STINSON

Legal Standards, Precedents, and Processes

PRESENTED BY HARVEY L. REITER
MICHIGAN STATE UNIVERSITY, INSTITUTE OF PUBLIC UTILITIES
EAST LANSING, MICHIGAN (Virtually)

AUGUST 13, 2024

Topics to be Covered:

- What do Regulators Do?
- What is the Legal Basis for Regulation?
- What are the Constitutional and Statutory Limits on Regulators
- What are the Basic Procedural Elements of the Regulatory Process?

What do Regulators Do?

- They regulate the rates, terms and conditions of regulated services
- They issue regulations and approve tariffs governing service
- They grant, deny or condition certificates and licenses, securities issuances, and corporate structural changes sought by regulated utilities e.g., Broadcast licenses, franchise boundaries, pipeline certificates to construct new pipelines, hydroelectric licenses, integrated resource plans, curtailment plans, merger applications, securities issuances
- They enforce their rules, regulations and orders

What is the legal basis for regulation?

- *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486,1508 (D.C. Cir. 1984), cert. denied, 469 U.S. 1034 (1984) ("It is of course elementary that market failure and the control of monopoly power are central rationales for the imposition of rate regulation." (citing S. BREYER, REGULATION AND ITS REFORM 5-16 (1982)).
- *Munn v. State of Illinois 94* U.S. 113 (1876). – State empowered to regulate business cloaked with a public interest.
- *Nebbia v. New York*, 291 U.S. 502 (1934). – “there is no closed class or category of business affected with a public interest”

4

What are the limits on regulators? Statutory and Constitutional

Constitutional Limits

"The Constitution within broad limits leaves the States free to decide what rate setting methodology best meets their needs in balancing the interests of the utility and the public."

- *Duquesne Light v. Barasch* 488 U.S. 299 (1989).

- Prohibition against confiscation
  - Fifth Amendment: "…nor shall private property be taken for public use, without just compensation" ("takings").
  - Query: Does the Supreme Court's 2021 holding in *Cedar Point Nursery v. Hassid*, No. 20-107, that requiring property owners to grant temporary access to third parties without compensation constitutes an unconstitutional "*per se* physical" taking apply to regulators inspecting utility facilities? (Probably not. Court cites FERC's right to inspect hydro facilities as likely permissible)

Constitutional Limits *(continued)*

- Preemption of state regulation under the dormant Commerce Clause
  - The Commerce Clause (Article I, Section 8, Clause 3) of the U.S. Constitution: Congress shall have the power "To regulate Commerce with foreign nations, and among the several States, and with the Indian tribes"
  - *Narragansett Elec. Co. v. Burke* 119 R.I. 559, 381 A.2d 1358 (1977). *(States cannot regulate interstate commerce)*
- Preemption of state regulation under the Supremacy Clause
  - *Nantahala Power & Light v. Thornburg* 476 U.S. 953 (1986).

Statutory Limits

- Agencies are only empowered to regulate what has been entrusted to them by statute.
  - *Atlantic City Electric Company, et al. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002)
  - *Food and Drug Administration v. Brown & Williamson Tobacco Corp.,* 529 U. S. (2000):
  - "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure Congress has enacted into law.'" (forerunner of "major questions doctrine")

Statutory Limits *(continued)*

- Federal agencies cannot delegate their responsibilities to third parties, including state commissions.
- *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities- private or sovereign- absent affirmative evidence of authority to do so.”)

Statutory Limits *(continued)*

- Entities cannot volunteer to be regulated
  - *Columbia Gas Transmission v. FERC*, 404 F.3d 459, 461 (D.C. Cir. 2005)
  - *Bonneville Power Administration v. FERC*, 422 F.3d 908, 916 (9th Cir. 2005)

Procedural protections and fairness

- The Hearing Process
- Rulemakings
- Judicial Review
- The interplay between statutes creating public utility commissions and administrative law

What are the basic legal standards applicable to utility regulation?

- Just and reasonable
- Not unduly discriminatory or preferential
- In the public convenience and necessity
- In the public good
- In the public interest

The Just and Reasonable Standard

The Just and Reasonable Standard

- *Smyth v Ames*, 169 U.S. 466 (1898). – rates can't be confiscatory, fair value as measure(not required any longer)
- *Bluefield Water Works v Public Service Comm'n*, 262 U.S. 679 (1923). – Rates sufficient to attract capital
- *FPC v. Hope Natural Gas Co. 320 U.S. 591 (1944). – end result test* – Whether rates are just and reasonable is based on the end result reached, not the method employed; regulator can base rates on historical costs rather than "fair value."

The Just and Reasonable Standard
(continued)

- *The Zone of Reasonableness, In Re Permian Basin Area Rate Cases,* 390 U. S. 747, 790 (1968)
  - End Result test doesn't relieve agency of duty to explain its methods or to apply them consistently
  - No fixed "just and reasonable rate"; there is a "zone of reasonableness"
- *Boundaries on Zone of Reasonableness, Jersey Central Power & Light Co. v. FERC,* 810 F.2d 1168 (D.C. Cir. 1987)
  - Bounded on the low end by constitutional prohibition against confiscation
  - Bounded on the high end by ratepayer protection against exorbitant rates
  - Agency is obligated to approve any rate filed by a utility that falls anywhere within the zone

Just and Reasonable Rates – Zone of Reasonableness, *(continued)*

- Limitation on confiscatory rates does not ensure protection against market forces, *Market St. Ry. Co. v. Railroad Commission of California, 324 U.S. 548 (1945); FPC v. Natural Gas Pipeline Co*. 315 U.S. 575, 585 (1942).
- Limitation on confiscatory rates does not ensure recovery of imprudent expenses, *West Ohio Gas Co. v. PUCO*, 294 U.S. 63 (1935).
- Denial of facilities not "used and useful" is not itself confiscatory even if investment is prudent, *Denver Union Stock Yard Co. v. U.S*. 304 U.S. 470 (1938), *Duquesne Light v. Barasch* 488 U.S. 299 (1989)

