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The Loss of Quorum at the Federal Energy Regulatory Commission

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Summary

On January 25, 2017, President Trump designated Commissioner Cheryl LaFleur of the Federal Energy Regulatory Commission (FERC or the Commission) to serve as acting chairwoman of FERC, replacing Norman Bay as chair. Commissioner Bay subsequently resigned from the Commission effective February 3, 2017, leaving FERC without a voting quorum of three members, since only acting Chairwoman LaFleur and Commissioner Colette Honorable remain as members of the Commission. The absence of a quorum limits FERC's authority to issue orders concerning projects or rate and tariff issues. A quorum will not be restored until at least one new member is seated.

FERC normally has five commissioners, with a quorum of three members required to be present to transact business. Under Section 401(e) of the Department of Energy Organization Act (P.L. 95-91), "... a quorum for the transaction of business shall consist of at least three members present. Each member of the Commission, including the Chairman, shall have one vote. Actions of the Commission shall be decided by a majority vote of the members present."

The Commission generally has three members from the party of the incumbent President, and two from the minority party. However, Republican Commissioner Philip Moeller left FERC in October 2015, and fellow Republican Tony Clark left the Commission following the expiration of his term on June 30, 2016. President Obama did not nominate replacements for either Commissioners Moeller or Clark, meaning that FERC was operating with only three Democratic commissioners since September 2016. Commissioner Honorable's current term expires on June 30, 2017, and Commissioner LaFleur's term expires on June 30, 2019.

On February 3, 2017, anticipating that the lack of quorum will continue for an indefinite period, the Commission chose to issue an order (while it still had a quorum) delegating authority to staff for certain agency functions (e.g., certain actions related to rate filings, uncontested settlements, or uncontested requests for waivers on certain terms or conditions of filings). FERC stated that the order was issued to assure that the Commission's regulatory obligations are carried out "in an effective and efficient manner consistent with the public interest." This is not the first time the Commission has issued a delegation order following a loss of quorum. FERC took similar action to delegate authority to its staff to act in the absence of a quorum in 1993.

FERC recognizes in the current delegation order that, in the absence of FERC authority, certain rate filings (for example, under the Federal Power Act and the Natural Gas Act) may take effect under operation of law "without suspension, refund protection, or the ability of contesting parties to appeal." Thus, FERC states that the delegation order is intended to "ensure that staff has the authority to prevent such filings from going into effect by operation of law during the period in which the Commission lacks a quorum."

The absence of a quorum means that FERC will not be issuing orders on business matters requiring member votes such as electric utility mergers and acquisitions, new policies or rulemakings, or natural gas pipeline certificates. However, staff will continue to issue Environmental Impact Statements and Environmental Assessments for pipeline projects and hydropower licenses. Staff may also continue to draft orders in preparing for member votes when a quorum is restored.

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Introduction

The Federal Energy Regulatory Commission (FERC or the Commission) is an independent agency that regulates the interstate transmission of electricity, natural gas, and oil, among other responsibilities. FERC's jurisdiction and regulatory authority are largely focused on interstate energy transactions, the development of a reliable energy infrastructure, and the protection of wholesale customers from unjust and unreasonable rates or undue discrimination and preference. FERC normally has five commissioners, with a quorum of three members required to be present to transact business.[1] As of February 3, 2017, following the resignation of former Chairman Norman Bay, there were only two serving FERC commissioners.

This report will discuss the current lack of quorum in the context of the Commission's history, its responsibilities, and its major initiatives that may be impacted by the lack of quorum.

FERC's Regulatory Authority and History

In 1920, Congress enacted the Federal Water Power Act (FWPA) to provide federal oversight of hydropower development on navigable waters in the United States. The act created the Federal Power Commission (FPC) to regulate the construction and operation of nonfederal hydropower projects.[2] In subsequent years, many companies began to enter the electric power industry. Large companies began to form and consolidate the industry, as economies of scale began to dominate the production of electric power. Many of these individual companies fell under the organizational control of even larger "holding companies."[3] This was likely an effort to evade state regulation because states did not have jurisdiction over interstate transmission or rates charged for electricity, and federal regulations did not exist for such interstate activities.[4]

In 1935, Congress passed the Public Utility Act (PUA) which sought to end the abuses of market power at that time.[5] Title I of the PUA, the Public Utility Holding Company Act of 1935 (PUHCA; P.L. 74-333), was created to address the lack of oversight over holding companies. Among other actions, PUHCA gave the Securities and Exchange Commission (SEC) authority over many holding company transactions, and it limited power industry mergers and acquisitions to contiguous areas.[6]

Title II of the PUA amended the FWPA to create the Federal Power Act (FPA),[7] and granted authority to the FPC to regulate the interstate transmission and sales of electricity and natural gas.

