



Congress Revisits the History of the Federal Power Act to Consider its Future

Sep 14, 2016

Reading Time : **4 min**

Four witnesses were invited to provide testimony and answer the questions of the Committee members: two former Federal Energy Regulatory Commission (FERC) General Counsel (Doug Smith and Susan Tomasky), a former FERC Commissioner (Clifford “Mike” Naeve) and a former Deputy Secretary of Energy (Linda Stuntz). Although the witnesses’ testimonies focused on the history of the FPA, the Committee members’ questions were generally forward-looking. Many of these questions targeted the boundaries between state retail and federal wholesale authority, such as the integration of customer-owned generation into the wholesale markets, the ability of states to implement their policy preferences in a wholesale market environment, and controversies regarding the siting of gas and electric transmission. Overall, the hearing had a “bipartisan sheen” (in the words of Rep. Jerry McNerney (D-CA)), with the Committee members focusing more on issues of specific concern to their constituents than on partisan issues.

The hearing is part of a larger effort by the Committee to re-evaluate the FPA and determine what changes, if any, need to be made to the statute in response to changes in the structure of the electricity industry and electricity technologies. The effort began in June 2016, when the Committee sent a letter to FERC Chairman Norman Bay, requesting his perspective on the “current and future state of the organized electricity markets.” The letter asked, among other things, whether “the [FPA] continue[s] to be well-suited for today’s electricity sector? Is it well-suited for the electricity system of the future?” These questions were the focus of the September 7 hearing, as the Committee looked at the statute’s past to help determine its future.

Chairman Bay responded to the Committee’s letter on September 6, 2016. With regard to the FPA itself, Chairman Bay stated that the FPA “is flexible and thus well-suited to respond to

changing circumstances.” He noted FERC’s efforts to address the issues of concern to the Committee, including improvements to price formation; changes to electric market rules to accommodate state renewable preferences; and ongoing proceedings addressing the removal of barriers to entry for alternative technologies, such as electric storage. He also noted that state/federal conflicts can be resolved through collaboration or, “if necessary, judicial action.”

The witnesses who testified at the hearing largely concurred with Chairman Bay’s determination that the FPA remains a sound foundation, and they also cited the statute’s flexibility as a defining and crucial feature. Although he acknowledged the role that Congress has played in granting FERC new authority when needed to manage changes in the power industry, Mr. Naeve also credited the FPA itself: “The [FPA] . . . is very broadly written, and it’s written in a way that’s given FERC the flexibility to adapt to changing conditions. So it’s a very useful statute, and it’s served well over the eighty-five years that it’s been there.” He observed that the alternative would be for Congress to “constantly be passing new bills, trying to catch up with yesterday’s technology.” Not all participants were confident that flexibility is a positive feature, however. Rep. John Shimkus (R-IL), observed: “On the Republican side here, we’ve been burnt too much by vagueness of law, and there is really a desire by many of us to be more specific.” He noted that some other agencies have “overstepped,” resulting in litigation and other problems. Rep. Shimkus did not, however, propose any changes to the FPA that would reduce the flexibility of the statute’s core provisions.

The witnesses also seemed to agree that further updates to the FPA, like those enacted in 1992 and 2005, might be needed to accommodate ongoing changes to the energy industry and markets. Mr. Smith noted that the FPA might need to be adjusted where the current allocation of responsibilities under the statute “doesn’t make sense.” As an example, he mentioned situations where “you have generation in little tiny chunks, connected to the distribution system on one side or the other of the consumer meter and is often owned by a retail customer.” Likewise, Ms. Stuntz observed that, “fundamentally, this wholesale/retail bright line is going to be challenged by things like distributed generation. . . . Is that a distinction that even will make sense when, as in California now, you’re seeing very large amounts of . . . generation coming from the customer? So that may be an adaptation that is beyond the capability of the current FPA.” However, Mr. Naeve observed that FERC “is not standing in the way” of state-level programs to promote distributed generation, and, thus, “I frankly don’t think there are changes [to the FPA that are] necessary right now.”

Transmission siting and planning was another recurring theme, with several participants mentioning the unsuccessful attempt in the Energy Policy Act of 2005 to promote transmission construction by giving FERC backstop transmission siting authority. Rep. Joe Barton (R-TX) noted transmission siting as an example of how complex energy issues can be: “1992, 2005, we’ve tried to handle the interstate transmission siting issue, and we have yet to get that right.” However, infrastructure siting remains challenging and controversial, with Rep. Shimkus and Rep. Morgan Griffith (R-VA) expressing concerns about large-scale gas and electric infrastructure projects that pass through their districts, but provide no benefits to their constituents.

Other topics of discussion related to specific market rules and organizational structures. The participants also discussed the relative benefits of auction-based power markets vs. bilateral contacts between traditional utilities with regard to capital investment and adequate reserves. Committee members also asked witnesses about the tendency of some participants in organized markets to bid into the markets at zero, rather than placing bids that reflect their cost of service, and what such zero bids reveal about the health of the markets. The inability of the current organized markets to “value” generation by some means other than marginal cost was also discussed, and witnesses were asked if there are structural conflicts between FERC’s competitive markets and the structure of the Environmental Protection Agency’s proposed Clean Power Plan.

In the end, the hearing provided not just insight into the history of the FPA, but also a whirlwind tour of the most prominent issues facing FERC and the energy industry today. True to Rep. Olson’s opening statement, the hearing set the stage for the Committee to further address these issues in future hearings.

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