

# EBA BRIEF<sup>TM</sup>

*A Quarterly Publication of the Energy Bar Association*



## 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?

BY HARVEY L. REITER

### Introduction

Under the Supreme Court's by now famous *Chevron* doctrine, federal administrative agencies interpreting ambiguous statutory provisions they have been entrusted to administer enjoy a judicial benefit of the doubt: If their interpretations of those statutes are reasonable courts will uphold them even if the courts would have interpreted the provisions otherwise.<sup>1</sup>

In the years following *Chevron*, the Supreme Court and lower courts have carved out a handful of limited exceptions to the doctrine: statutory interpretations found in agency actions that do not carry the force of law don't qualify,<sup>2</sup> nor can an agency claim deference if the courts have previously determined the statutory provision in question to be unambiguous.<sup>3</sup> An agency's interpretation of statutory terms governing the timing of appellate

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review likewise do not qualify for *Chevron* deference because those provisions are not administered by the agency, but apply directly to the courts.<sup>4</sup> When an agency relies, not on its own judgement, but its misreading of a court's interpretation of a statute, it gets no *Chevron* deference either.<sup>5</sup> When two agencies are charged with administering the same ambiguous statute and come to different interpretations, neither qualifies for *Chevron* deference.<sup>6</sup> Nor may an agency claim deference when it erroneously concludes that the statute in question is unambiguous.<sup>7</sup>

Until recently, what commentators have called the “major questions doctrine”<sup>8</sup> formed one further but very narrow limitation on *Chevron*'s applicability.<sup>9</sup> As originally characterized, the “major questions doctrine” was to be confined to “extraordinary cases”<sup>10</sup> of “deep ‘economic and political significance.’”<sup>11</sup> In such extraordinary cases, the Court must first ascertain that Congress has expressly assigned that interpretive role to the agency before giving the agency *Chevron* deference.<sup>12</sup> And here the operative phrase is “extraordinary cases,” for numerous agency rulemakings upheld by the courts have had indisputable “deep economic and political significance.”<sup>13</sup> The circumstances in both the canonical *Brown & Williamson* and *King v. Burwell* “major questions” cases were extraordinary. In ruling that the Food and Drug Administration (FDA) (at the time) lacked authority to regulate nicotine, the Court weighed heavily both the FDA's numerous past disclaimers of jurisdiction and Congress's rejection of legislation that would have given it that power.<sup>14</sup> And it concluded that, “although agencies are generally entitled to deference in the interpretation of statutes that they administer, ... Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.”<sup>15</sup> Put another way, it found that the agency's interpretation of its authority failed at *Chevron* step one. The circumstances in *King v. Burwell* were equally extraordinary. At issue there was the legality of the IRS's

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rule that the tax credit available to individuals taking health insurance under “an Exchange established by the State” would also apply to individuals taking the insurance under a Federal Exchange.<sup>16</sup> The Court gave the agency’s interpretation of the Affordable Care Act no *Chevron* deference, finding it implausible that Congress would have delegated key health policy decisions to a tax collection agency.<sup>17</sup>

It bears emphasis, as Professor Cass Sunstein has pointed out, that even in those “extraordinary cases” when the agency is denied *Chevron* deference it “does not necessarily mean that the agency will lose; it means only that the question of law will be resolved independently by courts. In *King v. Burwell*, the agency won.”<sup>18</sup> In *Brown & Williamson*, the agency lost, but in both cases the Court found *Chevron* deference inapplicable.<sup>19</sup> Two recent Supreme Court decisions—*Alabama Ass’n. of Realtors v. Department of Health and Human Services*<sup>20</sup> and *National Federation of Independent Business v. OSHA*<sup>21</sup>—however, appear to announce a significant expansion of the doctrine. The first of these involved a successful challenge to the legality of the Center for Disease Control’s (CDC) extension of a nationwide eviction moratorium as a COVID-prevention measure.<sup>22</sup> In the second case, the Court upheld a preliminary injunction barring the Occupational Health and Safety Administration (OSHA) from using its emergency powers to protect worker health to require that employers either test their employees for COVID or confirm they had been vaccinated.<sup>23</sup> Since the emergency standard was to remain in effect for only six months, the preliminary injunction effectively terminated the rule.<sup>24</sup>

The concern for FERC and other regulatory agencies posed by these most recent “major question

doctrine” cases goes beyond whether their interpretations of ambiguous statutory provisions will qualify for *Chevron* deference. As these cases articulate it, the absence of clear Congressional expression does not mean simply that the interpretive task falls to the courts, but that the agency lacks the power to regulate. The risk is that the major question doctrine, thus framed, can be used, as it was in these two opinions, to strip agencies of their power altogether in cases the court determines are simply too big and the Congressional delegation not precise enough.