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[1] Department of Energy Organization Act (P.L. 95-91), §401(e).

[2] 16 U.S.C. §§791 to 823d.

[3] "A company that confines its activities to owning stock in and supervising management of other companies. The Securities and Exchange Commission, as administrator of the Public Utility Holding Company Act of 1935, defines a holding company as "a company which directly or indirectly owns, controls or holds 10 percent or more of the outstanding voting securities of a holding company." (15 U.S.C. 79b, par. a (7))." 42 U.S.C 16451.

[4] Jonathan Lesser and Leonardo Giacchino, "A Brief History," in *Fundamentals of Energy Regulation*, 1st ed. (Vienna, VA: Public Utilities Reports Inc., 2007), pp. 4-5.

[5] See discussion 15 U.S.C. §79a.

[6] See 15 U.S.C. 79c(a). PUHCA required interstate holding companies engaged through their subsidiaries in the electric utility business to register with the SEC, to file detailed reports about their organization, financial structure, and operations, and to operate as coordinated, integrated systems, confined to the "State in which it is organized and States contiguous thereto." Repeal of PUHCA in the Energy Policy Act of 2005 (P.L. 109-58) nullified the contiguous requirement.

[7] 16 U.S.C. 791 et seq.

The FWPA became Part I of the FPA, with the FPC assuming authority over nonfederal hydropower projects on navigable waterways and federal lands.

Part II of the FPA authorized the FPC to regulate the interstate transportation and wholesale sale (i.e., sale for resale) of electric energy, while leaving jurisdiction over intrastate transportation and retail sales (i.e., sale to the ultimate consumer) in the hands of the states.[8] Under FPA Section 205, all rates and charges "made, demanded, or received" by public utilities for the transmission or sale of electricity subject to FPC authority cannot be "unjust or unreasonable" and cannot be "unduly discriminatory or preferential."[9] Under FPA Section 206, the FPC could initiate an investigation (on its own or by request) to ensure that rules or practices affecting wholesale rates are just and reasonable.[10]

Creation of the Federal Energy Regulatory Commission

In 1977, Congress enacted the Department of Energy Organization Act (EOA, P.L. 95-91), terminating the FPC and creating FERC as an independent commission[11] administratively situated within the newly formed U.S. Department of Energy. The reorganization effort was largely ascribed to growing doubts about the effectiveness of the FPC.[12]

The organization of FERC is addressed in EOA Section 401(b):

> The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate. One of the members shall be designated by the President as Chairman. Members shall hold office for a term of four years and may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

Section 402 of the EOA outlined FERC's jurisdiction, transferring some of the FPC's obligations to FERC. The Commission was tasked with hydroelectric dam licensing and safety (primarily under Part I of the FPA),[13] and regulation of rates and services for the transmission or wholesale sale of electric energy (primarily under Parts II and III of the FPA). Section 402 of the EOA also transferred the FPC's administrative, procedural, and accounting functions (among other responsibilities) under Part III of the FPA to FERC.[14]

Among other responsibilities, the EOA also transferred authority under the Natural Gas Act (NGA; P.L. 75-688) to FERC for the establishment, review, and enforcement of rates and charges for the transportation and sale of natural gas (under NGA Sections 1, 4, 5, and 6), and for the issuance of a certificate of public convenience and necessity, including abandonment of facilities or services, and the establishment of physical connections under Section 7 of the NGA.

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[8] See 16 U.S.C. 824(b)(1).

[9] 16 U.S.C. 824d.

[10] 16 U.S.C. 824e.

[11] FERC recovers the full cost of its operations through annual charges and filing fees assessed on the industries it regulates as authorized by the Federal Power Act and the Omnibus Budget Reconciliation Act of 1986. The Commission deposits this revenue into the Treasury as a direct offset to its appropriation, resulting in no net appropriations. FERC, *FY2017 Congressional Performance Budget Request / FY2015 Annual Performance Report*, 2016, page ii, https://www.ferc.gov/about/strat-docs/2016/FY17-Budget-Request.pdf. (Hereinafter, FERCBP.)

[12] "There was a colossal backlog of applications for natural gas permits, while there were chronic brownouts in the 1960s and the [Organization of the Petroleum Exporting Countries (OPEC)] embargo in the 1970s." FERC, *History of FERC*, 2016, https://www.ferc.gov/students/ferc/history.asp.

[13] 16 U.S.C. 791 et seq.

[14] 16 U.S.C. 825 et seq.

