Energy Bar Association Annual Meeting

Former FERC Chairs Reminisce, Sound off at EBA

Margaritas, Russian River Red Wine and Crony Capitalism

By Rich Heidorn Jr.

WASHINGTON — The Energy Bar Association closed its annual meeting last week with a panel discussion with five former FERC chairs whose terms collectively spanned two decades. The former chairs offered entertaining anecdotes about the past while expressing pride over the growth of competitive markets — and frustration over forces they said threaten them.

James Hoecker (1997-2001) jokingly referred to his tenure as the "Cretaceous period of FERC regulation," a time when he said there was less state-federal conflict but also no FERC authority to impose meaningful penalties on market manipulators. He started at FERC as a staff attorney in 1979 and left for a time before returning in 1993 as a commissioner. He cited Order 637, which revised gas pipeline rules to encourage competition, and Order 2000, which set the requirements for RTOs, among the biggest accomplishments of his tenure.

"FERC had not gotten to be so visible in the media because of its work in energy infrastructure as it's become recently," said Hoecker, now counsel to the trade group WIRES. "I guess I'm thankful for that."

Pat Wood III (2001-2005) expressed regrets over not returning a phone call to Southern Co. CEO H. Allen Franklin in 2002 after announcing Standard Market Design, "which was going to solve all the problems that happened in California" during the 2000-2001 Western energy crisis.

"Maybe I'm overselling my persuasive skills and it was never meant to be, but [I wish] I could have talked them out of being so intransigent against Standard Market Design," said Wood, now chairman of Dynegy.

He also wished he had been "more willing to accept imperfections" in the RTO applications filed by Southern and other companies in the Southeast and West.

"Accepting that could have avoided what I call the carnage that's happened [in the Southeast] with noncompetitive generation. … But I was pretty rigid on making sure they met the criteria of Order 2000 and neither of those [regions] had" sufficient independence.

Joseph T. Kelliher (2005-2009) said his pre-commission career as a congressional aide helped him in negotiations to eliminate "hostile" anti-FERC provisions from the Energy Policy Act of 2005 shortly after becoming chair. The law gave the commission the authority to issue enhanced penalties for market manipulation and mandatory reliability rules, and deputize NERC as the Electric Reliability Organization.

"At the time, I had a lot of doubts about NERC's capacity to discharge their responsibilities under the act," said Kelliher, now NextEra Energy's executive vice president for federal regulatory affairs. "And I thought it was necessary for FERC to adopt a larger role until NERC expanded its capacity, almost like a big brother throws his arm around his little brother until he gets some more muscle. … I think NERC is a much more capable institution than it was in 2005."

Jon Wellinghoff (2009-2013) said his background as Nevada's first consumer advocate informed his chairmanship, during which he "tried to ensure that the markets were open and fair" for technologies such as renewables and demand response.

Wellinghoff expressed special pride in Order 745, which required that RTOs pay DR resources LMPs, and Order 755, which required RTOs to compensate fast-regulation resources for speed and accuracy. He also cited Order 719, requiring RTOs to treat DR offers like generation, and Order 764, which aided the integration of variable energy resources.

"I think they're all important to ensuring that all resources can efficiently and effectively compete in these markets. And then … in Order 1000, the transmission planning order, we tried to ensure that there was some level of competition in the planning and selection of transmission."

Wellinghoff, who has continued to advocate for distributed energy resources as CEO of consulting firm GridPolicy, added he is "very encouraged" by actions the current commission has taken to open markets to energy storage and DERs.

"You're seeing the distributed resource technologies just explode. You're seeing the enabling technologies underneath them — which are really the communication and control technologies — get less and less

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Left to right: Wood, Kelliher and Wellinghoff share a laugh. | © *RTO Insider*

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expensive … and more available to consumers. My son is truly a computer geek. … He was cataloging our house the other day: We have 52 addressable devices in the house."

