



Commissioner Clements' Pending Departure Casts Uncertainty Over FERC

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On February 9, 2024, it was reported that Commissioner Allison Clements will not seek a second term on the Federal Energy Regulatory Commission (FERC or Commission) following the expiration of her first term in June of this year.¹ The Commission is already down two out of five members. Commissioner Clements' departure without replacement would leave FERC without a quorum and introduce additional uncertainty regarding the direction FERC may take on key energy issues in the coming years. FERC last went without a quorum in 2017, as explained in a prior [Speaking Energy post](#).

Potential Lack of Quorum

The Department of Energy Organization Act (DOE Act) establishes FERC as a five-member body and sets forth the schedule upon which the commissioners' terms are set to commence and expire.² The DOE Act requires that at least three members of the Commission be present in order for it to maintain a quorum and transact the business of the Commission.³ Without a quorum the agency is generally limited to addressing routine, uncontested matters through the delegation of certain limited authorities to FERC staff.

Commissioner Clements' term is set to expire on June 30, 2024. Although she can remain on the Commission until the end of the current Congressional session⁴—which is expected to last for the duration of 2024—Clements' office has declined to comment on whether she intends to remain on the Commission beyond June.⁵ But even if she were to stay on, it is not clear that there is a path in the U.S. Senate to replace her or the other two vacant seats at

FERC by the end of the year. This is particularly true during an election year and given that the White House has yet to put forward a nominee for the seats vacated by former FERC Chairman Richard Glick over a year ago or by former Commissioner James Danly in December 2023.

While it is uncommon for FERC to be without a quorum, it is not unprecedented. In 2017, FERC went without a quorum for six months following the departure of former Commissioner Norman Bay. At that time, FERC issued an order delegating certain limited authority to FERC staff necessary to address routine filings and other uncontested matters, such as waiver requests, extensions of time, and uncontested settlements.⁶ FERC also granted its staff authority to take action on rate filings made under Federal Power Act Section 205, Natural Gas Act (NGA) Section 4, and Interstate Commerce Act Section 6(3) that would become effective by operation of law in the absence of Commission action within a statutory time frame.⁷ For contested filings, FERC staff typically would issue an order accepting and suspending the filing subject to further Commission order and refund.⁸ The practical consequence of this approach was that proposed rates would be allowed to go into effect subject to refund to give the Commission an opportunity to rule on the merits once a quorum was restored.

If FERC were to find itself without a quorum again, it likely would delegate similar authority to its staff to ensure that the routine, uncontested business of the Commission could continue while reserving its ability to rule on the merits of filings that otherwise would go into effect by operation of law. FERC likely would be unable to take action on more complex matters, including rulemakings, contested or complex applications for mergers and acquisitions, and decisions on complaints and declaratory order petitions until it gains another commissioner.

The loss of a quorum would be disruptive for those subject to FERC's regulation in the near term. For utilities with contested filings, the loss of a quorum likely would mean uncertainty regarding how the Commission will rule on the merits of a filing until quorum is restored. Utilities and investors seeking authorization for transactions that FERC staff does not feel comfortable approving unilaterally (e.g., contested applications, major utility mergers) also may experience material delays in obtaining the approvals necessary to move forward with their transactions.

Long-Term Implications

While a lack of quorum would certainly be disruptive for the Commission in the near term, Commissioner Clements' departure and the eventual nominees confirmed to replace her and fill the Commission's other two open seats may have longer term implications for the trajectory of the Commission and key energy policies.

Commissioner Clements has been a vocal advocate for robust generator interconnection, transmission planning, and cost allocation reform throughout her term. She voted for Order No. 2023—which is aimed at reducing interconnection queue backlogs—while highlighting “more fundamental” issues left unaddressed by the rule.⁹ She also signed a joint statement with former Chairman Richard Glick arguing that the United States must move beyond “myopic, piecemeal fashion” transmission planning and “start holistically and proactively planning” for the clean energy transition.¹⁰ While Chairman Phillips has stated that the Commission will “mov[e] forward aggressively” while there is a quorum¹¹ and that he expects to release a final transmission planning and cost allocation rule in the coming months,¹² the ultimate form of that rule and Order No. 2023 may be shaped significantly by the Commission's orders on rehearing and utilities' corresponding efforts to comply with them—many of which likely would come after Commissioner Clements' departure.

On the flip side, Commissioner Clements has consistently dissented, in whole or in part, on orders permitting the construction of natural gas infrastructure under the NGA. Most of her dissents focused on the Commission's policy on not assessing the significance of a gas infrastructure project's environmental impact related to greenhouse gas emissions. However, she recently dissented on a pipeline certificate project supported by a precedent agreement with an unaffiliated third-party shipper on grounds that FERC would need more information about the end-use of the gas to support a finding of public benefit.¹³ That dissent suggests that Commissioner Clements is troubled by projects that could be used to transport natural gas for export. At a time when the country's liquefied natural gas export policy is in flux, as Akin has previously discussed, Clements' comments indicate that a change in the composition of commissioners at FERC could bring additional uncertainty or stability to the industry.

¹ Catherine Morehouse, *FERC Commissioner Clements will not seek second term*, PoliticoPro (Feb. 9, 2024) (“Morehouse Article”).

2 42 U.S.C. § 7171(a)-(b) (2018).

3 *Id.* § 7171(e). *See also* 18 C.F.R. § 375.101(e) (2023).

4 42 U.S.C. § 7171(b)(1).

5 *See* Morehouse Article, *supra* note 1.

6 *Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 at PP 5-7 (2017). *See also* *Agency Operations in the Absence of a Quorum*, Docket No. AD17-10-000, Errata Notice (Feb. 3. 2017).

7 *Id.* at P 4.

8 *See, e.g., Cal. Indep. Sys. Operator Corp.*, 148 FERC ¶ 62,154 (2017); *NextEra Energy Transmission Southwest, LLC*, 161 FERC ¶ 61,139 (2017); *Southern Company Gas*, 158 FERC ¶ 62,145 (2017).

9 *Improvements to Generator Interconnection Procs. & Agreements*, Order No. 2023, 184 FERC ¶ 61,054 (2023) (Clements, Comm'r, concurring at P 3).

10 Joint Statement from Chairman Glick & Commissioner Clements on Building Transmission for the Future (July 15, 2021), *available at*: <https://www.ferc.gov/news-events/news/joint-statement-chairman-glick-commissioner-clements-building-transmission-future>.

11 Zach Bright, *FERC greenlights projects that could unleash gas exports*, EnergyWire (Feb. 16, 2024), *available at*: <https://subscriber.politicopro.com/article/eenews/2024/02/16/ferc-green-lights-projects-that-could-unleash-gas-exports-00141713>.

12 *See* Ethan Howland, *FERC Outlook: Danly exit could boost transmission reform, but smaller commission poses risks*, UtilityDive (Jan. 29, 2024) (“Phillips said he aims to issue a final rule on transmission planning and cost allocation in the coming months.”). *But see* Naureen S. Malik, *FERC to Finalize Regional Transmission Rules in Coming Months*, Bloomberg Law (July 27, 2023); Zach Hale & Molly Christian, *FERC approves ‘historic’ rule to clear backlog of US generation projects*, S&P Global (July 27, 2023) (“Phillips said FERC plans ‘in the months ahead’ to finalize an April 2022 transmission planning proposal (RM21-17).”).

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