FERC's Responsibilities and Organization[15]

Under its current statutory authority, FERC

- regulates the transmission and wholesale sales of electricity in interstate commerce;
- reviews certain mergers and acquisitions and corporate transactions by electricity companies;
- regulates the transmission and sale of natural gas for resale in interstate commerce;
- regulates the transportation of oil by pipeline in interstate commerce;
- approves the siting, construction, operation, and abandonment of interstate natural gas pipelines, LNG terminals, and natural gas storage facilities;[16]
- reviews the siting application for electric transmission projects under limited circumstances;
- ensures the safe operation and reliability of proposed and operating LNG terminals;
- licenses and inspects private, municipal, and state hydroelectric projects;
- protects the reliability of the high voltage interstate transmission system through mandatory reliability standards;
- monitors and investigates energy markets;
- enforces FERC regulatory requirements through imposition of civil penalties and other means;
- oversees environmental matters related to natural gas and hydroelectricity projects and other matters; and
- administers accounting and financial reporting regulations and conduct of regulated companies.

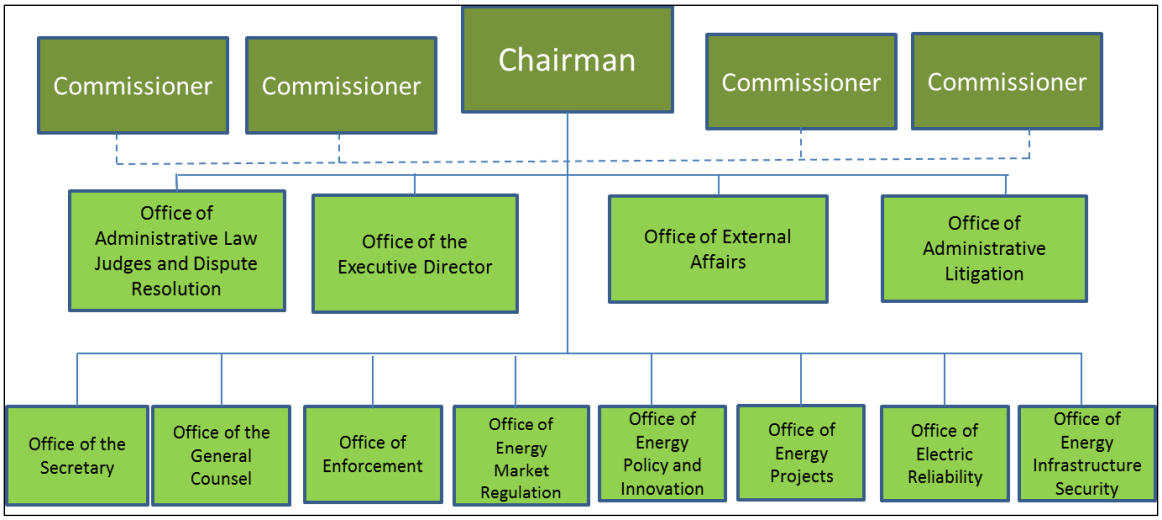
FERC's jurisdiction and regulatory authority are largely focused on interstate energy transactions, the development of a reliable energy infrastructure, and the protection of wholesale customers from unjust and unreasonable rates or undue discrimination and preference.

In order to manage its obligations and functions, FERC has been structurally organized to address these areas of responsibility. **Figure 1** illustrates FERC's hierarchy and organization into 12 separate offices. Each office is responsible for a specific portion of the Commission's mission and regulatory obligations.

[15] FERC, *What FERC Does*, May 24, 2016, https://www.ferc.gov/about/ferc-does.asp.

[16] The Department of Energy (DOE) regulates the import and export of natural gas through LNG terminals. Department of Energy, *Natural Gas Import and Export Regulation*, March 13, 2014, http://www.fossil.energy.gov/programs/gasregulation/.

Figure 1. FERC Organizational Chart



Source: FY2017 Congressional Performance Budget Request / FY2016 Annual Performance Report at https://www.ferc.gov/about/strat-docs/2016/FY17-Budget-Request.pdf.

Notes: The source document further describes the functions of each office.

FERC's Loss of Quorum

FERC normally has five commissioners, with one member serving as chairman.[17] On January 25, 2017, President Trump designated Commissioner Cheryl LaFleur to serve as acting chairwoman of FERC, replacing Norman Bay as chair. Commissioner Bay subsequently resigned from the Commission effective February 3, 2017, leaving FERC without a voting quorum of three members; only acting Chairwoman LaFleur and Commissioner Colette Honorable remain as members of the Commission.

A quorum of three members is required to be present to transact business. Under EOA Section 401(e), "... a quorum for the transaction of business shall consist of at least three members present. Each member of the Commission, including the Chairman, shall have one vote. Actions of the Commission shall be decided by a majority vote of the members present."