Wellinghoff said he'd like to see more done to open competition in transmission. Without competition, he said, the industry is "going to stamp down innovation. There are many innovative technologies coming into the transmission space … that are substitutes for transmission that need to have the opportunity to compete … against the incumbents."

Norman Bay (2015-2017) talked of the obligation he felt to live up to the legacy of his predecessors. "As I listened to their comments today, I'm struck by … the nonpartisan nature of the work that we've been doing. The ability of Republicans and Democrats alike to come together to get things done to further the public interest," said Bay, now head of Willkie Farr & Gallagher's energy regulatory and enforcement group in D.C. "I would bet that if anyone were to listen to the comments of anyone on this stage and didn't know what political party they belonged to, they would have no idea if that person was a Republican or a Democrat. And how great is that?"

'Crony Capitalism'

Wood and Bay debated the impact of zero-emission credits — enacted in Illinois and New York and under consideration in New Jersey — to subsidize nuclear generation.

"Are they a good idea? No. They're crony capitalism by just a new name," Wood said. "I do think that FERC has got to take … an informational role to let these state legislatures know … what damage these kinds of things do the operation of the competitive markets that we worked for a quarter century to set up. That's exactly what they are. The resilience thing looks like a continuation of the same crony game," referring to calls for subsidies for coal and nuclear plants with onsite fuel. "I just think it's poisonous to markets."

Bay, however, said ZECs are states' response to the markets' failure to price carbon emissions. "I think everyone on this panel would agree that the first best solution if you care about carbon emissions is to put a price on carbon and then harness the power of markets. That clearly has not happened.

"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. And that's essentially what states are trying to do. Running the market now without taking into account the negative externality results in an inefficient market outcome."

"And that would be fine, I think, if all zero-emitting resources now and in the future could qualify for that," Wood responded. "As opposed to the New York case, which is very egregious, that named plants [eligible for ZECs] and one [Indian Point] was excluded."

Future of Capacity Markets

Wood and Wellinghoff responded to a question about the future of capacity markets.

"As one who comes from the energy-only market of Texas, it works," said Wood, acknowledging that the market will be stressed this summer because of the reduction in ERCOT's reserve margin. "It will be a real big test. So, ask me this question at the end of September." (See *ERCOT Gains Additional Capacity to Meet Summer Demand*.)

Wellinghoff said he has grown increasingly skeptical of capacity markets.

"Don't tell him this, but Bill Hogan may be right," said Wellinghoff, referring to the Harvard University professor, a prominent proponent of energy-only markets. "Ultimately, I think capacity markets are very difficult to design correctly and functionally. I'm currently working in Alberta. The ISO and the government there have committed to put a capacity market in with a balancing energy-only market. I'm working with a client there trying to help them to help the ISO come up with a design that will work for everybody. And we're close to pulling our hair out!"

Confessions

At the end of the session, moderator and FERC Administrative Law Judge **Lawrence Brenner** elicited confessions from some of the panelists over "impulsive" actions they took as chair.

Bay recalled being up until 2 a.m. the night before the FERC Christmas party because he insisted on hand squeezing the 20 pounds of limes needed to make proper margaritas. "You can probably divide the world into two camps: the people who believe that a margarita can be made from a mix, and the people who realize, no, you really need to use fresh squeezed lime juice," he said.

Kelliher recalled when vineyards near California's Russian River petitioned him to authorize the release of water from hydro projects during a drought.

"Of course my first thought was, 'I really like Russian River red wine.' But my question to the staff was, 'What legal authority do I have to do that?' And the response was, 'Highly questionable' — FERC-staff speak for nonexistent.

"And I thought about it for about 10 seconds and I said, 'Release the water!'" he said to laughter. "It felt very Christ-like. I knew it was the closest I would get to being holy. … I wasn't turning water into wine but authorizing water. … And I thought if I go down [get overturned], I'll get a *Wine Spectator* cover or something."

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Norman Bay, Willkie Farr & Gallagher