Just and Reasonable Rates – Zone of Reasonableness, *(continued)*

- Costs of fines, penalties and legal judgments in civil cases may be disallowed as unreasonable expenses. Some state commissions have statutory authority to impose their own fines and penalties beyond disallowance of fines by other agencies. *See Pacific Bell Wireless, LLC v. Public Utilities Com. (Cingular)* (2006) 140 Cal. App. 4th 718; *Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company, Investigation* 12-01-007 (2012)

- Agencies may permit recovery of reasonable legal fees associated with defending lawsuits. *See, e.g., Iroquois Gas Transmission System v. FERC*, 145 F.3d 398 (D.C. Cir. 1998). Standard is whether "the underlying activity being defended in the litigation serves the interests of ratepayers." *BP West Coast Products v. FERC*, 374 F.3d 1263 (D. Ci Cir. 2004)

Just and Reasonable Rates – Zone of Reasonableness, *(continued)*

- Incentive Rates are permitted but must be tied to statutory objective, *Farmers Union Central Exchange v. FERC, 734 F. 2d 1486* (D. C. Cir. 1984)
- Market-based rates are regulated rates, *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D. C. Cir. 1993)
  - ("when there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a "just and reasonable" result. *See Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C.Cir.1990)")

Undue Discrimination and Undue Preference

Undue Discrimination and Undue Preference

- The bar against undue discrimination prohibits both the dissimilar treatment of similarly situated customers and the similar treatment of dissimilarly situated customers. *Alabama Electric Cooperative v. FERC*, 684 F. 2d 21 (D. C. Cir. 1982).
- Undue discrimination exists where a utility denies substantially the same service to substantially similarly situated customers. *St. Michaels Utilities Commission v. FPC*, 377 F.2d 912 (4th Cir. 1967).
- Undue discrimination can also exist where the same rate is charged to dissimilarly situated customers, e.g., where the costs of serving the customers are materially different. *Alabama Elec. Coop. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982)

Undue Discrimination and Open Access Transportation

- Order 436 FERC began the transition to an open access regime under which customers were given the option to purchase gas from the pipeline or to convert their contracts into transportation entitlements allowing them to transport gas sold by third parties. *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D. C. Cir. 1987)
- A few years later, under Order No. 636, FERC required the unbundling of sales for resale and interstate transportation service. *United Gas Distribution Cos. v. FERC*, 88 F.3d 1105 (D. C. Cir. 1996).

Undue Discrimination and Undue Preference

Contract and settlement factors

- When properly supported by private contract, which is what settlement agreements are, different treatment among a utility's customers may be of long duration without violating the standards of sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§824 d, 824e (1988). *See Metropolitan Edison Company v. FERC, 595 F.2d 851* (D.C. Cir. 1979).

Undue Discrimination and Undue Preference

Contract and settlement factors

- To support a claim of **undue discrimination** in the context of a settlement agreement there must be a showing of either bad faith or undue burden. Settlement agreements can justify a rate differential. To qualify, the agreements must have been negotiated in good faith and must not unduly burden any group of customers. *Louisiana Ass'n of Indep. Producers v. FERC,* 958 F.2d 1101, 1118 (D.C. Cir. 1992)

Undue Discrimination and Undue Preference

Contract and settlement factors *(continued)*

- A rate differential that results when the litigated rate turns out different than the settlement rate rejected by the litigant is not unduly discriminatory, it is the consequence of the litigating party's decision not to settle. *New England Power Co., 70 FERC* ¶ 61,152 (1995)

Undue Discrimination and Undue Preference

Rate or Service Disparities to Meet Competition or to Retain Load

- *St. Michaels Utilities Comm'n v. FPC*, 377 F.2d 912, 916 (4th Cir. 1967) (substantially lower rates given to help retain customers that represented over 90 percent of the utility's annual wholesale revenues did not constitute undue discrimination simply because the attractive rate was not offered to another class of customers).
- Discounted rates are allowed based on a showing that the discount is needed to retain the customer; customers paying maximum rates are better off because max rates could be higher without the discounted revenue.

Public Convenience and Necessity, Public Interest and Public Good, Just and Reasonable

- Section 7 of the Natural Gas Act (NGA) requires, prior to the commencement of construction, a finding by FERC that the proposed pipeline is in the "public convenience and necessity."
- There is a "'public interest' standard embodied in the Federal Power Act," FERC Order No. 474, FERC Stats. & Regs. ¶ 30,751 at 30,708 (1987)
- The statutory terms "public interest," "public convenience and necessity" and "just and reasonable" as used in federal regulatory statutes all embody a duty on the part of the agency to consider a variety of factors.

Competition factors and antitrust policy

- In "fulfilling its responsibilities" FERC is "called upon to consider applicable antitrust policies in its determination of what is in the public interest." *Southern Natural Gas Co.*, 75 FERC ¶ 61,046 at 61,165 (1996).

Public Convenience and Necessity, Public Interest and Public Good

Public Necessity Does Not Mean Exclusion of New Entry

- Even if not strictly “necessary” in the sense that the public demand could be met by the incumbent, “public convenience and necessity” does not shield incumbents from competition:
  - Investors in the natural gas industry, although granted an opportunity for a 'fair return,' are by no means guaranteed freedom from risk or competition. Such assurance would, in a case such as this, deprive competitors of the right to compete, inhibit efficient allocation of resources and deny ultimate consumers the lowest prices to which they are entitled.
- *Lynchburg Gas Co. v. FPC*, 336 F.2d 942,949-50 (D.C. Cir. 1964); *see also Panhandle E. Pipe Line Co. v. FPC*, 169 F.2d 881, 884 (D.C. Cir.) cert. denied, 335 U.S. 854 (1948)

Public Convenience and Necessity, Public Interest and Public Good *(continued)*

- Environmental considerations and other “public interest factors”
- *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2nd Cir. 1965) (“[The Commission's role as representative of the public interest does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it. . . . The Commission must see to it that the record is complete.”)