Although his article preceded these decisions, Sunstein saw *King v. Burwell* and related cases as examples of what he termed the “weak” version of the major questions doctrine, where the courts simply hold *Chevron* inapplicable.<sup>25</sup> But he also warned that under the “strong version” of the doctrine, “[t]he idea is not merely that courts will decide questions of statutory meaning on their own. It is that such questions will be resolved unfavorably to the agency.”<sup>26</sup> Put another way, under the “strong version,” the agency would be stripped entirely of its power to regulate.<sup>27</sup> Sunstein would almost certainly characterize the *Alabama Realtors* and *OSHA* opinions as falling into the latter category.

Two—although currently only two—of the current members of the Supreme Court have directly called into question the validity of the *Chevron* doctrine<sup>28</sup>—Justice Gorsuch while serving as a judge on the Tenth Circuit Court of Appeals<sup>29</sup> and Justice Thomas in dissent in *Baldwin v. United States*.<sup>30</sup> But the *Alabama Relators* and *OSHA* decisions—both the products of the Court’s “shadow docket”<sup>31</sup>—have arguably so expanded the “major questions” doctrine exception to *Chevron* that they threaten to swallow the

doctrine whole. The expansive language of these opinions—and, in particular, the concurring opinion in *OSHA*—may give appellate courts a new *de facto* veto power over agency rulemakings. They may now have the power to overturn agency decisions whenever, in their subjective judgment, the courts conclude that an agency’s policy initiative was too big and too important to be entrusted to it.<sup>32</sup> Indeed, without expressly saying so, the Court’s *per curiam* opinion in *OSHA* comes very close to an endorsement of the non-delegation doctrine *without* the limiting, i.e., “intelligible principle” exception—that only Congress can legislate, so rulemaking on major questions, as a form of legislation, is unconstitutional.<sup>33</sup> As Justice Kavanaugh has pointed out, Justice Gorsuch has endorsed this limitation on agency power expressly. “Justice Gorsuch,” he observed, “would not allow ... congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority.”<sup>34</sup>

How might the *Alabama Realtors* and *OSHA* decisions have affected some of the major rules adopted by FERC and its predecessor, the FPC? And how might these decisions affect the flexibility of administrative agencies, including FERC, to undertake major policy initiatives once thought to fall safely within their bailiwicks? This article examines those questions.

### **I. The *Alabama Realtors* and *OSHA* Opinions**

Why the recent focus on a doctrine heretofore reserved for “extraordinary cases”? In their provocatively-titled piece *The Trump Administration’s Weaponization of the “Major Questions” Doctrine*,<sup>35</sup> New York University law professor Richard L. Revesz and [www.eba-net.org](http://www.eba-net.org)

Yale law student Natasha Brunstein discussed their review of Justice Department briefs submitted during the Trump Administration and their conclusion that the Department had invoked the doctrine “routinely to support its deregulatory efforts.”<sup>36</sup> As the authors described it in their May 2021 piece: “In the hands of Trump’s Justice Department, the major questions doctrine became a weapon that could be wielded as a broadside attack on the administrative state.”<sup>37</sup> “Future invocations of the doctrine,” they predicted, “are likely to now come from Republican Attorneys General opposing Biden Administration regulations.”<sup>38</sup>

Their latter prediction has proven prescient. The *Alabama Realtors* and *OSHA* cases, challenging, respectively, the CDC’s eviction moratorium and OSHA’s vaccine rule, both involved “major question doctrine” challenges—successful ones—by “red” state attorneys general.<sup>39</sup> I turn to those two cases next.

#### **A. *Alabama Realtors* and the Eviction Moratorium**

*Alabama Realtors* involved a successful challenge by a group of landlords to the Biden Administration’s extension of a COVID-related eviction moratorium first imposed by the CDC during the Trump Administration.<sup>40</sup> The rule in question imposed a nationwide moratorium on evictions of any tenants who “live in a county that is experiencing substantial or high levels of COVID-19 transmission and who make certain declarations of financial need.”<sup>41</sup> Finding it “virtually certain” that the landlords would succeed on the merits the court granted a stay of the moratorium.<sup>42</sup>

