Washington vs Washington

Northwest Gas Association
2017 Annual Energy Conference
June 2017
Updates from Washington, D.C.

Mona Tandon, Partner
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Agenda

- What’s going on at the federal level?
  - Presidential Memoranda
  - Executive Orders

- What’s going on at FERC?
  - Lack of Quorum
  - Delegated Authority
  - Litigation
  - Other – Technical Conference
Agenda

What’s going on at the federal level?

- Presidential Memoranda
- Executive Orders

What’s going on at FERC?

- Lack of Quorum
- Delegated Authority
- Litigation
- Other – Technical Conference
Federal – Overview

- 90 “Executive Actions” in first 100 days
  - 32 Executive Orders
  - 28 Presidential Memorandum

- Force and effect of law if the action is based on power vested by Constitution or Congress
  - E.g., President Trump’s “Travel Ban” Order
Significant Presidential Memoranda

1. “Regulatory Freeze” Pending Review
   • Issued Jan. 20, 2017
   • “Freeze” all pending regulations until approved directly by administration or new agency appointees

2. “Made-in-the-USA” Pipelines
   • Issued Jan. 24, 2017
   • Sec. of Commerce to create plan for US pipelines to use US produced equipment and materials “to the maximum extent possible.”
   • All steel and metal products to be produced in US
   • March 17, 2017 – Dept. of Commerce “RFI”

3. Dakota Access & Keystone XL Pipelines
   • Issued Jan. 24, 2017
   • Promotes expedited review and approval
   • Keystone XL – received Presidential Permit
   • Dakota Access – now operational
Significant Executive Orders

1. Expediting Environmental Review for Infrastructure Projects
   • Issued Jan. 24, 2017
   • CEQ to streamline environmental reviews of high-priority infrastructure projects

2. Reducing Regulation and Regulatory Costs
   • Issued Jan. 30, 2017
   • “Two-for-One” for new regulations
   • Legal challenge filed
   • Codification of E.O.?

3. Energy Independence
   • Issued March 28, 2017
   • Agencies to review energy regulations issued by the Obama Administration, including the Clean Power Plan
   • Litigation over Clean Power Plan and Methane Rule held in abeyance
Significant Executive Orders (cont.)

4. “Buy American, Hire American”
   • Issued April 18, 2017
   • Agencies to review their policies on using American-made goods in federal contracts, including limiting the use of waivers from the Buy American Act
   • Has received significant push-back from industry

5. America-First Offshore Energy Strategy
   • Issued April 28, 2017
   • Promotes exploration and production in US offshore areas

6. Cybersecurity
   • Issued May 11, 2017
   • Develop cybersecurity “risk management” strategy for critical infrastructure
Federal Energy Regulatory Commission

- Independent regulatory commission
  - Oversees interstate transmission of electricity, natural gas, and oil

- Composed of five Commissioners
  - Appointed by President, with advice and consent of Senate
  - Each Commissioner serves a five-year term
  - At least three Commissioners are required for a “quorum”
FERC – Lack of Quorum

- No quorum since Feb. 3, 2017
- Two current Commissioners
  - Cheryl LaFleur, Acting Chairman
    - Term expires June 30, 2019
    - Appointed Acting Chairman by President Trump
  - Colette Honorable
    - Term expires June 30, 2017
    - Will not be pursuing another term
FERC – Lack of Quorum

Two FERC nominees have been proposed

- Neil Chatterjee
  - Energy policy advisor to Senate Majority Leader Mitch McConnell

- Robert F. Powelson
  - President of NARUC
  - Served as a Commissioner on the PA Public Utility Commission

Confirmation Hearing – May 25, 2017
FERC – Delegated Authority

- Statutory time limitations pursuant to NGA and FPA
  - Gas pipeline rate changes – 30 days
  - Rehearing – 30 days

- Codified delegated authority under FERC regulations
  - E.g., “tolling order”

- Feb. 3, 2017 Order
  - Expanded authority delegated to FERC staff
  - May be challenged on rehearing
  - Lifted once FERC regains a quorum
New delegated authority:

- Accept and suspend filing, subject to refund

- Accept and suspend filing, subject to refund, and set for hearing and settlement judge procedures before a FERC Administrative Law Judge (ALJ)

- Act on uncontested NGA filing seeking a waiver of terms and conditions of tariffs, rate schedules, and service agreements
  
  - Includes waivers of FERC’s capacity release and capacity market rules

- Act on uncontested NGA tariff filings (including rate filings)

- Grant requests for extension of time
Without a quorum, FERC staff cannot:

- Act on contested rate filings or settlements
- Act on application for certificates of public convenience
- Impose penalties in enforcement actions
- Act on complaint proceedings
- Act on requests for rehearing (except for issuing “tolling orders”)
- Act on petitions for declaratory orders
- Issue proposed rulemaking or policy statements
- Review initial decisions issued by ALJs
FERC – Challenges to Delegation Order

- **Wyoming Pipeline Authority**
  - Request for rehearing challenging FERC’s Feb. 3, 2017 order
  - Withdrew request on March 22, 2017

- **Allegheny Defense Project, et al v. FERC**
  - Challenging FERC order granting Transcontinental Gas Pipe Line Co., LLC’s application for authorization to construct and operate Atlantic Sunrise pipeline project.
    - April 28, 2017 – FERC filed Motion to Dismiss for Lack of Jurisdiction
    - Upcoming?
Technical Conference on Natural Gas Index Liquidity

- Scheduled for June 29, 2017
- Participants include:
  - Buyers and sellers of physical natural gas
  - Natural gas pipelines
  - ISO/RTOs or public utilities that use natural gas indices in their tariffs
  - Market monitors
  - Index developers
  - Energy exchanges
  - Academics & market experts
QUESTIONS?