Origins of Agency Duty to Consider Antitrust Policy

- The derivation of the obligation is clear. Antitrust principles are "a fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conf.,* 383 U. S. 213, 218 (1966). Indeed, the courts have found that antitrust policy is an integral part of the public interest equation for agencies overseeing a wide range of regulated industries – whether the reference term is "public convenience and necessity," "public interest" or "just and reasonable." *See, e.g, Northern Natural Gas Co. v. FPC*, 399 F. 2d 953, 960-63 (and cases cited therein) (D. C. Cir. 1968). *See also Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758-9 (1973)

Origins of Agency Duty to Consider Antitrust Policy *(continued)*

- *See e.g., Kansas Power and Light v. FPC*, 511 F.2d 1178 (D. C. Cir. 1977) (duty to consider antitrust policies under "public interest" test of Section 203)
- *See FPC v. Conway Corp.,* 426 U.S. 271 (1976) (duty to consider anticompetitive effects of rates under "just and reasonable" standard);
- *Tenneco Oil Co., 2 FERC* ¶ 61,247 (1978) ("duty to consider antitrust and competition policy in determining public convenience and necessity in certification proceedings").

Historic Role of Competition in State Regulation

Franchises are generally not exclusive

- Until the 1920s "the awarding of franchises, often for short periods or non-exclusively to promote competition, was the primary means of controlling the industry."

- Peter Fox-Penner, Electric Utility Restructuring: A Guide to the Competitive Era, in PUB. UTIL. REP. 95 (1997) (emphasis added).
  - A number of state constitutions contain prohibitions of various sorts against the granting of exclusive franchises to individuals or private corporations.
- See cases cited at 54A AM. JUR. 2D Monopolies, Restraints of Trade, And Unfair Trade Practices § 829 (1996).
  - While states often restrict competition among private utilities within designated franchise areas, they do not usually preclude the localities in which the utilities operate from forming their own competing systems.

Historic Role of Competition in State Regulation *(continued)*

Franchises are generally not exclusive

- See FEDERAL POWER COMMISSION NATIONAL POWER SURVEY Part I, at 19 (1964).
    - The presumption is that, in the absence of an agreement as to exclusivity, the mere grant of a franchise by a municipality to a public utility does not give the public utility a right to be free from competition by the municipality or a third party.
- Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118 (1939); Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619, 626 (1934) (utility assumed risks of competition "when it entered the field"). This is true even though, by entering into competition with the public utility, the municipality might thereby undermine the value of the utility's franchise. See 36 AM. JUR. 2d Franchises 5 35 (1968).

Federal Antitrust Exemptions for Regulated Industries are narrowly construed and implied repeal is disfavored

- Even in highly regulated industries, there is a presumption that competition should still play a vital role and regulated monopolies should be fully subject to the nation's antitrust laws. Express statutory antitrust exemptions, therefore, "are to be very narrowly construed."
- *See Georgia v. Pennsylvania R. Co.,*324 U.S. 439 (1945); *McLean Trucking Co. v. U.S.*, 321 U.S. 67.86 (1944); *Panhandle E. Pipe Line Co. v. FPC*, 169 F.2d 881,884 (D.C. Cir. 1948), cert. denied, 335 U.S. 854 (1948); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963);
- *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 351 (1963) (stating that only where there is a "plain repugnancy between the antitrust and regulatory provisions" will repeal be implied).
- Electric utilities have long known that the fact of regulation does not exempt them from the antitrust laws. *See, e.g., Otter Tail Power Co. v. United States, supra* 410 U.S. 366 (1973).

States and local governments may adopt restrictions on competition that effectively exempt utilities from the antitrust laws, but only if:

1. their policies are "clearly articulated and affirmatively expressed as state policy," (emphasis added) Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978); and
2. if (2) they "supervise actively any private anticompetitive conduct," Southern Motor Carriers Rate Conf. v. United States, 105 S.Ct. 1721, 1726-27 (1985).
3. But when acting in a commercial capacity, local governments cannot be sued for damages under the antitrust laws. Local Gov't Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

- **Mere approval of a utility's anticompetitive conduct by a regulatory agency will not shield it from antitrust liability.**

See Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (holding that state-approved tariff under which utility provided electric customers with "free" light bulbs did not foreclose private antitrust claim that the practice constituted an unlawful tying arrangement).

What are some of the elements of the regulatory process?

- Rulemakings vs. Adjudications
- Due Process
- Ex parte rules
- Separation of Functions
- Hearings, Evidence, Use of Experts
- Settlements
- Judicial Review

Elements of the Regulatory Process

- Rulemakings v. Adjudications, *SEC v. Chenery Corp.,* 332 U. S. 194 (1947) (agencies have discretion whether to proceed by rulemaking or adjudication).
- Differences between Rulemakings and Adjudications
- Factors to consider in choosing between rulemakings and adjudications
- Rulemakings and Adjudications both set precedents the agency must follow, but nonparties to adjudications can challenge the precedent anew when applied to them. *The Conference Group, LLC v. FCC*, No. 12-1124 (D.C. Cir. July 2, 2013)

Elements of the Regulatory Process

- Policy Statements, *Pacific Gas and Electric Co. v. FPC*, 506 F. 2d 33 (D.C. Cir. 1974) (agencies are permitted to announce policies in non-reviewable policy statements, but must justify their application in each case in which the policy is to be applied).

Elements of the Regulatory Process

Rate Change Filings:

- Advance Public notice
- Intervention
- Public Hearings

  Discovery, expert witnesses, trial

  Intermediate decision by ALJ/Hearing Examiner

  Decision by the Agency

The Complaint Case

What Is a Complaint Case?

- Any person may file a complaint under Section 5 of the NGA or parallel Section 206 of the FPA that a pipeline's existing rates are unjust and unreasonable and/or unduly discriminatory.

