

Recent Executive Actions on Agency Independence—Not-Quite-Hot Takes for FERC

Client Alerts

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In a spate of executive orders and other actions over the last several weeks, the new administration has moved to exert unprecedented control over independent regulatory agencies, including the Federal Energy Regulatory Commission (FERC). With so many directives coming out of the White House, this alert aims to provide one-stop shopping for the key actions affecting FERC and what changes these actions may—or may not—portend. We also discuss FERC Chairman Mark Christie's comments at a February 20, 2025 press conference and analyze some of the issues he left unresolved.

The bottom line: These actions will profoundly change the relationship between FERC and the elected administration. For energy companies, and others in industries that have traditionally interacted principally with independent agencies, one clear takeaway is this: It will be important to attend to relationships and policy priorities not just at FERC, but also at the White House and in the Executive Office of the President—which are poised, whatever happens, to play a more significant role in FERC's work and energy policy more broadly. But many important details remain to be worked out (and important legal challenges are still to be resolved). These specifics will matter intensely to businesses and other stakeholders as they navigate this new reality.

Three key recent actions

Independent regulatory agencies are agencies that Congress insulated from presidential control by statute. These protections include, most prominently, requiring that these agencies be headed by officials with fixed terms who can only be removed for cause; they can also include other statutory guarantees of independence. Three recent executive actions aim to reshape this independence.

1. DOJ's nondefense of removal protections

Twice in the last several weeks, the Department of Justice (DOJ) has articulated new positions on removal protections.

A. Independent agency heads. First, the acting solicitor general on February 12, 2025, sent a letter stating that her office would no longer defend the constitutionality of statutory removal protections for several independent agencies—including the Federal Trade Commission, the

National Labor Relations Board, and the Consumer Product Safety Commission. FERC, though unmentioned in the letter, may prove indistinguishable from these agencies. Our prior alert discusses this letter in more detail.

The Supreme Court is likely to resolve this issue soon—if not in 2025, then by June 2026. Although Chairman Christie received questions on this issue at his February 20 press conference, he largely declined to engage. But the reality is that if the Supreme Court agrees that statutory removal protections are unconstitutional, the change will be immense. FERC’s commissioners will become like the attorney general, the secretary of defense, or the Environmental Protection Agency administrator—removable for any reason or no reason at all, including for perceived failures to effectively advance the administration’s priorities. This change would be hugely impactful, regardless of the other measures the executive orders put into place. “The power to remove officers,” the Supreme Court has recognized, “is a powerful tool for control.” *Edmond v. United States*, 520 US 651, 664 (1997). The President may ultimately say to independent agencies, “my way or the highway”—with the precise balance of power between the White House and independent agencies ultimately worked out via political dynamics.

This change will have complicated effects, and only time will tell. On the one hand, independent regulatory agencies will predictably become more aligned with administration priorities. On the other, their work may become more unstable over time, with large swings in approach that could create challenges for businesses seeking predictability.

B. ALJs. The acting solicitor general on February 20, 2025, sent another letter stating that DOJ would not defend the constitutionality of multiple levels of removal protections for administrative law judges (ALJs). Currently, most ALJs—including FERC’s—can be removed only for cause, and decisions to remove them are subject to review by the Merit Systems Protection Board (MSPB), whose members also have for-cause removal protections. This position, if sustained by the courts, could again be significant: The ALJs who preside over hearings for FERC currently have very significant protections from removal. And if the administration prevails, those protections will at minimum be reduced.

This change, however, could be less revolutionary than the removal of for-cause protection from FERC Commissioners: Courts might remedy the constitutional problem the administration has identified by eliminating for-cause removal protections from MSPB members; ALJs might retain their for-cause removal protections and could seek judicial review of adverse MSPB decisions.

2. Executive order on independent agencies.

Removal is a powerful, but blunt, tool of control. In traditional, non-independent executive agencies, presidents over time have supplemented removal with a variety of tools that give the President and those close to the President greater day-to-day control. On February 18, 2025, President Donald Trump issued an executive order bringing independent agencies, including FERC, within many of these mechanisms. Aiming to “ensure Presidential supervision and control of the entire executive

branch,” the order imposes several new requirements on independent agencies, including FERC—subjecting them to Office of Information and Regulatory Affairs (OIRA) review and Office of Management and Budget (OMB) performance standards and budget review, requiring coordination with the Executive Office of the President on policies and priorities, and binding them to legal interpretations of the President and the Attorney General.