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Administration Impacts on Pipeline Safety

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The Regulator: PHMSA

- Pipeline and Hazardous Materials Safety Administration
  - Jurisdiction: Pipeline facilities and transportation of gas and hazardous liquids in or affecting interstate commerce
  - “In or affecting” includes intrastate pipelines

49 U.S.C. § 60101
State Regulators

- Inspect and enforce regulations for intrastate lines
  - Idaho Public Utilities Commission
  - Oregon Public Utilities Commission
  - Washington Utilities and Transportation Commission
    - Also inspects interstate lines, but PHMSA enforces violations
- Can adopt more stringent standards, but must be consistent with federal
Administration Impacts on PHMSA

- PHMSA Leadership
- Regulatory Initiatives
- New Emergency Order Authority
PHMSA Leadership

- Secretary of Transportation Elaine Chao
- Administrator has not yet been appointed
  - Difficult to finalize rules
- New Associate Administrator for Pipeline Safety Alan Mayberry
- Regional offices continue to conduct inspections and pursue enforcement
- OMB Director Mike Mulvaney and OIRA Administrator nominee Neomi Rao
  - Review costs/benefits of proposed rules
The “two-for-one” executive order

- PHMSA has indicated that it is developing a plan to implement the order.
- There is flexibility: an agency may withdraw non-enforceable advisory documents to offset the costs of a new regulation.
- There will be a DOT Notice in the Federal Register seeking comment on this soon.
Proposed Gas Transmission and Gathering Rule

- The “Mega” Rule proposes significant changes to the regulations for gas transmission and gathering pipelines
- Proposed in April 2016
- Gas Pipeline Advisory Committee has held two public meetings to discuss the proposal
Proposed Gas Transmission and Gathering Rule

- Significant topics include verification of MAOP and pipe material records, strength testing, assessments and repairs, IM, corrosion control, gathering lines
- A final rule will take some time to revise and clear OMB
Underground Natural Gas Storage

- Interim final rule became effective in January
- Incorporates new industry recommended practices: API RP 1170 and 1171
- Makes the recommendations mandatory
- Legal challenges from AGA, INGAA, and the State of Texas
State regulators of Underground Natural Gas Storage

- Idaho Department of Lands, Oil and Gas Conservation Commission.
- Oregon Department of Geology and Mineral Industries
- Washington Department of Natural Resources, Division of Geology and Earth Resources
New Emergency Order Authority

- 2016 Amendment to Pipeline Safety Act
- Temporary Interim Final Rule went into effect in October 2016
  - Authority to issue an order to address imminent hazards
  - Order is not restricted to a particular operator
    - Can affect a wider spectrum of the industry
  - We have yet to see how PHMSA will use this authority
- 2016 Act requires final regulations to be issued
  - Notice and comment rulemaking
QUESTIONS?

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Challenges to Northwest Energy Development

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Challenges to Northwest Energy Development

Energy Development in the Pacific Northwest will continue to be challenging despite strong support in Washington D.C. due to:

- Independence of Regional Federal Offices
- Power of the States
- Power of the Tribes
- Power of the Courts
Challenges to Northwest Energy Development - Examples

- Independence of Regional Federal Offices
  - NMFS – Wake Stranding on Lower Columbia
  - USACE
    - Vancouver Energy – NWP to IP; 404 for Filling Steel Piles
    - Gateway – Denial on Treaty Impacts
Challenges to Northwest Energy Development - Examples

- **Power of States**
  - Clean Air Rule - Chapter 173-442 WAC
  - Port of Kalama/Northwest Innovation Works – Kalama – Ecology Shoreline Conditional Use Permit
  - Vancouver Energy – EFSEC Process
  - New York Denial of 401 Certification for Empire Pipeline
Challenges to Northwest Energy Development - Examples

♣ Power of the Tribes
  • Cultural Resource Issues
  • Treaty Rights
    ▪ Interference with Fishing at Usual and Accustomed (U&A) Places
    ▪ Habitat Impacts (“Culvert Decision”)
Challenges to Northwest Energy Development - Examples

- **Power of the Courts**
  - U.S. v Washington – 9th Cir.
    - Affirming Treaty right to supply of fish, not just fishing
  - Deschutes River Alliance v. Portland General Electric Company – Oregon District Court
    - Affirming Citizen Suit Challenging 401 Cert. Compliance
  - Tulalip Tribes v. John F. Kelly (Filed April 25, 2017)
    - Claiming Coast Guard failed to consult with NMFS about potential impacts on Southern Resident Killer Whale population from shipping traffic in Puget Sound
QUESTIONS?

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