Difference Between Section 5 on Section 206 Complaint and Complaint of Tariff Violation

- A section 5 complaint or Section 206 complaint alleges that a pipelines existing rates and/or terms and conditions of service have become unjust and unreasonable. The burden is on the complainant to demonstrate this and the remedy is prospective

A complaint of tariff or rule violation alleges that the pipeline is not complying with its existing tariff or with rules or regulations established by the agency. The remedy in these cases is to restore the parties to the position they would have occupied had the pipeline complied with the terms of its tariff or the rules it has been found to have violated.

Difference between Section 5 and Section 206 complaints

- Section 5 of the NGA does not allow refunds
- Section 206 of the FPA provides for refunds

Elements of the Regulatory Process

Complaints

Initiated by parties adversely affected by a utility's existing rates and practices.

Complaints allege that a utility's current rates have become unreasonable, that it is violating an existing agency rule or order or is otherwise acting contrary to law.

Elements of the Regulatory Process

- **Settlements**
  - May be partial or complete
  - May involve some or all parties
  - Necessity for settlements

Elements of the Regulatory Process

Rulemaking

- Rulemakings can be substantive or procedural
  - Rulemakings must afford the public the opportunity for notice and comment

Elements of the Regulatory Process

Judicial Review– The Federal Model

STINSON

Appellate Review of Federal Administrative Agency Decisions

I. What Is Federal Administrative Law?

A. The Administrative Procedure Act and Related Regulatory Statutes

B. The Role of Appellate Review

5 U.S.C. 706 provides:

Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall:

1. compel agency action unlawfully withheld or unreasonably delayed; and
2. hold unlawful and set aside agency action, findings, and conclusions found to be:
    a. arbitrary, capricious, an abuse of discretion, or otherwisenot in accordance with law;

I. What Is Federal Administrative Law?
(continued)

b. contrary to constitutional right, power, privilege, or immunity;
c. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
d. without observance of procedure required by law;
e. unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
f. unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and **due account shall be taken of the rule of prejudicial error.**

II. Standard of Review

A. The Rule of Prejudicial Error

B. The Arbitrary and Capricious Standard

C. Procedural Defects

D. Substantial Evidence, Chevron, Auer and Agency Deference

The Rule of Prejudicial Error

- [T]the APA's reference to "prejudicial error" is intended to "su[m] up in succinct fashion the `harmless error' rule applied by the courts in the review of lower court decisions as well as of administrative bodies." *Shinseki v. Sanders*, 129 S. Ct. 169, 17046 (2009)
- The rule requires “case-specific” into whether the error affects a party’s “substantial rights,” not rigid application of presumptions that may lead a court to find an error harmful when it is not. Id. at 1705.

Arbitrary And Capricious Agency Action

Unexplained Departures From Prior Precedent Are Arbitrary

> An agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedence without discussion, it may cross the line from tolerably terse to intolerably mute.

- *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.1970), cert denied, 403 US 923 (1971).

Arbitrary and Capricious Agency Action
(continued)

- **No Heightened Standard When Agency Changes Its Policy**
  - The requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. … And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.
- *FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009)

Arbitrary and Capricious Agency Action
(continued)

When changing policies, an agency must also consider "serious reliance interests." *Fox Television, supra*.

That parties have come to rely on the prior rule does not prevent the agency from changing course, but it cannot ignore the impact on reliance interests. *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, _S. Ct.__ ,No. 18-587 (June 18, 2020)(remanding repeal of DACA (Deferred Action for Childhood Arrivals) rule because agency completely disregarded "serious reliance interests" of those dependent on the rule).

Arbitrary and Capricious Agency Action
(continued)

Disconnects Between The "Facts Found And The Choices Made“

Section 8(b) of the Administrative Procedure Act, 5 USC § 1007(d) requires that agency adjudications be supported by written findings and conclusions. Not only must the agency's decision contain the new findings and conclusions, it must articulate a “rational connection between the facts found and the choice made.” *Burlington Truck Lines, Inc. v. US*, 371 US 156, 168 (1962).

Arbitrary and Capricious Agency Action
(continued)

Agencies cannot lie about the real reasons for rule changes.

"The reasoned explanation requirement of administrative law… is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise." *Dep't of Commerce v. New York,* 139 S. Ct. 2551, 2575-76 (2019) (rejecting as "contrived" and "pretextual" Commerce Dept. Secretary Ross's claim that citizenship question was added to census to improve enforcement of the Voting Rights Act)

See also *New York v. Wolf*, Case 1:20-cv-01127 (withdrawing DHS rule to deny Global Entry passes to NY residents on false ground that it was "only state" to grant undocumented immigrants drivers licenses)"Defendants deeply regret the foregoing inaccurate or misleading statements and apologize to the court and plaintiffs for the need to make these corrections at this late stage in the litigation." Acting District Attorney for the Southern District of NY, July 23, 2020.

Arbitrary and Capricious Agency Action
(continued)

The Most Common Agency Error: Failure to Consider or Address Issues Raised by a Party

"In the present case, the Commission not only failed to provide an adequate response to NorAm's argument, it failed to take seriously its responsibility to respond at all. As we have said before, [i]t most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it - that it conduct a process of "reason" decision-making.“

NorAm Gas Transmission Company v. FERC, 148 F.3d 1158, 1165 (D.C. Cir. 1990).

Duty to Address Arguments Raised
(continued)

> This requirement imposes no significant burden upon the Commission. Since it is already doing the relevant calculation, it is a small matter to abide by the injunction of the arithmetic teacher: Show your work! For the Commission to do less deprives the ratepayer of a rational explanation of its decision.

City of Holyoke Gas & Elec. Dept. v. FERC, 954 F. 2d 740, 743 (D. C. Cir. 1992)

Arbitrary and Capricious Agency Action *(continued)*

Reliance on Post-Hoc Explanations by Agency Counsel

‘“In evaluating the Commission's arguments, we bear in mind the "time-honored rule that a reviewing court ‘must judge the propriety of [agency] action solely by the grounds invoked by the agency.’”

