

Energy Attorneys Describe Big Changes in Energy and Pipeline Law

By Kevin Adler, April 15, 2020



Speaking at the Energy Bar Association's spring meeting (held as a single-day virtual conference on April 15, due to COVID-19 precautions), energy attorneys said that the last few years have brought a rapid rate of change to energy law and more critical activity is on the horizon.

"The current period is as profoundly consequential for the development of energy law as any period in our history," said FERC Solicitor Robert Solomon, one of four panelists who discussed recent and upcoming key court cases at the federal level.

"We have 21st Century technological advances and changes in societal values...and disaggregation of energy markets," Solomon said. "But we are trying to fit it into 20th Century statutes and legal frameworks which are premised on stand-alone, vertically integrated companies.... Those no longer replicate the circumstances of the 21st Century industry and regulation of those industries."

Delegation and deference

Perhaps the biggest legal issue that pipelines and utilities should watch is how new cases are challenging the authority that has been delegated to federal agencies that regulate them. For decades, it was agreed that Congress "had broad, virtually unchecked ability to delegate to agencies," explained Zachary Schauf,

partner, Jenner & Block. But in the last few years, this has been increasingly called into question, especially for independent agencies that oversee energy, such as FERC and the Nuclear Regulatory Commission. If federal agencies' authority becomes more limited, it will have immense ramifications for energy producers and users, he said.

"The Supreme Court hasn't struck down a statute on delegation grounds since New Deal era," Schauf said. But it came as close as it has since 1935 in a case in 2019, *Gundy v. United States*. The case involved application of Sex Offender Registration and Notification Act, and whether that law represented a violation of the limits to which Congress can delegate authority.

The court upheld the Act by a 5-3 vote (Justice Brett Kavanaugh had not been confirmed), but the dissent written by Neil Gorsuch called into question the nondelegation doctrine. "In essence, Gorsuch said that the only thing Congress can delegate is filling in the details," said Schauf, but not the essence of the law. If that line of thinking is continued—and Schauf said that Kavanaugh has said he agrees with it—then, "If you put it against EPA and FERC [regulations] and ask yourself is the core policy judgment one that Congress has made or has delegated entirely...you can easily make the case it's a problem under Gorsuch's theory."

A similar challenge to how agencies have operated for decades could come up through the issue of deference. "Once you've got a delegation, the orthodox account of administrative law through the *Chevron* doctrine is that courts will defer to reasonable interpretation," said Schauf, referring to a Supreme Court case in 1984. The court in *Chevron* said that it will defer to an agency's expertise in interpreting its own regulations unless they are "plainly erroneous" or Congress's intent "is unambiguous".

But in *Kisor v. Wilkie*, also decided by the Supreme Court in 2019, the question of at what point a court could overrule deference to agency was raised. Deference was upheld, but barely—and again, with Gorsuch writing a detailed dissent that was signed by three other justices.

Equally significant, Chief Justice John Roberts signed on with the majority, but in doing so, Schauf said he placed new limits on deference, "as if it was the price of his concurrence," said Schauf. The Roberts opinion "left the *Chevron* doctrine very different than when it came to the court," said Schauf. For example, the court asked whether it should accept an agency's interpretation of a regulation, "even if departs from the best reading of the regulation," said Schauf. "It's part of a new a series of limits on that deference. This opens the door for a litigator to present a best interpretation...of the regulation." The majority opinion also placed new procedural requirements on agencies in order to achieve deference.

Adding it up, Schauf said that a case can be made that the independence of an agency such as FERC is under threat. But he said that extreme outcome is not likely to occur. "You can certainly make the argument that if you take the abstract principles in the Gorsuch dissents, you can get yourself there," he said. "FERC [is] making the judgments about how the energy industry is structured that is moored only in the most tenuous way to what Congress has decided."

But Schauf and fellow panelist Emily Hammond, dean at George Washington University School of Law, said that the "just and reasonable standard" through which FERC rate cases are decided is well-established law that's unlikely to be overturned. The principle is more than a century old and predates the Natural Gas Act, Hammond observed.

Also, FERC has another arrow in its legal quiver, said FERC Solicitor Solomon. "Chevron receives most of the attention," he said, "but the main source of deference that FERC receives is the Administrative Procedures Act, which sets the 'arbitrary and capricious standard' for judging its decisions."

While loss of deference might not occur, there's another way in which the independence of agencies is being challenged that bears watching, said Hammond.

Seila Law v. CFPB, for which oral arguments were held at the Supreme Court on March 3, is a little different than FERC or NRC because the Consumer Financial Protection Bureau (CFPB) is headed by one person, Hammond said, whereas the other independent agencies have multiple commissioners who are nominated by each political party and serve staggered terms. But again, a principle that's been in effect since 1935 is under serious review. The idea of laws creating independent agencies is to shield their actions "from winds of political pressure," she said. But Kavanaugh and other judges in federal courts have said that a higher standard should be applied: "protection of the liberty of entities from having to comply with what the government tells them to do." Under that higher standard, Hammond said there's, "Growing momentum among more conservative judges that the 1935

case should be overruled...because, they say, the agencies might interfere with the president's obligation to do his constitutional duty."