The Commission generally has three members from the party of the incumbent President, and two from the minority party.[18] However, Republican Commissioner Philip Moeller left FERC in October 2015, and fellow Republican Tony Clark left the Commission following the expiration of his term on June 30, 2016. President Obama did not nominate replacements for either Commissioners Moeller or Clark, meaning that FERC was operating with only three Democratic commissioners since September 2016. Commissioner Honorable's current term expires on June 30, 2017, and Commissioner LaFleur's term expires on June 30, 2019. A quorum will not be

[17] "The Commission shall be composed of five members appointed by the President, by and with the consent of the Senate. One of the members shall be designated by the president as Chairman. Members shall hold office for a term of four years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The terms of the members first taking office shall expire (as designated by the President at the time of appointment), two at the end of two years, two at the end of three years, and one at the end of four years." EOA §401(b).

[18] "Not more than three members of the Commission shall be members of the same political party." EOA §401(b).

restored until at least one new member is seated. The absence of a quorum limits FERC's authority to issue orders concerning projects or rate[19] and tariff[20] issues as discussed below.

On February 3, 2017, anticipating that the lack of quorum would continue for an indefinite period, the Commission chose to issue an order (while it still had a quorum) delegating authority to staff for certain agency functions.[21] FERC stated that the order was issued to assure that the Commission's regulatory obligations would be carried out "in an effective and efficient manner consistent with the public interest." This is not the first time the Commission has issued a delegation order following a loss of quorum. FERC took similar action to delegate authority to its staff to act in the absence of a quorum in 1993.[22]

FERC recognizes in the current delegation order that, in the absence of FERC authority, certain rate filings (for example, under the FPA and NGA) may take effect under operation of law[23] "without suspension, refund protection, or the ability of contesting parties to appeal." Thus, FERC states that the delegation order is intended to "ensure that staff has the authority to prevent such filings from going into effect by operation of law during the period in which the Commission lacks a quorum."[24]

FERC summarized the delegation of agency authority as follows:[25]

- **Rate and other filings:** The Director of the Office of Energy Market Regulation (OEMR) can accept and suspend rate filings, and make them effective subject to refund and further order of the Commission, or accept and suspend them, make them effective subject to refund, and set them for hearing and settlement judge procedures. For initial rates or rate decreases submitted under Section 205 of the FPA, for which suspension and refund protection are unavailable, FERC staff is granted authority under Section 206 to institute proceedings in order to protect the interests of customers.
- **Extensions of time:** FERC staff can extend the time for action on matters where it is permitted by statute.
- **Waiver requests:** The Director of OEMR can take appropriate action on uncontested filings under the NGA, FPA, and ICA, seeking waivers of the terms and conditions of tariffs, rate schedules and service agreements, including waivers related to capacity release and capacity market rules.

[19] "The authorized charges per unit or level of consumption for a specified time period for any of the classes of utility services provided to a customer." See FERC Glossary at https://www.ferc.gov/resources/glossary.asp#R.

[20] "A compilation of all effective rate schedules of a particular company or utility. Tariffs include General Terms and Conditions along with a copy of each form of service agreement." See FERC Glossary at https://www.ferc.gov/resources/glossary.asp#T.

[21] 158 FERC ¶ 61,135.

[22] See Order Delegating Authority to the Secretary and Certain Office Directors, 63 FERC ¶ 61,073 (1993).

[23] For example, under the Federal Power Act, certain rates take effect 60 days after they are filed with FERC, absent a Commission order to the contrary.

[24] Ibid. "Thus, during the Delegation Period even in the absence of this delegation of authority to its staff, limited Commission operations can continue: inspecting and responding to incidents at liquefied natural gas facilities or jurisdictional hydropower projects; and other activities involving the safety of human life or protection of property."

[25] FERC, "Commission Delegates Authority to Staff in Absence of Quorum," press release, February 3, 2017, https://ferc.gov/media/news-releases/2017/2017-1/02-03-17.asp#.WJtZIr-YKk4.https://ferc.gov/media/news-releases/2017/2017-1/02-03-17.asp#.WJtZIr-YKk4.

- **Uncontested settlements:** The Director of OEMR has authority to accept settlements not contested by any party or participant, including Commission trial staff.

Until there is a quorum, FERC cannot issue new agency policies or rules or make final decisions on applications to authorize certain electric utility mergers and acquisitions, natural gas pipelines, liquid natural gas import/export terminals, or hydroelectric projects. FERC staff can, however, continue to gather information and prepare analyses (such as for Environmental Impact Statements and Environmental Assessments for pipeline projects and hydropower licenses) necessary to process those applications. Staff may also prepare draft orders that the Commission may approve, once a quorum is restored.[26]

Some Pending FERC Projects

As of February 9, 2017, a search of FERC's online system for projects reveals almost 46,000 applications, petitions, or requests filed under the category of certificates of public convenience and necessity. There were also over 600 applications, petitions, or requests for tariffs with requested effective dates.[27] FERC also lists almost 60 major pipeline projects as pending.[28]

Many Commission decisions are challenged or enforced in the federal courts. The Office of the Solicitor, Office of the General Counsel, has independent authority to defend the Commission in court.[29]

Major FERC Initiatives

The Commission's major activities in the electric, natural gas, and oil industries are summarized below. A detailed description of every FERC function is beyond the scope of this report. However, the following sections provide an overview of the major activities within the industries. It should be noted that FERC's authority varies across these industries, with generally more regulatory control in the electric power and natural gas industries.