Western Resources, Inc. v. FERC, 9 F.3d 1568, 1576 (D.C. Cir. 1993); (quoting *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947)).
The court does not “give an agency the benefit of a post hoc rationale of counsel.”

Missouri Public Service Commission v. FERC, 234 F.3d 36, 41 (D.C. Cir. 2000).

Agency Abandonment of a Rationale on Appeal Can Be Post-Hoc Rationale, Too

- We obviously cannot affirm a decision based on three different and inconsistent answers to the same fundamental questions. In its brief, FERC elides this inconsistency by ignoring its second and third answers and urging only the first, which it said we accepted as sufficient in a closely analogous context in *Public Systems II*. This, we think, is *post hoc* rationalization - though by subtraction of old reasons rather than addition of new ones. Unless we can agree that FERC would necessarily have reached the same decision on the basis of the first reason ... we would in effect be affirming on a ground different from the one on which the agency based its decision, in contravention of the *Chenery* principle.

- *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 353 (D.C. Cir. 1985). *See also Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D. C. Cir. 2006)

Conformance with Procedural Protections

Application of New Policy Without Notice to Affected Parties

The Administrative Procedure Act requires that a person involved in an agency adjudicatory hearing "shall be timely informed of ... [the] law asserted." 5 U.S.C. § 554 (d)(3). Courts have uniformly held that for an agency to meet this obligation where it seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the party before the agency must be given notice and then opportunity to introduce evidence bearing on the new standard.

Hatch v. FERC, 654 F.2d 825, 835 (D.C. Cir. 1981).

Conformance with Procedural Protections *(continued)*

Can An Agency Change, Via Adjudication, A Policy Originally Adopted By Rulemaking?

While an agency ordinarily has considerable discretion under the APA whether to formulate policy by rulemaking or adjudication, *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 294 (1974), once it adopts a policy through notice and comment rulemaking, it can only amend or repeal its rule or policy through the same notice and comment procedure. *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795, 798-801 (D.C. Cir. 1983). *See also American Fed'n of Gov't Employees v. NLRB*, 777 F.2d 751, 759 (D.C. Cir. 1985)

Standard of review – the substantial evidence standard

What Constitutes Substantial Evidence?

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Consolidated Edison Company v. NLRB, 305 US 197 (1938).

Failures to Consider Record As a Whole

> Substantiality of evidence must take into account whatever in the records fairly detracts from its weight."

Universal Camera Corporation v. NLRB, 340 US 474, 488 (1951). *See also Carpenters and Millwrights v. NLRB*, 481 F.3d 804, 809 (D.C. Cir. 2007) (agency must "explain why it rejected evidence that is contrary to its findings.")

See also *Morall v. DEA*, 412 F.3d 165, 177 (D.C. Cir. 2005) (holding that "the ALJ's 'decision is part of the record, and the record must be considered as substantial evidence. The agency's departures from the [ALJ's] findings are vulnerable if they fail to reflect attentive consideration.'").

Interchangeability of the Substantial Evidence and Arbitrary And Capricious Standards

- If an agency acts without substantial evidence it is acting arbitrarily. If an agency's fact findings are inconsistent with its conclusions then its decision is not supported by substantial evidence.
- *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 338 (D.C. Cir. 1985).

Judicial Deference to Agency Interpretations of the Statutes They Administer - Forty years of *Chevron* go poof!

The Supreme Court's June '24 decision in *Loper-Bright Enterprises v. Raimando,* 144 S. Ct. 1244 (2024), overturned the 1984 *Chevron* Doctrine

What was the **Chevron Deference Doctrine?**

The Chevron Deference Doctrine

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give affect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron USA v. Natural Resources Defense Council, 467 US 837,842-43 (1984).

The Chevron Deference Doctrine

- There were several exceptions to the *Chevron* doctrine that deprived agencies of *Chevron* deference:

- Conflicting prior judicial interpretations of the statutory question at issue finding the statute unambiguous – *National Cable & Telecommunications Assn v. Brand X Internet Services*, 545 U.S. 967, 982 (2005)

- Agency actions that are insufficiently "formal" to warrant deference – *Christensen v. Harris County*, 529 U.S.576 (2000).

  Agency actions taken in mistaken belief that they were compelled by prior court decisions – NLRB v. Prill, 755 F. 2d 941, 947 (D.C. Cir. 1985); PSEG Energy Res. & Trade LLC v. F.E.R.C., 665 F.3d 203, 209 (D.C. Cir. 2011).

- Dueling interpretations by multiple agencies administering the same statute got no deference.

Loper Bright and Limited Agency Deference

- The Court found that the exceptions to *Chevron* had made it unworkable (although it had been applied by the lower courts 17,000 times)
- From now on, it said, courts, not agencies would decide the meaning of federal statutes.

So what's left of deference to agency interpretations of the statutes they administer post-Loper?

- Pre-*Chevron* agencies got *Skidmore* deference- not definitive, but courts would give weight to persuasive agency interpretations grounded in agency expertise. *Skidmore* is back.

So What's left of *Chevron* Deference Post-*Loper*? (**con'td**)

Previous agency decisions upheld under Chevron will be given *stare decisis* protection

Post-*Loper* traditional regulatory agencies will still have latitude to interpret broad statutory commands:

In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. Batterton v. Francis, 432 U. S. 416, 425 (1977) (emphasis deleted).5 **Others empower an agency to prescribe rules to "fill up the details" of a** statutory scheme, *Wayman v. Southard*, 10 Wheat. 1, 43 (1825), or to regulate subject to the limits **imposed by a term or phrase that "leaves agencies with flexibility**," *Michigan v. EPA*, 576 U. S. 743, 752 (2015), **such as "appropriate" or "reasonable."**

When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," H. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 27 (1983), and ensuring the agency has engaged in "'reasoned decisionmaking' " within those boundaries, *Michigan*, 576 U. S., at 750 (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U. S. 359, 374 (1998)); see also *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983). By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

Chevron-like deference to agency interpretations of their own orders and regulations

The Auer Doctrine

Courts will give *Chevron*-like deference to agency interpretations of their own rules, orders and regulations.

