

Composition of the Federal Energy Regulatory Commission Under the New Administration

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With President-elect Trump poised to take office, some in the energy sector are considering what this means for the composition of the Federal Energy Regulatory Commission (FERC).

FERC has five Members. Although frequently FERC does not have its full complement of Members, there are currently five seated FERC Members: three Democrats and two Republicans. The Democrats are Chairman Willie Phillips (term ending June 30, 2026), Commissioner David Rosner (term ending June 30, 2027), and Commissioner Judy Chang (term ending June 30, 2029). The two Republicans are Commissioner Mark Christie (term ending June 30, 2025), and Commissioner Lindsay See (term ending June 30, 2028). Upon expiration of a Member's term, an individual commissioner may choose to continue at FERC until Congress goes out of session. This occurs frequently.

Neither the FERC Chairman nor any Commissioner is required to resign because a President of the opposite political party is elected. Moreover, the relevant statutory provision, 42 U.S.C. § 7171(b), allows the President to remove a sitting FERC Commissioner only in very limited circumstances. Specifically, the President may remove a sitting FERC Commissioner only for "inefficiency, neglect of duty, or malfeasance in office." However, if Chairman Phillips voluntarily steps down from his role as FERC Chairman because President-elect Trump takes office, it would not be a novel action among Democrat appointed agency Chairs. Commodity Futures Trading Commission (CFTC) Chairman, Rostin Behnam, very recently announced his intention to step down from his role as CFTC Chairman on January 19th (the day before President-elect Trump's inauguration), and then resign from the CFTC altogether shortly thereafter on February 7th, prior to the expiration of his term.

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The sitting President does have statutory authority to designate one of the seated FERC Commissioners as Chairman. See 42 U.S.C. § 7171(b). The expectation is that President Trump will designate Commissioner Christie or Commissioner See as Acting Chair. In that case, Chairman Phillips could remain at FERC as a Commissioner. If Chairman Phillips or one of the Commissioners voluntarily resigns, President Trump would have the opportunity to nominate a candidate of his choosing (presumably a Republican) to become the fifth FERC Commissioner following Senate confirmation and the related processes.

In the context of the National Labor Relations Board (NLRB), some have speculated that once in office, President Trump may use the Unitary Executive Theory to broadly interpret his constitutionally endowed removal powers and replace NLRB Board Members before their terms expire. Although Supreme Court precedent holds that certain removal restrictions on the President do not violate the President's executive power or the President's constitutional duty "to take Care that the Laws be faithfully executed," the Unitary Executive Theory posits that statutory removal restrictions on the President interfere with the President's constitutional authority. Thus, with the backing of a conservative Court that may be deferential to expansive executive powers, there has been talk that President Trump may seek to replace NLRB Board Members before their terms expire. Although the NLRB is an independent agency similarly situated to FERC in many ways, the statutory removal restriction for FERC has material differences from the statutory removal restriction for the NLRB and FERC's removal restriction is far less likely to be found unconstitutional (*i.e.*, President Trump is less likely to try to rely on the Unitary Executive Theory to remove FERC Members than to remove NLRB Members).

We will continue to keep Bracewell clients and friends updated regarding the composition of FERC.