Electric Industry

FERC lists 14 areas under a summary of its *Industry Activities* in the electricity industry.[30] Among these areas, ensuring that a competitive marketplace exists for wholesale power markets has been a major undertaking.[31] FERC states that it has been national policy to foster competition for the

[26] Discussion with FERC Office of External Affairs, February 7, 2017.

[27] "A certificate issued by FERC that allows the recipient to engage in the transportation and/or sale for resale of natural gas in interstate commerce or to acquire and operate facilities needed to accomplish this." See FERC Glossary at https://www.ferc.gov/resources/glossary.asp#C.

[28] See FERC, *Major Pipeline Projects Pending (Onshore)*, December 12, 2016, https://www.ferc.gov/industries/gas/indus-act/pipelines/pending-projects.asp.

[29] FERC, *Court Cases*, February 3, 2012, https://www.ferc.gov/legal/court-cases.asp.

[30] FERC, *Electric Industry*, November 4, 2016, https://www.ferc.gov/industries/electric.asp.

[31] The importance of transparency in wholesale electricity markets was underscored by the Energy Policy Act of 2005 (EPACT05; P.L. 109-58) where under Subtitle G §1281, the Federal Energy Regulatory Commission (FERC or the Commission) was directed to facilitate price transparency in interstate markets for the sale and transmission of electric energy "having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers." CRS Report R43093, *Electricity Markets—Recent Issues in Market Structure and Energy Trading*, by (name redacted) .

last few decades in wholesale markets,[32] a concept which is at the heart of the administration of these markets by the regional transmission organizations (RTOs).[33]

In regions with traditional regulation, power plants are generally scheduled to run by the vertically integrated utility which owns the generation and wires (i.e., transmission and distribution) businesses. However, in RTO regions as shown in **Figure 2**, power generators generally compete to sell electricity from their power plants to retail suppliers (i.e., a distribution utility or other Load Serving Entity)[34] via a wholesale electricity market. RTOs are the facilitator in this supply and demand process, coordinating the purchase, sale, and delivery of wholesale electricity from seller to buyer. The participation of renewable generation[35] and demand response[36] resources in RTO markets has been an area which FERC wants to ensure fair value and access to wholesale markets.

[32] FERC, *Electric Competition*, October 21, 2014, https://www.ferc.gov/industries/electric/indus-act/competition.asp.

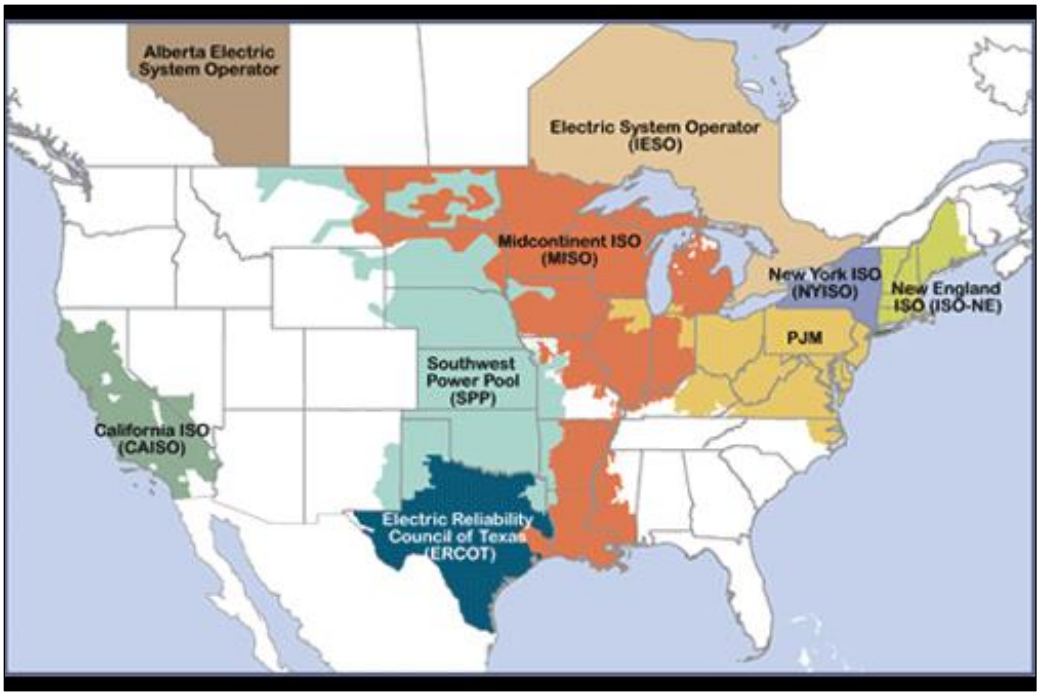
[33] "Independent System Operators [ISOs] grew out of [FERC] Orders Nos. 888/889 where the Commission suggested the concept of an Independent System Operator as one way for existing tight power pools to satisfy the requirement of providing non-discriminatory access to transmission. Subsequently, in Order No. 2000, the Commission encouraged the voluntary formation of Regional Transmission Organizations to administer the transmission grid on a regional basis throughout North America (including Canada). Order No. 2000 delineated twelve characteristics and functions that an entity must satisfy in order to become a Regional Transmission Organization." FERC, *Electric Competition*, October 21, 2014, https://www.ferc.gov/industries/electric/indus-act/competition.asp.