The opinion opens with the Court’s discussion of why it concluded that the statute under which the CDC had claimed its authority was not ambiguous, an implicit ruling under *Chenoweth* one. As the Court

explained, the express authorization for the earlier eviction moratorium was specific federal COVID relief legislation that had expired.<sup>43</sup> To extend the moratorium, the CDC had relied on § 361(a) of the 1944 Public Health Service Act, a statute that “has rarely been invoked” and then been “limited to quarantining of infected individuals and prohibiting the sale of animals known to transmit disease.”<sup>44</sup> Reading the first two sentences of the provision together, the Court rejected the CDC’s argument, regarding it as “a stretch to maintain that § 361 gives the CDC the authority to impose this eviction moratorium.”<sup>45</sup>

The Court went on to conclude that the moratorium failed the major questions doctrine, but as an argument in the alternative: “*Even if the text were ambiguous*, the sheer scope of the CDC’s claimed authority under § 361(a) would counsel against the Government’s interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”<sup>46</sup>

While the Court itself has since described the *Alabama Realtors* case as an application of the “major questions” doctrine,<sup>47</sup> its reference to the doctrine was unnecessary to its ruling. That makes the reference at least arguably dicta,<sup>48</sup> a point rendered moot by the *OSHA* opinion.<sup>49</sup>

## B. OSHA and the Vaccine Rule

At the heart of the *OSHA* case was the scope of the Occupational Safety and Health Administration’s emergency authority under Occupational Safety and Health Act of 1970.<sup>50</sup> Most rules governing safety and health in the workplace must go through the familiar notice and comment procedure. But under OSHA’s

emergency powers, it may adopt temporary standards allowed to “take immediate effect upon publication in the Federal Register.”<sup>51</sup> Such emergency standards, however, must be supported by evidence (1) “that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” and (2) that the “emergency standard is necessary to protect employees from such danger.”<sup>52</sup> If the agency’s fact findings in support of the rule are supported by substantial evidence, under a judicial review provision nearly identical to those found under the Federal Power and Natural Gas Acts, the courts must treat those findings as “conclusive.”<sup>53</sup>

Last fall, acting under its emergency authority, and citing the extreme health risk COVID-19 posed to millions of workers, OSHA adopted a temporary rule “requiring either vaccination or masking and testing, to protect American workers.”<sup>54</sup> The virus, OSHA found, is a “new hazard” as well as a “physically harmful” “agent.”<sup>55</sup> The rule’s adoption, the agency estimated, would have “save[d] over 6,500 lives and prevent[ed] over 250,000 hospitalizations in six months’ time.”<sup>56</sup> OSHA defended the broad scope of the rule—applicable to companies employing over 100 persons—by noting that “[t]he science of transmission does not vary by industry or by type of workplace; that testing, mask wearing, and vaccination are highly effective— indeed, essential—tools for reducing the risk of transmission, hospitalization, and death; and that unvaccinated employees of all ages face a substantially increased risk from COVID-19 as compared to their vaccinated peers.”<sup>57</sup>

The rule would have applied broadly—the agency found that COVID-19 exposure was not limited to



those working in close quarters. Rather, it is “readily transmissible in workplaces because they are areas where multiple people come into contact with one another, often for extended periods of time.”<sup>58</sup> This, the agency found, meant that workplace outbreaks could occur “not just in cheek-by-jowl settings like factory assembly lines, but in retail stores, restaurants, medical facilities, construction areas, and standard offices.”<sup>59</sup> But it did draw distinctions, for example, between those working in offices and factories and those working outdoors, alone, or from home, exempting the latter group entirely.<sup>60</sup> It also would have provided religious exemptions and exemptions for medical necessity.<sup>61</sup> Finally, nothing in the rule would have precluded any employer able to show that its “conditions, practices, means, methods, operations, or processes” make its workplace equivalently “safe and healthful” from seeking an exemption.<sup>62</sup>

Quoting its earlier decision in *Alabama Realtors*, however—and thereby elevating dicta to precedent—the Court enjoined operation of the rule: “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. There can be little doubt that OSHA’s mandate qualifies as an exercise of such authority. The question, then, is whether the Act plainly authorizes the Secretary’s mandate. It does not.”<sup>63</sup>

At the apparent heart of the Court’s ruling was its determination that by enacting a statute governing *workplace* safety, Congress could not have intended to grant OSHA authority to adopt health measures to address “the everyday risk of contracting COVID-19 that all face.”<sup>64</sup> The rule’s “indiscriminate” approach, it concluded, “fails to account for this crucial distinction— between occupational risk and risk more

generally—and accordingly the mandate takes on the character of a general public health measure, rather than an ‘occupational safety or health standard.’”<sup>65</sup> The court did not reject a vaccine/masking and testing mandate outright however, stating that OSHA could “regulate risks associated with working in particularly crowded or cramped environments.”<sup>66</sup>

