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5 Things To Expect From FERC Under Biden's Administration

By **Keith Goldberg**

Law360 (January 14, 2021, 7:06 PM EST) -- The Federal Energy Regulatory Commission will focus on closely scrutinizing the climate change impacts of gas projects and will work to further increase renewable energy's access to the U.S. electricity grid after President-elect Joe Biden takes office next week.

FERC may be an independent agency within the executive branch, but experts say the Biden administration's focus on combating climate change and clean energy development will inevitably trickle down to the primary federal regulator of the natural gas and electricity sectors.

"I would expect the Democrats to ask FERC to take a somewhat more assertive role in taking greenhouse gas emissions into account in certificating pipelines and structuring the wholesale markets, and respecting state preferences that may favor renewable resources," said Covington & Burling LLP senior counsel William Massey, a former FERC commissioner.

Changes at FERC will start with a leadership shuffle. Biden can immediately appoint a Democratic chairperson and many FERC watchers expect current Democratic commissioner Richard Glick to get that post.

With Democrats controlling the U.S. Senate, the five-member FERC could have a Democratic majority as soon as July, when Republican commissioner Neil Chatterjee's term expires and his departure opens the door for Biden to nominate a replacement to join Glick and recently confirmed Democratic commissioner Allison Clements.

Here are five policy moves FERC watchers expect the commission to make under the Biden administration:

Expand Climate Change Reviews for Gas Projects

There has been a stubborn, partisan split at FERC over how closely it must review the climate change impacts of pipelines and other gas infrastructure projects. The current GOP majority of FERC commissioners has approved dozens of projects over the objections of Glick, who argues that the agency hasn't adequately reviewed the climate impacts of those projects as required by the National Environmental Policy Act and Natural Gas Act.

A more stringent climate change analysis awaits gas project developers with Glick possibly in the chairman's seat and the Democrats gaining a majority, FERC watchers say.

"We'll see a renewed focus on pipeline certificate policy, in particular, cases where issues of indirect and direct greenhouse gas emissions will be considered," Kirkland & Ellis LLP energy regulatory partner Bob Fleishman said.

Former FERC Commissioner Colette Honorable expects the agency to revisit how it analyzes greenhouse gas emissions impacts of projects and to make sure it's compliant with recent decisions from the D.C. Circuit.

The appeals court in 2017's Sierra Club v. FERC ruling said NEPA requires the agency to review indirect environmental impacts that are "reasonably foreseeable" and ordered FERC to review the downstream GHG impacts of the Sabal Trail pipeline. The D.C. Circuit then said in 2019's Lori Birckhead v. FERC that the agency's contention that the required GHG analysis was limited to the specific facts of the Sabal Trail pipeline was an improper reading of its Sierra Club decision.

"I fully expect [FERC], under new leadership ... to implement the D.C. Circuit precedent, but also to contemplate the impacts of these projects on the environment," said Honorable, an energy partner at Reed Smith LLP.

Reduce Power Market Barriers for Clean Energy

Increasing grid access to clean energy is a Biden administration priority, and FERC watchers expect a Democrat-led commission to rethink recent attempts to blunt the impact of state clean energy programs in regional, wholesale electricity markets.

The poster child has been FERC's order that state-subsidized power producers must hit a price floor to participate in electricity capacity auctions run by PJM Interconnection LLC, a move that's sparked a flurry of legal challenges and threats by states to pull out of markets run by the nation's largest regional grid operator.

"It's clear that state policy experts, state commissioners and others were not pleased with that ruling," Honorable said. "That is one rule FERC may consider revisiting."

FERC watchers expect the commission to take an aggressive stance over how regional grid operators implement a recently finalized rule opening up wholesale electricity markets to aggregated distributed energy resources, such as rooftop solar panels. They also expect the agency to follow through on a policy statement indicating its willingness to review and approve regional grid operator plans to include state programs that charge polluters for carbon emissions in their markets.