Soft deference

As FERC's Solomon explained, the *Chevron* doctrine might be relatively intact for deference under the laws that FERC directly administers: Natural Gas Act and Federal Power Act. But increasingly he's seeing the agency's decisions challenged when it interprets other laws for which it is not the chief administrator, such as the National Energy Policy Act (NEPA), Coastal Zone Management Act, Endangered Species Act and Minerals Leasing Act. Increasingly, he sees FERC challenged on issues such as whether it is sufficiently considering under NEPA environmental justice and indirect effects on upstream natural gas production and downstream natural gas consumption. And the challenges can run in surprising areas, such as a major case last year that challenged FERC under the Religious Restoration Freedom Act, on behalf of nuns who opposed a pipeline's path in Pennsylvania.

Another way to think of these cases is that they are about "soft deference," said Seamon Joyce, a partner at Sidley Austin. "Soft deference is where FERC has spoken either outside or on margin of its delegation...and it may presage some issues that are coming down the pike," he said.

The Fourth Circuit's review of the Section 401 Clean Water Act certificates for the Atlantic Coast Pipeline (ACP) is one example, he said, as "it is purely in Virginia's power to decide the issue."

Opponents of ACP argued that Virginia Department of Environmental Quality did not conduct an anti-degradation review before issuing the permit. The court approved Virginia's decision because FERC had done the required review instead. "This means that regardless of what the courts say...in terms of formal deference...reasoned decision-making by FERC will get deference from the court," he said. "This is because FERC does meaningful work...often more meaningful than the work done by the states."

Other major cases

Panelists also briefly discussed recent and upcoming activity about issues of eminent domain, tolling and federal-state deference. Several of these involve the growing issue of federal-vs.-state preemption issues, said Solomon. "The problem is that statutes do not reflect what going on in industry," he said. "There has been a transition in Supreme Court thinking...that there was a sharp, clear dividing line of federal and state authority but in recent decades the court recognized overlapping and complementary authority. Justice Kagan in 2006 *FERC v EPSA* said federal and state authority cannot be divided into hermetically divided spheres.

A brief summary of the cases is below:

Eminent domain. *U.S. Forest Service v. Cowpasture River Preservation Association, and Atlantic Coast Pipeline LLC v. Cowpasture River Preservation* were heard in oral argument by the Supreme Court on February 24, over US Forest Service permits for the ACP. FERC's involvement comes from accepting the Forest Service's review of the project, which is now being challenged.

More eminent domain. Joyce called *Cowpasture* "the least interesting, and the least significant," of the eminent domain cases in federal courts. He said that the *City of Oberlin v. FERC* that was decided by the DC Circuit Court raises interesting issues. "It seemed easy on paper, right in FERC's heartland [to decide] on whether a pipeline is in the public interest," he said. "But the city challenged the use of eminent domain because only 40% of the gas in the pipeline [NEXUS Pipeline] will be used domestically." The DC Circuit found that FERC's approval was "arbitrary and capricious," and it said the Commission must explain why such a large share of exported gas is in the public interest.

And more eminent domain. A lawsuit involving the PennEast Pipeline project seems likely to receive Supreme Court review, said Joyce. It is an appeal of a Third Circuit decision from last year in which the court said that FERC could not condemn for the benefit of a private party, the pipeline developer, over a state's objection of use of land it is holding in an environmental easement. "The court recognized that [the decision] may disrupt the Natural Gas Act," Joyce said. "It could be a sea change in how pipelines should be routed, and relationship of developers in states that are hostile to pipelines."

Tolling. Following what Joyce called a "blistering" concurring statement by one judge in a DC Circuit case, the same court agreed to hear the question of FERC use of tolling agreements in *Allegheny Defense Project et al. v.*

FERC. Already FERC has changed its policy to attempt to respond to any rehearing request within 30 days, as the judge criticized tolling orders that too so long that the pipeline was almost completed before the rehearing request was denied. Said panel moderator Kathleen Barron, senior vice president of government and regulatory affairs at Exelon Corp., “I can’t think of a topic that would cause more of a panic at FERC if they have to write rehearing decisions in 30 days.”

Clean Water Act Section 401. States are required to make decisions on Clean Water Act Section 401 permits within a year, a timeline that has been violated many times. In *Hoopa Valley*, the DC Circuit upheld a decision that a state lost its ability to issue a Section 401 permit for a hydroelectric dam because it allowed the applicant to repeatedly resubmit its application in order to restart the one-year deadline. FERC then applied the ruling to the New York State Department of Environmental Conservation’s (NYSDEC) delays on pipeline permits, and Joyce said the Commission is “taking a very hard action on any case that takes more than a year.” But NYSDEC has challenged FERC in the 2nd Circuit, saying that *Hoopa Valley* has limited application, and the state can decide on issues such as when an application is complete, and the one-year clock starts to tick.

A final issue that could affect FERC, as well as other federal agencies, involves administrative law judges (ALJ). As a case now at the US Court for the DC Circuit involves the Horse Protection Act and the US Department of Agriculture, explained Hammond. In essence, it seeks to remove the protections that ALJs hold from removal, which are quite limited to “for cause” actions. This is under attack, she said. “Justice Kavanaugh endorsed this principle [less protection for ALJs] when he was on DC Circuit, and I’m seeing it gaining increasing traction on the part of conservative judges and attorneys,” said Hammond