[34] An entity that secures electric energy, transmission service, and related services to serve the demand of its customers.

[35] Generally, electric power produced from wind and solar power, geothermal or biomass power are considered renewable since they do not reduce the resource used. FERC, *Integration of Renewables*, June 26, 2016, https://www.ferc.gov/industries/electric/indus-act/integration-renew.asp.

[36] Generally, demand resources can reduce the need for power generation by reducing the overall consumption of electricity. FERC, *Demand Response*, March 2, 2016, https://www.ferc.gov/industries/electric/indus-act/demand-response.asp.

Figure 2. Map of RTO and ISO Areas



Source: Regional Transmission Organizations (RTO)/Independent System Operators (ISO) at https://www.ferc.gov/industries/electric/indus-act/rto/elec-ovr-rto-map.pdf.

Notes: RTOs and ISOs perform essentially the same function. Areas of the United States in white are generally under traditional rate regulation.

The Commission is also evaluating how current RTO market rules and structures are supporting the procurement and retention of new power generation resources necessary to meet future reliability and operational needs established by the regions. While the capacity market mechanisms—a distinct activity from electricity price formation—the Commission approves for RTOs often vary in design,[37] all are intended to provide the proper price signals to retain existing efficient resources, and encourage the entry of new resources in areas where they are needed to meet electric supply needs.[38]

The Energy Policy Act of 2005 (EPACT, P.L. 109-58) gave FERC responsibility for the reliability of the bulk electric power system,[39] with the power to approve mandatory cyber and physical security standards proposed by a designated Electric Reliability Organization (ERO). Currently, the North American Electric Reliability Corporation (NERC) serves as the ERO. NERC therefore proposes reliability standards which are updated periodically considering the status of reliability and cybersecurity concerns for the grid. FERC views grid security as a high priority, and seeks comprehensive solutions to potential risks to FERC-jurisdictional facilities.

[37] See CRS Report R43093, *Electricity Markets—Recent Issues in Market Structure and Energy Trading*, by (name redacted) .

[38] FERCBP, p. 6.

[39] FERC Order No. 773 established a "bright-line" threshold essentially considering all transmission facilities and related facilities operating at 100 kilovolts or above to be part of the bulk electric power system. As such, these facilities are subject to the applicable NERC reliability standards.

Infrastructure investment is another area in which FERC is active, and may be considered a part of FERC's reliability mandate. This includes major initiatives in Smart Grid development,[40] and encouraging electric transmission investments.[41] Transmission investment is also considered important for the development of renewable resources; the Commission has undertaken an initiative to make state renewables development policies as high a priority for transmission development as it is for system reliability.[42]

Hydropower

Under Part I of the FPA, FERC is responsible for the licensing of new hydropower projects (including construction of new hydrokinetic, small and low-impact hydro projects, and pumped storage[43] hydro), and relicensing of existing hydropower projects. The Commission is also responsible for oversight of existing project operations, including dam safety inspections and environmental monitoring.[44] FERC has been updating its regulations in accordance with federal policy to improve hydropower development processes, especially for water conduits and run-of-river projects with less or no impoundment of water.[45]

Natural Gas Industry

FERC lists six areas under a summary of its *Industry Activities* in the natural gas industry, mostly including interstate activities related to natural gas storage and transportation.[46]

> Under sections 4 and 5 of [the NGA], the Commission oversees the rates, terms and conditions of transportation and certain sales for resale of natural gas in interstate commerce. The Commission is also responsible for determining fair and equitable rates for intrastate pipelines transporting or storing natural gas under section 311 of the Natural Gas Policy Act of 1978 (NGPA). The Commission's jurisdiction over sales for resale of natural gas is limited by the NGPA and the Natural Gas Wellhead Decontrol Act of 1989. Regulation of the production and gathering of natural gas, as well as retail sales and local distribution, are matters left to the states.