Auer v. Robbins, 519 U.S. 452 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

The Chevron Deference Doctrine *(continued)*

The Auer Doctrine

- But the deference is limited.
- Agency interpretations need not be well-settled or long-standing to be entitled to deference.
  - But they get no deference where:
    - they conflict with a prior interpretation,
    - the interpretation is no more than a convenient litigating position, or the interpretation is a post hoc rationalization
- *Christopher v. Smithkline Beecham Corp*., 132 S. Ct. 2156, 2166 (2012)

The Chevron Deference Doctrine *(continued)*

The Auer Doctrine

Auer was further narrowed in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019):

- "a court should not afford Auer deference unless the regulation is genuinely ambiguous." Id. at 2405.
- "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." Id.
- "If genuine ambiguity remains, moreover, the agency's reading must still be 'reasonable.'" Id.
- "the regulatory interpretation must be one actually made by the agency." Id. at 2416.
- "the agency's interpretation must in some way implicate its substantive expertise." Id. at 2406.
- "an agency's reading of a rule must reflect 'fair and considered judgement' to receive Auer deference." Id.

The Chevron Deference Doctrine *(continued)*

Courts will also give *Chevron-like* deference to agency interpretations of contracts and tariffs subject to agency jurisdiction.

Williams Natural Gas Co. v. FERC, 3 F. 3d 1544, 1549 (D.C. Cir. 1993) ; *Constellation Energy Commodities Group v. FERC*, 457 F.3d 14, 20 (D.C. Cir. 2006).

The Major Questions Doctrine

Agency Decisions on Matters Beyond Their Basic Mission

While finding "an Exchange established by the state" to be ambiguous, the Court held that the IRS's interpretation of the term was not entitled to *Chevron* deference because it lacked expertise in health care policy:

> When analyzing an agency's interpretation of a statute, this Court often applies the two-step framework announced in *Chevron*, 467 U. S. 837. But *Chevron* does not provide the appropriate framework here. The tax credits are one of the Act's key reforms and whether they are available on Federal Exchanges is a question of deep "economic and political significance"; had Congress wished to assign that question to an agency, it surely would have done so expressly. And it is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.

***King v. Burwell*, 135 Supt. Ct. 2480 (2015) – Now considered a "major questions doctrine case**

Major Questions Doctrine

West Virginia v. EPA, Nos. 20-1530, 20-1531, 20-1778, 20-1780 (June 22, 2022)

Court announces that in "extraordinary cases" of "deep economic and political significance" agencies have no authority to regulate absent "clear" expression of Congressional intent.

Because the test is so malleable, it may open virtually any regulatory initiative of consequence to court challenge as a "major question"*

*** See Reiter, Expanding 'Major Questions Doctrine' Risks Regulatory Stability (Bloomberg Law, July 12, 2022) https://news.bloomberglaw.com/environment-and-energy/expanding-major-questions-doctrine-risks-regulatory-stability?utm_source=Email_Share**

The Major Questions Doctrine- an exception to *Chevron*? (cont'd)

***Pre-West Virginia* MQD -- Agency Decisions on Matters Beyond Their Basic Mission**

While finding "an Exchange established by the state" to be ambiguous, the Court held that the IRS's interpretation of the term was not entitled to *Chevron* deference because it lacked expertise in health care policy:

> When analyzing an agency's interpretation of a statute, this Court often applies the two-step framework announced in *Chevron*, 467 U. S. 837. But *Chevron* does not provide the appropriate framework here. The tax credits are one of the Act's key reforms and whether they are available on Federal Exchanges is a question of deep "economic and political significance"; had Congress wished to assign that question to an agency, it surely would have done so expressly. And it is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.

King v. Burwell*, 135 Supt. Ct. 2480 (2015) – *No deference to IRS, but agency still won!

How does *W. Va. v. EPA* affect *Loper*?

- ***Loper* simply denies agencies deference, but if the courts find that a major question is presented, the agency may lose jurisdiction altogether**.
- Prior version of major question doctrine (MDQ) simply stripped the agency's interpretation of deference. Even without deference agency could still win. *See e.g., King v. Burwell*, 576 U.S. 473, 485-86 (2015) (denying IRS deference, but upholding its interpretation of the Affordable Care Act)*
- Under expanded MDQ, absent clear Congressional authorization agency loses for lack of jurisdiction. Rarely cited before, the Supreme Court has now addressed it *five* times in the last three years – most recently in striking down President Biden's student debt relief plan.

* See Harvey L. Reiter, *Would FERC's Landmark Decisions Have Survived Review Under the Supreme Court's Expanding "Major Questions Doctrine" And Could The Doctrine Stifle New Regulatory Initiatives?, 3 Energy Br. 1 (2022), https://www.eba-net.org/felj/eba-brief/#:~:text=Would%20FERC%E2%80%99s%20Landmark%20Decisions%20Have%20Survived%20Review%20Under%20the%20Supreme%20Court%E2%80%99s%20Expanding%20%E2%80%9CMajor%20Questions%20Doctrine%E2%80%9D%20And%20Could%20The%20Doctrine%20Stifle%20New%20Regulatory%20Initiatives%3F .*

Last Year's slide on *Chevron*

Is *Chevron* on the Chopping Block?

Supreme Court hasn't cited *Chevron* since 2016, leading commentators presciently to question whether Court will revisit it.