Chairman Christie’s perspective. We start with the perspective of Chairman Christie, who faced multiple questions about the executive order on independent agencies and its impacts on FERC during a February 20, 2025 press conference. Chairman Christie:

- Referenced a clause in the executive order that states it does not affect the existing authority of the agencies under law, noting that this likely limits the impacts of the order.
- Stated that the order did not bring every single FERC action within the purview of OIRA review. As an example, Christie cited FERC’s planned technical conference on resource adequacy, for which the agency did not ask the administration for approval.
- Averred that the executive order “is basically putting in one place past practices that have been going on for years,” noting that FERC already submits its budget and strategic plan to OMB and consults with the White House and other agencies.
- Indicated that the President already asserts considerable policy influence, noting that it is “fanciful to think . . . the President is going to appoint a chair who’s going to do something 180 degrees opposite of what the general policy of the Administration is” and questioned why a Commission would “initiate a big, sweeping regulation that’s contrary to what the presidential Administration wants.”
- Highlighted that FERC continues to be “independent in decision-making according to the terms of the [Department of Energy (DOE)] Organization Act,” and stated that once a proceeding commences, FERC is still obligated to comply with the Sunshine Act’s rules prohibiting ex parte communications.
- Noted, more broadly, uncertainty about how exactly the executive order may apply to FERC, particularly given FERC’s significant caseload and commissioner voting process, and stated that FERC will ask for clarification.

Deeper dive. Because Chairman Christie has understandably been careful in providing his view of the administration’s recent actions, and because of the legal uncertainty surrounding these actions, we are independently analyzing what these actions may or may not portend.

As Chairman Christie noted, the executive order states that it must “be implemented consistent with applicable law” and may not “be construed to impair or otherwise affect . . . the authority granted by law” to independent regulatory agencies. In particular, the DOE Organization Act provides that

FERC’s “members, employees, or other personnel . . . shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department [of Energy]” in the “performance of their functions.” 42 U.S.C. § 7171(d). The DOE Organization Act also expressly recognizes FERC’s “independent” status, provides that FERC decisions “shall not be subject to further review” by DOE, and grants FERC independent litigating authority. *Id.* §§ 7171(a), 7171(i), 7172(g). These provisions, among others, could be read to provide FERC some measure of insulation. Below, we discuss this issue in the specific context of the executive order’s provisions.

- *OIRA review.* The order brings independent agencies fully within the process for regulatory review created by Executive Order 12866 and overseen by the OMB’s Office of Information and Regulatory Affairs. Independent agencies have long been subject to one part of this process, requiring the submission of the agency’s regulatory plan. OIRA, however, also oversees a centralized review of all “significant regulatory actions”—including cost benefit analysis, consultation with other affected agencies, and, in the case of disagreement, resolution by the president or vice president. For the first time, the new executive order brings independent agencies within that process.

The administration will very likely take the position that no statute prohibits bringing FERC within the OIRA review process established by Executive Order 12866 (12866). The Office of Legal Counsel (OLC) during the first Trump Administration advised, drawing on prior executive branch positions, that the features of independent agencies do not generally preclude the President from bringing them within this process.

Two caveats, however, are important. First, the 12866 process has been understood not to apply to adjudications—and hence FERC’s adjudications under, for example, Federal Power Act (FPA) Sections 205 and 206 would appear to fall outside this process. But FERC in recent years has pursued many significant policymaking efforts through rulemakings, including Order No. 1920 on transmission planning and cost allocation and Order No. 2023 on generator interconnection procedures and agreements. FERC often has a choice about whether to proceed via rulemaking or adjudication, and the new executive order may at the margins encourage FERC to rely more on adjudication. To be sure, whichever tool FERC picks, potential removal will remain a powerful tool for control. But the 12866 process is also just *time consuming*: OIRA can take months to review a significant rule, and the process of consulting with other agencies can add even more delay. Sometimes, only White House intervention can break the logjam. FERC may prefer to avoid this process when it can.

Second, the 12866 process formally gives OIRA merely a consultative role—it does not permit OIRA to block a rule. Indeed, the OLC opinion relied on that feature in concluding that the President could lawfully bring independent agencies within the process. In practice, however, the distinction between consultation and approval may be thin—because the president ultimately resolves disagreements under Executive Order 12866, and because of the President’s removal authority. To be sure, one might argue that applying Executive Order

12866 in this way violates FERC's "independent" status. But the administration seems virtually certain to argue that the separation-of-powers principles that (in its view) preclude removal restrictions also bar any statute that would prohibit the president from resolving disagreements among agencies.