The concurring opinion by Justices Gorsuch, Alito, and Thomas goes even further. It not only states expressly that this was a “major questions doctrine” case (the *per curiam* decision did not use the phrase) but makes clear the concurring Justices’ view that an agency rule addressing a major question without express Congressional authorization would violate the Constitution’s separation of powers.<sup>67</sup> And, the concurrence concludes, “OSHA’s mandate fails that doctrine’s test.”<sup>68</sup>

The scope of the concurrence is breathtaking. Consider what it demands before it would find clear authorization from Congress to address a major question. “Section 655(c)(1),” the concurrence states, “was not adopted *in response to the pandemic*, but some 50 years ago at the time of OSHA’s creation.”<sup>69</sup> This author, at least, and I suspect other practitioners before regulatory agencies, have long assumed that the authority granted agencies is intentionally broad, precisely to address changed circumstances Congress could not expressly anticipate. “Regulatory agencies,” after all, “do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy.”<sup>70</sup> “[A]n agency,” regulatory practitioners have long been taught, “*must* be given

ample latitude to ‘adapt their rules and policies to the demands of changing circumstances.’”<sup>71</sup>

As support for their position, the concurring Justices make two claims. Citing the Supreme Court’s 1994 decision in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, they maintain that “[f]ar less consequential agency rules have run afoul of the major questions doctrine.”<sup>72</sup> They also cite then Judge Kavanaugh’s dissent from the D.C. Circuit’s denial of rehearing en banc in *United States Telecom Assn. v. FCC* as an articulation of the scope of the doctrine.<sup>73</sup>

It is hard to see how the *MCI* case qualifies as an application of the major questions doctrine. At issue there was a rule that would have *eliminated* statutory filing requirements for all but one telephone company based on the FCC’s authority to *modify* filing requirements. But in rejecting the rule the Court simply held that the FCC had failed at *Chevron* step one. “[A]n agency’s interpretation of a statute,” it held, “is not entitled to deference when it goes beyond the meaning that the statute can bear.”<sup>74</sup> *MCP*’s discussion of major versus minor changes was about the meaning of the statutory term “modify,” not about the “major questions doctrine.”<sup>75</sup>

The concurring Justices’ reference to then Judge Kavanaugh’s dissent, if anything, has even broader implications. In *United States Telecom Ass’n v. FCC*, the D.C. Circuit, citing *Chevron* and *Brand X*, upheld the FCC’s determination (its net neutrality rule) that providers of broadband internet service were telecommunications carriers under the 1996 Telecommunications Act.<sup>76</sup> The FCC’s rule had reversed an earlier FCC interpretation that had also been upheld on *Chevron* grounds by the Supreme Court in *Brand X*.<sup>77</sup> Dissenting from the Court’s refusal to

grant rehearing en banc, then Judge Kavanaugh argued that the question was so big—and Congress’s intent so ambiguous—that the FCC had no authority to adopt a rule on the subject (i.e., what constitutes a telecommunications carrier) at all.<sup>78</sup> While now Justice Kavanaugh did not join in the concurrence, it seems likely that the three concurring Justices believe Justice Kavanaugh is in their camp.

What was remarkable about the Kavanaugh dissent was that in 2005 the Supreme Court itself had upheld the *same* agency’s interpretation of the *same* statutory provision on *Chevron* grounds—years after the “major questions doctrine” had been developed. The Supreme Court’s decision a few years later in *City of Arlington, Tex. v. FCC* left no room for doubt, at least in 2013, that the question was not too big for the FCC to decide. Justice Scalia, speaking for the Court, expressly cited the example of a regulatory agency deciding who is a common carrier as an example of a question that would be evaluated under *Chevron*.<sup>79</sup> These very points were raised in an unusual response by two of the D.C. Circuit’s judges in taking issue with the Kavanaugh dissent.<sup>80</sup> As those judges noted, in *Brand X* the Supreme Court had “no difficulty concluding that *Chevron* applic[ed] to the agency’s decision to classify cable broadband as an information service rather than a telecommunications service.”<sup>81</sup>