On May 1, 2023 the Supreme Court did just that. It agreed to reconsider its *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo, No*. 22-451.*

The case involves challenge by several commercial fishing companies to a National Marine Fisheries Service rule requiring those companies to pay for observers to monitor their compliance with fishery management plans. While the relevant statute allows the agency to require the presence of monitors, it is silent on who should pay for the monitors. The lower court found that the statute's ambiguity permitted the agency's interpretation.

The case will be heard and decided during the Court's 2023-23 term. The court framed the question presented as follows:

> Whether the court should overrule ***Chevron v. Natural Resources Defense Council***, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

Other Supreme Court Decisions that Could Affect Public Utility Regulation

SEC v. Jarkesy, No. 22-859 – Where agency has authority to prosecute and penalize companies or individuals for fraud and other conduct also prohibited at common law, targets have rights to jury trials and agencies cannot decide enforcement cases internally with ALJs – even if their decisions are subject to judicial review. No likely effect on FERC electric enforcement proceedings – defendants already have right to go to court. But while FERC can still investigate, it has no authority to take NGA enforcement cases to federal court. So *Jarkesy* may require a statutory amendment to the NGA.

Corner Post Inc. v. Bd. of Fed. Reserve, No. 22-1008 – by specific statute, appeals of FERC, FCC decisions must be filed within 60 days or parties lose appeal rights. But where no specific statutory deadline exists the default in the federal six year statute of limitations. Under *Corner Post*, the clock doesn't start to tick until the potential appellant is harmed. So a new entity harmed by a rule, *even an affiliate of an existing entity* that lost its challenge decades ago, can challenge even very old regs. *Corner Post* could possibly apply to PURPA cases.

The Requirement That Some Party Has Raised The Issue Below

- See *Coalition for Non-Commercial Media v. FCC*, 249 F.3d 1005, 1009 (D.C. Cir. 2001).

The Rehearing Requirement in Energy Cases and Other Statutes

- A prerequisite for appellate review of some state and federal administrative agency decisions is that the petitioner first seek rehearing of the agency's decision.
- *See, e.g*, Section 313 of the Federal Power Act, Sections 717 of the Natural Gas Act and Ohio Rev. Code § 4903.10.

B. Timing Of Appeal

- Statute provides period in which appeal must be filed.
  - Federal Power Act: 60 Days
  - Natural Gas Act: 60 Days
- Where there is no agency-specific judicial review provision, Title 28, Section 1331 governs
- (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”) unless judicial review is precluded by statute or agency action is committed to agency discretion by law. 5 U.S.C. Section 701(a)

82

Remand v. Reversal - Implications

- Under the APA, a court may review agency action for the limited purpose of determining whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Absent statutory authorization to do so, a court is not empowered "to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Moreover, if the court finds that agency action is not justified on the existing record under the applicable standards, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” “Ibid.”
- “[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.”
- *FPC v. Idaho Power Co*., 344 U.S. 17, 20 (1952)

Direct Appeals to Circuit Courts vs. Appeals To District Courts

- The statutes governing judicial review of final actions by some federal agencies provide for direct review by the circuit courts of appeal.
- Some statutes providing for direct review permit it in the circuits generally. Decisions of the Federal Communications Commission, Federal Energy Regulatory Commission, Federal Trade Commission fall into this category.
- Other statutes may provide for direct review in a particular circuit court. Decisions by the Bonneville Power Administration are heard only in the Ninth Circuit.
- Still others may provide for direct circuit court review of only certain types of actions by an agency. Specific types of EPA regulations fall into this category.

APA Review by the district courts

- 28 U.S.C. § 1331 gives district courts jurisdiction to review final agency actions under the APA where:
  - 1)the agency's organic statute is silent regarding the process for judicial review;
  - 2) no statutory provision precludes judicial review;
  - 3) the challenged agency action is not "committed to agency discretion by law."

Discovery in APA Cases in the District Courts

- There is no discovery in the circuit courts when they conduct review of federal agency decisions. Review in such instances is the equivalent of an appeal in that the court only decides matters of law.
- When a party seeks review of agency action under the APA before a district court the general rule is similar: “The district judge sits as an appellate tribunal. The `entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). “The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'" *Camp v. Pitts*, 411 U.S. 138 (1973).

Discovery in APA Cases in the District Courts *(continued)*

Exceptions to the general bar on discovery:

- Where the plaintiffs may be challenging the agency's claim about the scope of the record on which it relied the courts often allow some discovery. *See, e.g., Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (C.A.10 1993) ("An agency may not unilaterally determine what constitutes the Administrative Record")
- Recent example – *New York v. Dept. of Commerce*, (18-CV-2921 (SDNY 2019)(discovery permitted to test the veracity of Commerce Department's claim that citizenship question added to Census questionnaire was added at the directive of the Justice Department to better enforce the Voting Rights Act)

STINSON

Energy: Federal-State Jurisdiction, Legal Issues

Origin of FERC Responsibilities and Relationship to Role of State Commissions

- The Regulatory Gap
- *Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927) (Attleboro.)* (interstate wholesale sales of electricity were beyond the reach of state regulation and barred by the Commerce Clause because such regulation would impose a "direct burden" on interstate commerce.)
- This ruling created a gap in utility regulation that Congress filled with the Federal Power Act:
- Passage of Public Utility Holding Company Act (PUCHA), and Federal Power Act to prevent corporate concentration. Subsequent passage of Natural Gas Act.

What Does FERC Approval or Acceptance of a Federally-Regulated Rate Mean for State Jurisdiction of Utilities that Pay that Rate?

The Narragansett Doctrine and the Pike County Exception

- Under the *Narragansett* doctrine: “when the Commission, under the authority of Sections 205 and 206 of the FPA, 16 U.S.C. §§824 d and 824e, sets a rate for the sale of power to a wholesale purchaser, a state may not exercise its jurisdiction over retail rates to prevent the wholesale purchaser from recovering at retail the costs of paying the Commission-approved rate.” *Central Vermont Public Service Corp.,* 84 FERC ¶61,194 at 61,974 (1998) (citing *Narragansett Electric Co. v. Burke*, 381 A.2d 1358 (1977), cert.denied, 435 U.S. 972 (1978))
- Under the *Pike County* exception to the *Narragansett* doctrine “while the state cannot review the reasonableness of the wholesale rate set by the Commission, it may determine whether it is in the public interest for the wholesale purchaser whose retail rates it regulates to pay a particular price in light of its alternatives.” Id.(citing *Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n*, 465 A.2d 735, 738 (1983) (Pike County)).