- *Performance standards.* Under the order, OMB must "establish performance standards and management objectives for independent agency heads." This provision's effect remains to be seen. It is unclear, for example, whether OMB's standards and objectives will include substantive outcomes, or just management matters—and what management matters it may cover.
- *Budget review.* OMB will "review independent regulatory agencies' obligations for consistency with the President's policies and priorities" and then must "consult with independent regulatory agency chairmen and adjust such agencies' apportionments." Congress often appropriates on a lump-sum basis; apportionments shape: (a) when agencies spend money; and (b) what agency spend money on. The order states that OMB "may prohibit independent regulatory agencies from expending appropriations on particular activities . . . , so long as such restrictions are consistent with law."

Although FERC does submit a requested budget to Congress, it is "revenue neutral," as Chairman Christie explained, recovering its entire budget through annual charges and filing fees assessed on regulated entities. Nevertheless, when agencies like FERC are appropriated funds from Congress, they need to "apportion" those funds across the year and across initiatives.

The executive order's biggest impact is in the highly specific way it contemplates that OMB may engage in this task, including prohibiting expenditures on particular activities. This authority could be powerful, and more so even than bringing independent agencies into the 12866 process: Unlike the 12866 process, this authority applies to FERC's activities across the board, and the executive order on its face gives OMB a veto, not mere consultation rights.

Given the degree of control this provision might confer, it might again be challenged as inconsistent with FERC's statutory independence. Moreover, Congress has also directed that when FERC submits its budget to OMB, it "shall concurrently transmit a copy thereof to . . . Congress," 42 U.S.C. § 7171(j)—an authority that might be thought to indicate Congress's intent that FERC be able to control its finances independently from OMB. But again OLC has advised the president's exclusive executive powers—namely, his authority under the Recommendations Clause to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient"—include supervision of agencies' legislative recommendations to Congress. Hence, the administration may take the position that this provision is unconstitutional. And it seems likely that the current administration would argue that Congress cannot constitutionally limit the president, via OMB, from overseeing agencies'

expenditure funds, at least so long as OMB does not dictate a result contrary to an express congressional directive. Litigating these issues, moreover, would require that a plaintiff with standing—who could show harm from the executive order—pursue a challenge in court.

- *Consultation on policies and priorities and White House Liaison.* Under the order, agencies “shall regularly consult with and coordinate policies and priorities with the directors of OMB” and other elements of the Executive Office of the President; agencies must also submit “for clearance” their strategic plans. And agency heads must establish a “White House Liaison.” While independent agencies have long submitted their regulatory plans to OMB, the requirements of “regular[.]” consultation, and of “clearance” of strategic plans, are new. So, too, is the White House Liaison—which has never existed and could potentially be used to exert close day-to-day influence over the FERC’s operations. This provision’s significance will again depend on implementation and on the political balance between agencies and OMB within the administration.
- *Legal interpretations by the Attorney General and President.* The executive order states that “the President and the Attorney General’s opinions on questions of law are controlling on all [executive branch] employees,” and it states that no executive branch employee—including independent agencies—“may advance an interpretation of the law as the position of the United States that contravenes the President or the Attorney General’s opinion on a matter of law, including but not limited to the issuance of regulations, guidance, and positions advanced in litigation, unless authorized to do so by the President or in writing by the Attorney General.”

This provision’s impact may, or may not, be relatively cabined. The Attorney General (AG) has statutory authority to advise agency heads. These legal interpretations—often developed by OLC—have long been regarded as binding across the executive branch *except* with respect to independent agencies. This provision eliminates that exception. If that is all that the provision does, then its impact will depend on how aggressively the attorney general and the president use their authority to issue legal interpretations affecting independent agencies. Historically, the Attorney General and the President have issued relatively few such opinions; while DOJ takes many positions in litigation, those have not been regarded as carrying the same status as an opinion of the attorney general. The current administration could maintain that approach—or the Attorney General or the President could use their power to a new degree and in new ways.

The executive order also leaves important questions unanswered. For example, it prohibits independent agencies from advancing interpretations “as the position of the United States” that depart from the opinions of the Attorney General or the President; agencies, however, sometimes file briefs in their own names, and the executive order is not express on whether it covers such filings. FERC regularly files respondent briefs in federal courts across the country based on its independent litigating authority.