[40] "Smart Grid advancements will apply digital technologies to the grid, and enable real-time coordination of information from generation supply resources, demand resources, and distributed energy resources." FERC, *Smart Grid*, October 18, 2016, https://www.ferc.gov/industries/electric/indus-act/smart-grid.asp.

[41] "The Energy Policy Act of 2005 directed the Commission to develop incentive-based rate treatments for transmission of electric energy in interstate commerce, adding a new section 219 to the Federal Power Act. The rule implemented this new statutory directive through ... incentive-based rate treatments." FERC, *Transmission Investment*, March 17, 2016, https://www.ferc.gov/industries/electric/indus-act/trans-invest.asp.

[42] "[FERC] Order No. 1000 is a Final Rule that reforms the Commission's electric transmission planning and cost allocation requirements for public utility transmission providers." FERC, *Order No. 1000—Transmission Planning and Cost Allocation*, October 26, 2016, https://www.ferc.gov/industries/electric/indus-act/trans-plan.asp.

[43] "Pumped hydroelectric storage facilities store energy in the form of water in an upper reservoir, pumped from another reservoir at a lower elevation.... During periods of high electricity demand, power is generated by releasing the stored water through turbines in the same manner as a conventional hydropower station. During periods of low demand (usually nights or weekends when electricity is also lower cost), the upper reservoir is recharged by using lower-cost electricity from the grid to pump the water back to the upper reservoir." Energy Storage Association, *http://energystorage.org/energy-storage/technologies/pumped-hydroelectric-storage*, 2016, http://energystorage.org/energy-storage/technologies/pumped-hydroelectric-storage.

[44] FERC, *Hydropower*, October 18, 2016, https://www.ferc.gov/industries/hydropower.asp.

[45] FERC, *Hydropower Regulatory Efficiency Act of 2013*, P.L. 113-23, June 28, 2016, https://www.ferc.gov/industries/hydropower/indus-act/efficiency-act.asp.

[46] FERC, *Natural Gas*, November 2, 2016, https://www.ferc.gov/industries/gas.asp.

The Commission responds within its regulatory authority when companies propose to expand and construct needed pipelines and related facilities. Under the NGA, FERC approval is needed for the siting of interstate natural gas pipelines and related facilities.

> Under section 7 of the Natural Gas Act, the Commission reviews applications for the construction and operation of natural gas pipelines. In its application review, the Commission ensures that the applicant has certified that it will comply with Department of Transportation safety standards. The Commission has no jurisdiction over pipeline safety or security, but actively works with other agencies with safety and security responsibilities.[47]

The siting and construction of LNG import and export facilities is under FERC authority (i.e., Section 3 of the Natural Gas Act), as is the issuance of certificates of public convenience and necessity for LNG facilities engaged in interstate natural gas transportation by pipeline and storage facilities. As part of its responsibilities, FERC reviews the cryogenic and technical design of proposed LNG facilities, and conducts compliance reviews during construction.[48] FERC also issues Presidential Permits for cross-border natural gas pipelines, whereas DOE does so for electric transmission lines.[49]

Oil Pipelines

FERC has jurisdiction over the rates, terms, and conditions of transportation services supplied by interstate oil pipelines under the Interstate Commerce Act.[50] "Oil" pipelines under FERC's jurisdiction include pipelines that transport crude oil, refined petroleum products (including gasoline, jet, and fuel oils), natural gas liquids (including ethane, propane, and butane), and liquefied petroleum gas.[51] FERC seeks to ensure that service conditions exist to provide shippers with equal access to pipeline transportation, and reasonable rates are in place for transporting petroleum and petroleum products by pipeline.[52] FERC does not have authority to approve construction of new oil pipelines[53] (which remains with the states) or to regulate pipeline safety.[54]

FERC's Regulatory Rulings

FERC reviews filings by public utilities seeking to establish or change rates under FPA Section 205, and hears complaints or requests to change rates under FPA Section 206. Similarly, FERC can initiate its own investigation of natural gas rates under FPA Section 206. Section 4 of the NGA requires that "[a]ll rates and charges made, demanded or received by any natural gas company for or in connection with the transportation or sale of natural gas subject to the

[47] FERC, *Gas Pipelines*, December 29, 2015, https://www.ferc.gov/industries/gas/indus-act/pipelines.asp.

[48] "As required by the National Environmental Policy Act [P.L. 91-190], the FERC prepares environmental assessments or impact statements for proposed LNG facilities under its jurisdiction." FERC, *LNG*, October 13, 2016, https://www.ferc.gov/industries/gas/indus-act/lng.asp.

