

Legislative Update

March 2017

Bay's Final Concurrence Leaves Roadmap for Public Power

On Feb. 3, in one of the final acts of the Federal Energy Regulatory Commission (FERC) before losing a quorum to do business, Commissioner Norman Bay provided a comprehensive and compelling blow to the logic underpinning the capacity market's most frustrating rule – just before leaving the Commission.

The Order in question was a denial of rehearing, requested by generators, of ISO-New England's exemption from the minimum offer price rule (MOPR) for up to 200 MW/year of subsidized or mandated renewables. Generators had argued that the state actions reduce capacity prices, but FERC rejected the idea that prices are unjust and unreasonable simply because they are lower than they would be without the exemption, saying, "intermittent renewable resources ... have limited or no incentive and ability to exercise buyer market power to artificially suppress capacity market prices." The Commission also noted that an exemption is not the only mechanism to accommodate state public policy goals, and encouraged cooperation through the Integrating Markets and Public Policy (IMAPP) process.

Bay's concurrence "would go further in reconsidering the MOPR's rationale," calling it "unsound in principle and unworkable in practice." Citing the MOPR's ongoing conflict with state goals, Bay called it a "significant intervention in the market that raises costs to consumers." The concurrence goes on to question the logic behind the application of the MOPR to any resource that has received support outside the market, saying the MOPR "suffers from a troubling lack of coherence" and querying why the Commission simply assumes buyer-side market power exists when it employs elaborate screening to detect seller-side power.

Finally, Bay includes many of the arguments public power has made about the capacity market (including the frustration of having to potentially pay twice for capacity), and concludes that the MOPR could be relaxed or the capacity market could transition to a voluntary auction. The concurrence demonstrates that public power has made significant inroads in its persuasive arguments at FERC, even as Bay's departure means the education process will begin again with new Commissioners.

FERC Moves to Facilitate Delegating Orders to Staff

FERC will provide staff more authority now that the agency lacks the quorum needed to approve certain transactions, Acting Chairman Cheryl LaFleur said. Without a quorum, FERC can still review and consider pending filings, proceed with environmental reviews of projects, hold commission meetings, tech conferences, workshops, and prepare orders for future voting. All existing staff duties, including hydropower inspections, LNG safety reviews, and audits will continue during the period of no quorum.

A new FERC nominee will need to go through an FBI background check, fill out government ethics forms, and face



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financial vetting. Following these actions, Senate confirmation on a nominee or nominees is required, and the full vetting process could take several months. The situation has the attention of Senate Energy and Natural Resources Committee Chair Lisa Murkowski (R-AK), who called finding Bay's replacement a "top priority," and said she would do her part to move the process forward, though the Trump Administration has not yet made a nomination.

Portman-Shaheen Energy Efficiency Bill Reintroduced

Sens. Rob Portman (R-OH) and Jeanne Shaheen (D-N.H.) formally reintroduced the Energy Savings and Industrial Competitiveness Act, an energy efficiency bill the two lawmakers have been trying to get passed for the last six years. As in years prior, Portman and Shaheen have gathered bipartisan support. Senators Michael Bennet (D-CO), Susan Collins (R-ME), Chris Coons (D-DE), Al Franken (D-MN), Joe Manchin (D-WV), Mark Warner (D-VA), and Roger Wicker (R-MS) have signed on as co-sponsors. Provisions similar to this bill were included in the comprehensive energy bill that passed the Senate last year but stalled in the House.

Gorsuch Nominated for Supreme Court

On Jan. 31, President Trump nominated Neil Gorsuch, a federal judge on the 10th Circuit U.S. Court of Appeals, to the Supreme Court. If confirmed, he would fill the seat vacated by Antonin Scalia. Gorsuch is seen as a mainstream, conservative judge who subscribes to "originalism," or interpreting the Constitution as it was written at the time. Gorsuch faces a difficult path to confirmation because Senate Democrats are incensed that Senate Majority Leader Mitch McConnell (R-KY) delayed a vote on President Obama's nominee, Merrick Garland, effectively "stealing" the Supreme Court seat. Supreme Court nominees still require 60 votes to pass the Senate, but a prolonged delay may force McConnell to change the rules to allow a simple majority to seat a justice, something known as the "nuclear option" that has been advocated by the President.

Energy Panel Hosts Wide-Ranging Hearing on "Grid Infrastructure"

On Feb. 15, the House Energy and Commerce Subcommittee on Energy held a wide-ranging hearing titled, "Modernizing Energy and Electricity Delivery Systems: Challenges and Opportunities to Promote Infrastructure Improvement and Expansion," and covering pipelines, generation, transmission, distribution systems, technologies such as storage and data analytics, and cyber security. Panelists focused on technology, innovation, and the need for national policies that reflect the integrated, interconnected nature of the grid. The question period spanned interests in permitting, storage, renewables, and data production, reflecting that the theme of "infrastructure" may be a framework by which substantive energy policy changes are advanced.

Environment Panel Begins Broad Review of Statutes, Plans to Advance Targeted Bills

On Feb. 16, the House Energy & Commerce Subcommittee on Environment held a contentious hearing on modernizing environmental statutes, part of the expanded jurisdiction of the newly created panel. The hearing covered land, water, and air pollution laws, with sharp partisan divides on whether changes to the status quo are warranted. Republicans spoke about reforming the laws to facilitate infrastructure development and job creation, while Democrats cautioned against rolling back protections. One area that appeared to enjoy some bipartisan support was brownfields remediation, which is managed under the Comprehensive Environmental Response, Compensation, and Liability Act. Subcommittee Chairman John Shimkus (R-IL) suggested that that statute could be ripe for an overhaul similar to the modernization of the Toxic Substances Control Act in the previous Congress.