

158 FERC ¶ 61,135
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Norman C. Bay, and Colette D. Honorable.

Agency Operations in the Absence of a Quorum

Docket No. AD17-10-000

ORDER DELEGATING FURTHER AUTHORITY TO STAFF
IN ABSENCE OF QUORUM

(Issued February 3, 2017)

I. Introduction

1. Pursuant to section 401(b) of the Department of Energy Organization Act,¹ the Commission is composed of five members, and pursuant to section 401(e) of the Department of Energy Organization Act,² “a quorum for the transaction of business shall consist of at least three members present.” The Commission anticipates that it will lack a quorum for an indeterminate period in the near future. The Commission also recognizes that it has a continuing responsibility to carry out its regulatory obligations under the various statutes that the Commission administers, including among other statutes, the Federal Power Act (FPA), the Natural Gas Act (NGA), and the Interstate Commerce Act (ICA), in an effective and efficient manner consistent with the public interest.³ For example, companies subject to the Commission’s jurisdiction will continue to make rate filings under the FPA and NGA with the Commission that, in the absence of Commission action, would take effect without suspension, refund protection, or the ability for protesting parties to appeal.⁴ The Commission’s general practice has been not to allow such filings to go into effect by operation of law. Similarly, the Commission’s intention

¹ 42 U.S.C. § 7171(b) (2012).

² 42 U.S.C. § 7171(e) (2012); *accord* 18 C.F.R. § 375.101(e) (2016).

³ 16 U.S.C. §§ 791a *et seq.*; 15 U.S.C. §§ 717 *et seq.*; 49 App. U.S.C. § 1 *et seq.* (1988).

⁴ *See Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016).

is to ensure that staff has authority to prevent such filings from going into effect by operation of law during the period in which the Commission lacks a quorum.

2. Accordingly, the Commission by this order, issued while the Commission has a quorum, delegates further authority⁵ to its staff⁶ to take action, as provided below,⁷ effective February 4, 2017. The authority delegated herein is effective until such time as the Commission again has a quorum and takes action to lift the delegation, and in no event will this delegation extend beyond days 14 days following the date a quorum is reestablished (Delegation Period).⁸

⁵ All pre-existing delegations of authority by the Commission to its staff continue to be effective. 18 C.F.R. §§ 375.301-.315 (2016). This includes the authority of the Secretary to toll the time for action on requests for rehearing. 18 C.F.R. § 375.302(v) (2016).

⁶ This delegation of authority is to the relevant office director, but such authority may be further delegated to his or her designee consistent with 18 C.F.R. § 375.301(b) (2016).

⁷ As to emergency functions, the Commission will look to the Anti-Deficiency Act to guide its decision as to what actions may continue to be pursued notwithstanding the absence of a quorum and even if it were not to delegate authority to its staff. Specifically, the Anti-Deficiency Act allows work to continue even during a lapse in appropriations on activities the suspension of which would “imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342 (2012); *see also* 31 U.S.C. § 1341 (2012). Thus, during the Delegation Period even in the absence of this delegation of authority to its staff, limited Commission operations can continue: inspecting and responding to incidents at liquefied natural gas facilities or jurisdictional hydropower projects; and other activities involving the safety of human life or protection of property.

⁸ 41 U.S.C. § 7171(f) (2012) (authorizing the Commission “to establish such procedural and administrative rules as are necessary to the exercise of its functions”); *accord, e.g.*, 15 U.S.C. § 717o (2012); 16 U.S.C. § 825h (2012); *see generally* 18 C.F.R. §§ 375.301-.315 (2016) (pre-existing delegations of authority by Commission to its staff); *cf. NLRB v. Bluefield Hospital Co., LLC*, 821 F.3d 534 (4th Cir. 2016) (upholding the authority of the Board’s staff to act pursuant to delegated authority when the Board did not have a quorum); *Advanced Disposal Services East, Inc. v. NLRB*, 820 F.3d 592 (3d Cir. 2016) (same); *UC Health v. NLRB*, 803 F.3d 669 (D.C. Cir. 2015) (same); *SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302 (D.C. Cir. 2015) (same).