[49] CRS Report R43261, *Presidential Permits for Border Crossing Energy Facilities*, by (name redacted) and (name re dacted) .

[50] 49 U.S.C. §§ 60501- 60503.

[51] FERCBP, page xii.

[52] FERC, *Oil*, October 17, 2016, https://www.ferc.gov/industries/oil.asp.

[53] FERC, *What FERC Does*, May 24, 2016, https://www.ferc.gov/about/ferc-does.asp.

[54] Pipeline safety is regulated by the Pipeline and Hazardous Safety Administration, an agency within the Department of Transportation. For further information, see CRS Report R44201, *DOT's Federal Pipeline Safety Program: Background and Key Issues for Congress*, by (name redacted) .

jurisdiction of the Commission ... shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be invalid."[55]

Section 5 of the NGA provides a means by which FERC and third parties can challenge the rates established by pipeline companies.

Both the FPA and the NGA require rates, terms, and conditions of service to be "just and reasonable," and "not unduly discriminatory or preferential." Differences in rates can be deemed "just and reasonable" if the difference can be justified by cost or market conditions, and therefore not likely to be "unduly discriminatory or preferential." While the standards for fair rates and charges are similar for natural gas and electricity, the remedies available to FERC to deal with violations in electricity cases are more robust than the remedies to deal with violations in natural gas cases. Under FPA Section 206, if the Commission finds that any rate or condition is not just and reasonable, or is unduly discriminatory, it can increase or decrease the rate. While the new rate cannot be retroactive, in a complaint-initiated case, FERC can order retroactive refunds for a period going back up to 15 months, starting as early as the date the complaint is filed (or as late as five months from the filing date).[56] There is no comparable 15-month "refund window" in an NGA Section 5 proceeding.[57]

Some Pending Policy Areas Likely Affected by Loss of Quorum [58]

This section lists some recent policy activities at FERC which may require a vote by FERC Commissioners for a final decision and subsequent FERC order:

- **Mergers and Sections 201 and 203 Transactions:** "The Commission is responsible for determining whether merger and corporate applications are consistent with the public interest. In making its determination, the Commission examines a merger's effect on competition, rates and regulation, and the potential for cross-subsidization. The Commission's screening approach to mergers, reviews for horizontal competitive concerns, and establishes guidelines for vertical competitive analysis, and establishes filing requirements for mergers that potentially raise vertical market power concerns."[59]
- **FERC Policy for Establishing Length of Hydropower Licenses:** "[FERC] is inviting comments on whether, and, if so, how, to revise its policy for establishing the length of original and new licenses it issues for hydroelectric projects located at nonfederal dams. The Commission's current policy is to set a 30-year term where there is little or no authorized redevelopment, new construction or environmental mitigation and enhancement; a 40-year term for a

[55] 15 U.S.C. §717c(a). Rates for transportation or sale of natural gas in interstate commerce are "subject to the jurisdiction of the Commission" pursuant to 15 U.S.C. §717(a).

[56] 16 U.S.C. §824e(d).These refunds are calculated as the difference between the rate charged and the rate FERC determines to be just and reasonable.

[57] 15 U.S.C. §717d(a).

[58] The following sections are taken from various summaries of the issues on FERC's website and other FERC sources on the topics.

[59] FERC, *Mergers and Sections 201 and 203 Transactions*, October 3, 2016, https://www.ferc.gov/industries/electric/gen-info/mergers.asp.

license involving a moderate amount of these activities; and a 50-year term where there is an extensive amount of such activity."[60]

- **FERC Proposes to Integrate Electricity Storage into Organized Markets:** "[FERC] proposed to more effectively integrate electric storage resources into organized wholesale markets to enhance competition and help ensure that these markets produce just and reasonable rates. [The] proposal stems from concerns that electric storage resources may face barriers that limit them from participating in organized wholesale electric markets. In April 2016, FERC staff issued Data Requests to the six Regional Transmission Organizations and Independent System Operators, and a Request for Comments to the public, seeking information on the rules that affect the participation of electric storage resources in the organized wholesale electric markets and potential barriers to the participation of electric storage resources in those markets."[61]

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[60] FERC, *FERC Seeking Comment on Policy for Establishing Length of Hydropower Licenses*, November 17, 2016, https://www.ferc.gov/media/news-releases/2016/2016-4/11-17-16-H-1.asp#.WDSJC02QJMw.

[61] FERC, *FERC Proposes to Integrate Electricity Storage into Organized Markets*, November 17, 2016, https://www.ferc.gov/media/news-releases/2016/2016-4/11-17-16-E-1.asp#.WEWD1U2QJMw.