

NEWLY INSTALLED FERC CHAIRMAN NORMAN BAY'S PAST OPINIONS SIGNAL PREFERENCE FOR ENERGETIC USE OF COMMISSION AUTHORITY

Date: 24 April 2015

Federal Energy Regulatory Commission Article

By: David L. Wochner, Sandra E. Safro, Molly Suda, Benjamin L. Tejblum, Michael L. O'Neill, William M. Keyser

On April 15, 2015, Norman Bay assumed the chairmanship of the Federal Energy Regulatory Commission ("FERC"). [1] Prior to taking the chairman's role, Chairman Bay was appointed to the Commission in July 2014 after five years of service as director of FERC's Office of Enforcement. [2] In his nine months on the Commission, he has signaled his preference for employing the full power and authority vested in FERC to regulate the interstate electricity and natural gas sectors. Because he will have significant authority to shape the Commission's agenda over the course of his term as chairman, regulated entities should take note of his views on the extent and requirements of FERC's jurisdiction over key portions of electric power and natural gas industries.

CHAIRMAN BAY ON ELECTRIC POWER

Thus far, Chairman Bay has generally voted in agreement with the other FERC commissioners in the majority of decisions regarding electric power issues. However, he was also the deciding vote in two recent 3-2 decisions where the Commission denied or reduced the transmission rate incentives requested by two stand-alone transmission companies ("Transcos"), the New York Transco, LLC ("NY Transco") and ITC Midwest, LLC ("ITC Midwest"). [3]

Traditionally, the Commission has been more generous in granting incentive ROE adders to stand-alone Transcos in order to promote competition and transmission development by non-incumbent utilities. However, in addressing the recent applications by ITC Midwest and NY Transco, the Commission reduced or denied the applicant's request for adders to its return on equity ("ROE"). As pointed out by the dissent in the ITC Midwest Order, the Commission's decision marked the first instance in which a requested 100-basis point ROE adder by a Transco was reduced. [4] In both cases, the dissenting commissioners criticized the majority for reducing or denying transmission investment incentives without providing clear criteria or guidance as to how the Commission will evaluate similar requests for transmission incentives going forward. It remains to be seen whether, in light of Order No. 1000's reforms, such decisions signal that the Commission under Chairman Bay will no longer feel a need to provide incentives to Transcos, or whether the ITC Midwest and NY Transco's affiliation with traditional transmission-owning utilities influenced the Commission's decision to reduce the incentives requested.

CHAIRMAN BAY ON NATURAL GAS AND LNG

To date, Chairman Bay has voted in line with the other FERC commissioners to approve natural gas interstate

pipeline and liquefied natural gas ("LNG") projects, including conditional approvals of the Constitution Pipeline, [5] the Dominion Cove Point, and Sabine Pass expansion [7] LNG projects.

However, as a commissioner, Chairman Bay issued several notable dissents in FERC proceedings to determine the extent of FERC's jurisdiction over small-scale compressed natural gas ("CNG") and LNG facilities from which CNG or LNG would be transported by truck to existing port facilities for eventual export overseas. In this series of dissents, [8] Chairman Bay disagreed with the other commissioners' finding that these CNG and LNG facilities did not fall within FERC's jurisdiction under the Natural Gas Act ("NGA"). Strictly construing the NGA, Chairman Bay explained in his dissents that transportation of natural gas by pipeline, a prerequisite for NGA-jurisdiction that the majority imposed, should not be determinative of whether a facility is FERC-regulated. These dissents have been Chairman Bay's most significant departures from FERC's other commissioners and in all instances, he would have extended FERC's jurisdiction beyond the limits imposed by the other commissioners.

CONCLUSION

Chairman Bay's past actions as a FERC commissioner provide insight into his priorities and likely decisions in his new role as chairman. His dissents indicate a more expansive view of FERC's jurisdiction than his colleagues on the Commission, particularly in the natural gas sector. As his tenure as chairman evolves, regulated entities should pay careful attention to any further signals of expansion or changes to FERC's jurisdiction.

Notes:

[1] Fed. Energy Regulatory Comm'n, <http://www.ferc.gov/media/statements-speeches/bay/2015/04-15-15-bay.asp#.VTUjzCHBzRY> (last visited Apr. 20, 2015).

[2] Fed. Energy Regulatory Comm'n, <http://www.ferc.gov/about/com-mem/bay/bay-bio.asp> (last visited Apr. 20, 2015).

[3] *New York Independent System Operator, Inc., et al.*, 151 FERC ¶ 61,004 (Apr. 2015) (Commissioners Moeller and LaFluer dissenting); *Midcontinent Independent System Operator, Inc.*, 150 FERC ¶ 61,252 (Mar. 2015) (Commissioners Clark and Moeller dissenting).

[4] *Midcontinent Independent System Operator, Inc.*, Docket No. ER15-945-000 (Issued March 31, 2015).

[5] *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (Dec. 2014).

[6] *Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244 (Sept. 2014).

[7] *Sabine Pass Liquefaction Expansion, LLC*, 151 FERC ¶ 61,012 (Apr. 2015).

[8] *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006 (Apr. 2015); *Emera CNG, LLC*, 148 FERC ¶ 61,219 (Sept. 2014); *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163 (Sept. 2014).