"I think you're going to see a big push for that," Davis Wright Tremaine LLP energy regulatory partner Sean Atkins said of FERC's carbon pricing efforts. "That is a way to get the wholesale markets in the most populated portions of the country to reflect carbon pricing and green energy policies in a way that doesn't require any legislation."

Tackle Grid Project Gridlock

Multistate transmission lines are seen as key to increasing clean energy development and while individual states retain authority over siting, construction and permitting of projects, FERC watchers say the commission will wield as much of its federal authority over the interstate grid as it can to encourage transmission upgrades.

Experts say that will likely start with FERC revisiting its landmark transmission planning rule, known as Order No. 1000. The rule finalized in 2011 was designed to encourage new, competitive transmission development by directing utilities and regional grid operators to create regional plans and a framework for allocating project costs, but it hasn't moved the needle much in terms of helping needed transmission get built.

"There were concerns that the actual work occurring in regions wasn't as the order contemplated," Honorable said. "We have to see whether the kinds of transmission lines that were envisioned by Order No. 1000 are actually being built."

FERC watchers expect the commission will take further stabs at revising rate incentives available to transmission developers in order to encourage new projects. The commission could also reprise an order last year allowing regional grid operator Midcontinent Independent System Operator **to treat** energy storage resources as transmission assets for grid expansion purposes.

"That's an opportunity that's easy for FERC to act on quickly, to create more ability to integrate a higher level of renewable resources and particularly, intermittent renewable resources," Kirkland energy regulatory partner Brooksany Barrowes said.

Take Harder Line on Enforcement

The Trump administration saw a slowdown in FERC enforcement activity in both the number of cases brought and penalties imposed for energy market manipulation and other violations. Don't expect that to continue, especially if Glick is appointed FERC chairman, experts say.

"We'll probably see a renewed focus at FERC on energy enforcement," Kirkland partner Fleishman said. "I think it's clear from some of the recent public announcements that Commissioner Glick has some concerns about where FERC enforcement has been headed in the last couple of years."

Indeed, upon hearing that FERC approved settlements worth just more than $550,000 in civil penalties and disgorgement to resolve investigations and opened just six new investigations in the 2020 fiscal year, Glick in November said he was "concerned that we've gone AWOL at this point."

But a beefed-up FERC enforcement arm isn't just about bringing more cases and imposing more penalties, experts say. It could also mean additional disclosure requirements for market participants, as well as FERC itself indicating how it will oversee gas and electricity markets.

"It's crucial that FERC provide transparency and certainty about what is allowed and what is not allowed in the operation of wholesale markets," Honorable said. "It's not a 'gotcha' bureau, that's not their job."

Boost Public Advocacy

Landowner, environmental justice and consumer advocates got a major holiday present in last month's omnibus bill, which directed FERC to outline how it would craft, fund and operate an Office of Public Participation.

Congress authorized FERC to create the office in 1978, which would provide assistance to members of the public looking to participate in FERC proceedings, including potentially covering costs for participating or intervening.

FERC never followed through on that authorization, but the likely next chairman appears eager to make an Office of Public Participation a reality.

"The Office will provide a much-needed addition to FERC — one that ensures that consumers, landowners, & others that can't afford expensive legal representation can participate effectively in complex FERC proceedings that have significant impacts on their lives," Glick said in a statement on Twitter on Dec. 27. "This new Office will also improve FERC decisionmaking by providing a voice for environmental justice communities that have too often been overlooked."

Tyson Slocum, who directs the energy program at Public Citizen and has long pushed FERC to establish the public participation office, said he expects FERC will receive pushback from industry, especially because the office will be funded at its expense. FERC's budget is set by Congress, which authorizes it to raise revenue from industry fees in order to cover their appropriations.

But Slocum said that many utilities already recover their FERC fees from ratepayers and noted that state regulators, such as the California Public Utilities Commission, have helped fund public intervenors in its cases for years.

"The FERC OPP is about parity — not special treatment for the public," Slocum said. "All the FERC OPP does is attempt to finally level the playing field."

--Editing by Emily Kokoll and Nicole Bleier.

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