- *Independence from DOE.* Several provisions of the DOE Organization Act, as noted, grant FERC independence from DOE. 42 U.S.C. § 7171(d), 7172(g). These provisions may give FERC grounds to resist attempts by DOE to impose controls. A broader argument might also be made that these provisions reinforce an inference that FERC more generally is meant to be independent. These provisions, however, expressly apply only to DOE. And the administration can be expected to argue that these provisions must be read narrowly in light of the president’s Article II powers.
- *Sunshine Act.* Chairman Christie also raised the Sunshine Act as a possible limit on the executive order. But at least as construed by OLC, the Sunshine Act may have limited effect: The Sunshine Act is limited to “meetings,” and OLC has concluded that “most discussions between a covered agency and OIRA would likely not qualify as a ‘meeting,’” including because the discussions are not sufficiently focused on “discrete proposals” and because a “meeting” must include a quorum. Hence, exchanges between the Chairman or staff and others in the executive branch would not trigger the Sunshine Act under OLC’s view. This view, of course, might be challenged in litigation.
- *Ex parte rules.* An important potential friction point is how FERC applies its ex parte rules to matters covered by the executive order. Those rules prohibit “off-the-record communications” to or from any “decisional employee” in any “contested on-the-record proceeding.” 18 CFR § 385.2201(b). This rule broadly covers FPA Section 206 proceedings, proceedings arising from enforcement actions, proceedings in which there is an intervention right and an intervenor disputes a material issue (including FPA Section 205 proceedings), and more. These provisions will raise many issues, including:

First, the rule exempts certain “broad policy discussions” that do not “address the specific merits of the proceeding.” *Id.* § 385.2201(c)(5). How broadly will FERC, OMB, and others apply this exception?

Second, the rule also exempts “off-the-record communication permitted by law and authorized by the Commission,” and permits (with disclosure) a “written communication from a non-party elected official.” *Id.* § 385.2201(e)(1)(i), (iv). The administration might take the position that communications necessary to effectuate the president’s Article II powers are “permitted by law.” But even accepting that argument, it is a separate question whether Article II requires that these communications occur *without disclosure*.

Going forward, we will track whether FERC publicizes its approach to communications relating to the executive order—or if instead these issues get worked out informally without transparency to stakeholders.

3. Executive Order on “Ensuring Lawful Governance.”

The President on February 20, 2025 issued another executive order, also applicable to independent agencies, that imposes more specific requirements aimed at bringing agencies' rulemaking and enforcement efforts within the administration's view of their proper sphere.

Rule rescissions. The order directs agencies to, within 60 days, identify for rescission several classes of regulations, including (a) unconstitutional regulations and regulations raising serious constitutional questions; (b) regulations based on unlawful delegations of legislative power (i.e., violations of the nondelegation doctrine); (c) regulations “based on anything other than the best reading of the underlying statutory authority or prohibition” (i.e., regulations whose validity turns on the now-overruled *Chevron* doctrine); (d) “regulations that implicate matters of social, political, or economic significance that are not authorized by clear statutory authority” (i.e., regulations that would be invalid under the major questions doctrine); (e) regulations that unjustifiably burden private parties; and (f) regulations that “harm the national interest” by impeding, *inter alia*, “infrastructure development,” “economic development,” and “energy production.”

Enforcement discretion. The executive order directs agencies to de-prioritize enforcement actions “that are based on anything other than the best reading of a statute” or that exceed the federal government's constitutional powers. The order also directs agencies to terminate enforcement proceedings “that do not comply with the Constitution, laws, or Administration policy.”

DOGE review of new regulations. As to new regulations, the order directs agency heads to consult not just OIRA but also “their [Department of Government Efficiency (DOGE)] Team leads.”

These provisions present advocacy opportunities. The order directs agencies, including FERC, to take certain actions as to rules or enforcement actions that violate certain legal principles—but which rules and enforcement actions fall into that category will be contested. For example, many agency regulations have been sustained under the *Chevron* doctrine, and the scope of the major questions doctrine remains contested. The order directs agencies to identify some rules and enforcement actions for termination, and the question will be: What actions will FERC identify?

Jenner & Block's Energy and Appellate and Supreme Court teams will continue to monitor new developments regarding the state of agency independence, at FERC and elsewhere. Our teams continue to counsel clients through this developing regulatory landscape and are available to provide guidance.

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