterjee, Glick, and Clements voted against a draft order that would have disclaimed jurisdiction over New Fortress Energy, LLC's liquified natural gas (LNG) terminal in San Juan, Puerto Rico. New Fortress said that its LNG facility imports LNG to supply industrial users and a power plant; LNG is delivered to the facility on small vessels and either regasified and piped to a power plant next door or loaded onto trucks and delivered around Puerto Rico for regasification and use. While Commissioner Chatterjee noted concern that the draft order did not adequately address the jurisdictional issue raised in this proceeding, both Commissioners Glick and Clements forcefully asserted that Section 3 of the Natural Gas Act gave FERC jurisdiction over the construction and operation of the facility. Notably, Commissioner Glick also suggested that the facility, which is already operational, might not need to shut down operations while a certificate proceeding was pending, potentially offering an olive branch to the developers of the project that had sought FERC staff input at an earlier stage in the facility's development.

Although none of these discussions led to any orders that would serve as precedent, they provide a glimpse into the commissioners' thinking on key issues likely to arise again this year.

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