(continued...)

II. Delegation of Agency Authority

A. Notice

3. Given the anticipated loss of a quorum,⁹ an immediate plan for the orderly delegation of agency functions to the Commission's staff is required. Public notice of this action, otherwise required by 5 U.S.C. § 553(b) (2012), is impracticable because of the timeframe for the anticipated loss of quorum. The Commission's requirement to protect the public interest creates an immediate need for this action.

B. Action on Rate and Other Filings

4. If the date by which the Commission is required to act on rate and other filings¹⁰ made pursuant to section 4 of the NGA, 15 U.S.C. § 717c (2012), section 205 of the FPA, 16 U.S.C. § 824d (2012), and section 6(3) of the ICA, 49 App. U.S.C. § 6(3) (1988), falls during the Delegation Period, the Commission in this order delegates to its staff (a delegation to the Director of the Office of Energy Market Regulation (OEMR)) the further authority: (1) to accept and suspend such filings and to make them effective, subject to refund and further order of the Commission;¹¹ or (2) to accept and suspend such filings and to make them effective, subject to refund, and to set them for hearing and settlement judge procedures. For initial rates or rate decreases filed pursuant to section 205 of the FPA, for which suspension and refund protection are unavailable, we

The Commission, when previously facing similar circumstances, has taken similar action to delegate further authority to its staff to act in the absence of a quorum. *Order Delegating Authority to the Secretary and Certain Office Directors*, 63 FERC ¶ 61,073 (1993).

⁹ At present, the Commission has three sitting members, but will lose a quorum after February 3, 2017.

¹⁰ Decisions made pursuant to delegated authority may be challenged on rehearing, *see* 18 C.F.R. § 385.1902 (2016), and authority to act on requests for rehearing is not being delegated (authority to issue tolling orders already rests with the Secretary, *see supra* note 5), and so timely requests for rehearing will be addressed when the Commission again has a quorum.

¹¹ The acceptance for filing and suspension and making effective subject to refund and to further Commission order of these filings is without prejudice to any further action of the Commission with respect to these filings once the Commission again has a quorum.

also delegate to Commission staff authority, pursuant to section 206 of the FPA,¹² to institute a proceeding to protect the interests of customers.

C. Extensions of Time

5. The Commission delegates the authority to extend the time for action on matters where such extension of time is permitted by statute.

D. Waiver Requests

6. During the Delegation Period, the Commission in this order delegates to its staff (a delegation to the Director of OEMR) the further authority to take appropriate action on uncontested filings made pursuant to section 4 of the NGA, 15 U.S.C. § 717c (2012), section 205 of the FPA, 16 U.S.C. § 824d (2012), and section 6(3) of the ICA, 49 App. U.S.C. § 6(3) (1988), seeking waivers of the terms and conditions of tariffs, rate schedules and service agreements, including waivers related to, e.g., capacity release and capacity market rules.

E. Uncontested Settlements

7. During the Delegation Period, the Commission in this order delegates to its staff (a delegation to the Director of OEMR) the further authority to accept settlements not contested by any party or participant, including Commission Trial Staff, filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602 (2016).¹³

The Commission orders:

(A) The Commission hereby delegates to its staff further authority to act, effective February 4, 2017, until the Commission again has a quorum, as discussed in the body of this order.

¹² 16 U.S.C. § 824e (2012).

¹³ See, e.g., 16 U.S.C. § 824b(a)(5) (2012) (providing for extensions of 180-day period for consideration of FPA section 203 filings); 18 C.F.R. § 375.302(a)(2)(vi) (2016) (providing for extensions of time to consider FPA section 215 Notices of Penalties).

(B) The Secretary is hereby directed to promptly publish this order in the Federal Register.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.