

## **Previous FERC chairs trade views on pipeline policy, nuclear power credits**

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Former chairmen of the commission offered competing views on frontburner topics in gas and power sector regulation at the annual Energy Bar Association meeting last week. Their conversation comes as the commission is weighing whether to revise its 1999 natural gas pipeline certificate policy and considering whether steps must be taken to promote grid resilience, and as debate brews over state policies that could affect the wholesale power markets that FERC regulates. Joseph Kelliher, who chaired the commission from 2005 to 2009, defended FERC's existing pipeline certificate policy against some popular attacks, while James Hoecker, at FERC's helm when the policy was written, suggested FERC has stepped back from the probing of project proposals as it once did. On the power front, Pat Wood, chair from 2001 to 2005, tore into out-of-market supports for specific types of generators, while Norman Bay, who headed FERC from 2015 to 2017 lent some support to accounting for "negative externalities" such as carbon emissions. The chairmen on the panel found common ground lauding the agency's role in advancing competitive markets, and backing further steps to give new technologies market access, an area emphasized by Jon Wellinghoff, FERC chair from 2009 to 2013, as well as Bay. "If I had any suggestion for FERC, ... it would be to continue to work on laying this groundwork for electrification that I think can be coming in the next few years and certainly throughout the 2020s," said Bay, now a partner at Willkie Farr & Gallagher. Kelliher is currently executive vice president at NextEra Energy, which has interests in major projects under development including the Sabal Trail Transmission project and the Mountain Valley Pipeline. He dubbed the current pipeline certificate policy "very sound," and told conferees he was surprised by how current it felt when he recently re-read it, as it grappled with goals of promoting competitive markets, protecting captive shippers, and avoiding

unnecessary environmental and landowner impacts. On the other hand, Kelliher said he didn't understand the arguments increasingly put forth questioning whether projects relying on affiliates for precedent agreements have adequately demonstrated need. They "reflect a point of view that somehow pipelines can arrange for affiliate precedent agreements, where nobody bears any risk in a completely unnecessary pipeline that has no value and no market need that can somehow be profitable to both the pipeline and the affiliate that has no possible use for the gas." "I think that's a bizarre perspective," he said, adding he sees little threat of "sham" transactions. From his vantage point, FERC's certificate orders are in greater need of improvement than the policy itself. The orders should become more transparent about the balancing of benefits versus adverse impacts, he suggested. Greater transparency about benefits would strengthen orders on judicial review and ease the focus on market need and how much capacity is reflected in precedent agreements, he said. He welcomed, however, the effort to speed review timelines, which he cast as stretching from 9-11 months, from proposal to approval, to as long as 25 months. Hoecker was less impressed by those timelines, noting that "electric transmission developers would kill for a timetable like that." Hoecker is senior counsel at Husch Blackwell and principal of Hoecker Energy Law & Policy. His clients include WIREs, a trade group promoting transmission investment. He was more open to concerns about affiliates in the pipeline reviews. FERC commissioners in his time were "very aware of the possibility for unnecessary projects based on precedent agreements that were fundamentally phony," he said. He recalled a major project in the East for which "we kept asking where are the contracts, where are the contracts, and finally, all of a sudden, an affiliate mysteriously appeared with one sole purpose, to hold the contracts." On the question of transparency in those reviews, Hoecker noted that certificate cases aren't set for hearing, which was once the commission's "meat and potatoes" in getting facts and developing a record. "I think there should be some threshold that would trigger a hearing in some cases, because the commission just doesn't do the kind of investigation it used to do," Hoecker said. Commissioners separately weighed in on whether zero emissions credits pursued by states to keep nuclear power plants afloat were a good idea. Wood called such steps "crony capitalism by just a new name." "I do think FERC has got to take an informational role to let these state legislators know, and maybe writhe in pain from the truth being told by an objective agency [on] what

damage these kind of things do to the operation of the competitive markets.” Wood is a principal at Wood3 Resources, chairman of the board at Dynegy and a director of SunPower and Quanta Services. Bay offered that there is, however, a policy argument in favor of ZECs – that there is an unpriced negative externality in carbon emissions. “I think everyone on this panel would agree that the first best solution is to put a price on carbon and then harness the power of markets,” he said. “The second best solution, and I would say second by a long ways, is to provide financial incentives to resources that do not produce the negative externality,” he said. “The argument would be that running the market now without taking into account the negative externality results in inefficient market outcome” that states are trying to correct. Wood’s critique extended to proposals pitched by DOE to support grid resilience by taking steps to stave off retirement of coal and nuclear generation. “The resilience thing looks like a continuation of the same crony game,” he said. “I think it’s poisonous to markets.” Nonetheless, Wood pushed back on a notion that FERC’s independence was compromised by the administration’s pitch, asserting Energy Secretary Rick Perry used the process as laid out by law, and that the commission’s response was professional. “I think the process actually proved the resilience of the FERC,” he said. “They passed the test.” On that topic, Hoecker agreed FERC held to its independence. “I think we can hope that this little adventure was kind of a sidebar to satisfy some constituent out there,” he said. Hoecker expressed the hope, however, that DOE could be more active as a research and development partner to FERC in looking at new technologies and how they might be used in future energy markets.