Although the “major question” doctrine has been thought of as a *Chevron* exception, surprisingly, neither the Court speaking *per curiam* in *OSHA*, nor the concurrence makes any reference to *Chevron*. *Alabama Realtors* makes no mention of *Chevron*, either. The Court frames the question in *OSHA* as “whether the Act *plainly* authorizes the Secretary’s mandate.”<sup>82</sup> Under *Chevron*, however, the twofold issue isn’t

whether the Act “plainly authorizes” the Secretary’s mandate, but whether it *arguably* does so and whether that argument is reasonable. Indeed, for the reasons discussed in more detail later in this article, the Court’s decision is hard to square with its decision less than a decade ago in *City of Arlington v. FCC*. As the late Justice Scalia wrote for the Court in that case, “We consider whether an agency’s interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron*” and conclude that it does.”<sup>83</sup>

In the next section, this article explores not only the apparent inconsistency between the Court’s *Alabama Realtors* and *OSHA* decisions on one hand and *City of Arlington* and predecessor cases on the other, but why the former—and in particular the concurring opinion in *OSHA*—cannot be squared with numerous appellate decisions upholding some of FERC’s landmark decisions.<sup>84</sup>

## II. How Would Some of FERC’s and the FPC’s Major Rulemakings Have Fared Under the Court’s Expanded “Major Questions Doctrine”?

### A. Is the Historic Flexibility Accorded Agency Rulemakings Still Good Law, or Would Past Rules Now Pose “Major Questions” Triggering the Doctrine?

What constitutes a rule of vast economic and political significance under *Alabama Realtors* and *OSHA*? And when that threshold is met, what constitutes clear or express Congressional intent?<sup>85</sup> In the past, what constituted a case of “vast economic and political significance” triggering the clear Congressional authorization threshold was limited to “extraordinary cases.”<sup>86</sup> *Alabama Realtors* and *OSHA*, however, seem not only to have greatly diminished, if not abandoned this threshold requirement, but to have

raised the bar for proof of clear Congressional intent when the “major questions” doctrine is triggered.

#### 1. *The new relevance of previously unclaimed authority.*

While the Court has not defined “vast economic and political significance,” one factor common both to the *Alabama Realtors* and *OSHA* cases is the Court’s conclusion that the agencies had never previously claimed the authority to do what they did. In the case of the CDC’s eviction moratorium the Court noted that the agency’s seventy-five year old emergency powers had “rarely been invoked” and “never before to justify an eviction moratorium.”<sup>87</sup> And in *OSHA* it similarly found that in the fifty years the Occupational Safety and Health Act had been in existence, OSHA had “never” used its emergency powers “to issue a rule as broad as this one.”<sup>88</sup> “OSHA, in its half century of existence,” it stated, “has never before adopted a broad public health regulation of this kind.”<sup>89</sup>

What the Court seems to be saying is that under the major questions doctrine, an agency may be found to lack statutory authority, not because the statutory terms are insufficiently broad, but because it is doubtful that Congress would intend a broad but infrequently used delegation of authority to cover something so important. A standard, however, that triggers the doctrine whenever an agency adopts a new or novel interpretation of even broadly worded statutory authority would have significant implications. As Professor Sunstein notes:

Many agencies, and many administrations, are interested in adopting significant initiatives, asserting novel authority, and breaking with the past (even with longstanding interpretations of statutory provisions). This is especially true at the beginning



of a new presidential term, but it can be true as well at the start of a second term, or even in the middle.<sup>90</sup>

The Court's focus on the newness of the agency's position, moreover, would represent a sea change in the view the Court and lower courts have taken of the flexibility Congress has intentionally built into the structure of regulatory regimes. There are many examples.

Consider, for instance, the Supreme Court's 1943 decision in *Nat'l Broadcasting Co. v. United States*.<sup>91</sup> There, roughly a decade after passage of the 1934 Communications Act, it upheld the FCC's "Chain Broadcasting Regulations," a major rule governing limitations on the ability of large radio networks, among other things, to own local radio stations or restrict the ability of local stations to negotiate with non-network advertisers.<sup>92</sup> "Congress," it observed, "was acting in a field of regulation which was both new and dynamic."<sup>93</sup> The Court acknowledged that the Act did "not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest."<sup>94</sup> But "[i]n the context of the developing problems to which it was directed, the Act gave the Commission . . . expansive powers."<sup>95</sup> "[T]his kind of flexibility and adaptability to changing needs and patterns of transportation," it similarly emphasized a quarter century later in affirming an Interstate Commerce Commission rule in *American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Railway Co.*, "is an essential part of the office of a regulatory agency."<sup>96</sup> "Regulatory agencies," it famously said,