The Filed Rate Doctrine And Its Relationship to the Narragansett Doctrine – (Filed As Well As Approved Rates Are Covered)

- The filed rate doctrine " forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."
- *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577(1981)

Transmission and Sales for Resale in Interstate Commerce

What is interstate?

- Transmission facilities do not have to cross state lines if the transaction using those facilities does.
- *Jersey Central Power & Light Co. v. FPC, 319 U.S. 61 (1943) (Jersey Central). See also Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945) ("The sole test of jurisdiction of the Commission over accounts is whether these facilities, 'local' or otherwise, are used for the transmission of electric energy from a point in one state to a point in another.")

Transmission and Sales for Resale in Interstate Commerce *(continued)*

What is interstate?

- Transmission and/or resale is interstate if there is a physical interconnection – direct or indirect -- between the transmission or power seller and another transmission or power seller in another state. Jurisdiction is tied to physical flows of power, not contract paths.
- *Federal Power Commission v. Florida Power & Light Company, 404 U.S. 453, reh'g denied*, 405 U.S. 948 (1972) (Florida Power & Light). ("(i)f any (Florida Power & Light) power has reached Georgia, or (if Florida Power & Light) makes use of any Georgia power * * * FPC jurisdiction will attach * * *.")

The "Bright Line" Separation
Between Retail and Wholesale Sales.

- The Federal Power Act creates a "bright line" between FERC and state jurisdiction over power sales: Retail power sales are regulated by the states, sales for resale in interstate commerce are regulated by FERC.
- *FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964)*. ("(Colton) held, among other things, that * * * a California utility that received some of its power from out-of-state was subject to federal and not state regulation in its sales of electricity to a California municipality that resold the bulk of the power to others."). *See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 380 (1983)

"Bright Line" revisited

Jurisdiction Over Demand Response Programs

Electric Power Supply Ass'n v. FERC, 753 F.3d 216 (D. C. Cir. 2014), *reversed*, *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760 (2016)

Under FERC's rules (Order No. 745), end users in organized markets may bid (usually through aggregators) to curtail their electric usage in FERC's wholesale markets and are paid the full locational marginal price (LMP) if their bids are accepted. FERC's rules also provide that states may disapprove of end user participation in these markets.

A coalition of generators, investor-owned, rural electric cooperative and municipal utilities petitioned for review, raising two arguments:

- States have exclusive jurisdiction over retail sales and FERC only regulates wholesale sales. An end user's decision whether to consume electricity is a retail activity exclusively within state jurisdiction under the FPA and not a "practice" affecting wholesale rates.
- Even if FERC had jurisdiction over end user demand response, compensating end users at full LMP is arbitrarily compensating them twice, once for reducing demand and a second time by lowering their electric bills.

"Bright Line" revisited *(continued)*

- **There remains a bright line. BUT** – contrary to lower court, Supreme Court found that the practice of paying end users to reduce consumption was a practice *directly* affecting wholesale rates, not regulation of retail rates. The effect of the practice on wholesale prices was direct because it was tied expressly to the wholesale rate.

  RTO "practice" of paying for demand response did *affect* retail rates, but did not set them. Only the latter was off limits to FERC.

"Bright Line" revisited *(continued)*

Jurisdiction over Storage regulation

NARUC v. FERC, 964 F.3d 1177 (D. C. 2020)

(upholding FERC Order No. 841)

Court held that FERC Order No. 841 constituted "direct regulation" of wholesale markets in barring states from precluding storage providers to sell at wholesale. FERC's comprehensive regulation at wholesale preempted states from barring participation under Supremacy Clause. Permissible even if it has a spillover impact on state regulation.

But Court also held that while states could not bar storage sellers' participation in wholesale markets it could require them to choose between participation in wholesale or retail markets.

"Bright Line" revisited (continued)

- **Jurisdiction over Distributed Energy Resources** (DER)

FERC Order No. 2222 enables DERs (100 kw or greater) to participate alongside traditional resources in the regional organized wholesale markets through aggregations. Order No. 2222, 172 FERC ¶ 61,247 (2020)

Invoking the DC Circuit's ruling upholding Order No. 841, the DER rule follows the same model, denying states "opt out" permitted for demand response programs. Order No. 2222-A, 174 FERC ¶ 61,197 (2021)

"Bright Line" revisited *(continued)*

- *Hughes v. Talen Energy Marketing, LLC*, 578 U.S.__ (2016)
- Maryland law enacted to encourage construction of new generating capacity required load-serving entities (LSEs) to pay winning bidder difference between PJM auction price and higher bid price, but for winning bidder to pay LSEs if bid price was lower than PJM auction price. *These payments were conditioned on bidder clearing the auction.*

"Bright Line" revisited *(continued)*

State-mandated contracts for differences

- Court found that this "contract for differences" mandated by Maryland state law amounted to state regulation of the wholesale price paid by load-serving entities for wholesale power because the amounts received were "tethered" to FERC-set wholesale rates.
- *And* – because FERC has the exclusive power to regulate wholesale rates, Court found Maryland's law preempted under Supremacy Clause.

"Bright Line" revisited *(continued)*

State-mandated contracts for differences

What *Hughes v. Talen* Didn't Decide

While Court struck down MD law, it emphasized that its ruling was "limited":

> *We …do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector.* ****So long as a State does not condition payment of funds on capacity clearing the auction**, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.

Any Questions

Thank You

Harvey L. Reiter
202.728.3016
harvey.reiter@stinson.com