[D]o not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their

rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.<sup>97</sup>

In what was then a thirty-five year old Federal Power Act, the Federal Power Commission found that the transmission of electricity between two utilities located entirely within the state of Florida nonetheless involved transmission in interstate commerce giving the agency authority to regulate their transactions.<sup>98</sup> The Supreme Court's opinion in *FPC v. Florida Power & Light*<sup>99</sup> upholding the Commission's jurisdictional claim effectively—and virtually overnight—brought nearly every transmission arrangement within the 48 contiguous states under federal jurisdiction.<sup>100</sup> At the time, one would have been hard-pressed to say that this was not an agency action of "vast economic and political significance."<sup>101</sup>

Fifteen years later the Commission went even bigger in Order No. 436. There, the FPC's successor FERC would find in what was by that time a nearly fifty-year old Natural Gas Act's prohibition against "undue discrimination" the authority to create a nationwide open access regime for natural gas pipelines.<sup>102</sup> This rule had indisputably vast economic and political significance. In upholding the rule, the D.C. Circuit predicted it might "come to rank with the three great regulatory milestones of the industry."<sup>103</sup>

Parties challenging the rule claimed then, as opponents of OSHA's vaccine rule have more recently argued, that it was too late in the day to discover such vast authority in decades-old legislation. The court had little trouble disposing of that argument:

It is finally argued that the Commission's not having imposed any requirements like those of Order No. 436 in the period from enactment in 1938 until the present demonstrates the lack of any power to do so. But as our introductory review of the economic background sought to illustrate, the Commission here deals with conditions that are altogether new. Thus no inference may be drawn from prior non-use.<sup>104</sup>

Eleven years after Order No. 436, FERC issued Order No. 888.<sup>105</sup> There, it found that the seventy-five year old Federal Power Act gave it the power to order jurisdictional utilities nationwide to file open access transmission tariffs.<sup>106</sup> That order “laid the foundation for the development of competitive wholesale power markets by requiring public utilities to offer nondiscriminatory open access transmission services.”<sup>107</sup> The D.C. Circuit described Order No. 888 in similarly broad terms—an “effort to end discriminatory and anticompetitive practices in the national electricity market.”<sup>108</sup> As in Order No. 436, FERC relied on its long-extant power to remedy undue discrimination for its industry transformative rule.<sup>109</sup> That rule, too, was affirmed on appeal on *Chevron* grounds.<sup>110</sup>

A little over a decade ago, FERC issued Order No. 1000 mandating that jurisdictional utilities engage in coordinated regional transmission planning.<sup>111</sup> The courts upheld that rule, too, agreeing that the agency's authority to regulate “practices” related to interstate transmission service was broad enough to give it that power.<sup>112</sup> And as recently as 2016, in *Electric Power Supply Ass'n v. FERC*, the Supreme Court relied on that same “practices” authority to uphold FERC's Order No. 745.<sup>113</sup> This was a rule regulating demand response

as a “practice” related to the sale for resale of electricity, even though demand response—the *non-purchase* of electricity<sup>114</sup>—was the opposite of the sale for resale of electricity. It was far more likely that the Congress of 1970 that passed the Occupational Safety and Health Act envisioned a future pandemic than that the 1935 Congress that passed the Federal Power Act had any notion that “demand response” could become a thing.

## 2. *The new relevance of the number of persons affected.*

Aside from the newness of the claimed authority, the Supreme Court's *OSHA* opinion also signals that the number of persons or businesses affected (in that case potentially 84 million employees) will help identify what regulations trigger the major questions doctrine.<sup>115</sup> But, like other landmark agency regulations relying on previously unclaimed authority, this large-number-of-affected-persons standard would call into question some of the same major rules discussed above. FERC Order Nos. 436 and 888, for example, affected virtually every interstate natural gas pipeline and public utility, respectively, in the United States.

Rulemakings, which establish regulations of general applicability, will almost by definition affect large numbers of businesses and persons. Indeed, Congress anticipates as much when it creates major regulatory regimes. “The avowed aim of the Communications Act of 1934,” for example, “was to secure the maximum benefits of radio to *all* the people of the United States. To that end, Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio.”<sup>116</sup>

“Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.”<sup>117</sup> The FDA, for example, is given broad rulemaking authority to determine when drugs are “safe and effective.”<sup>118</sup> When the FDA establishes procedures for approval of vaccines, including the COVID vaccine, its regulations will inevitably affect the lives and health of millions of persons. By making the large number of persons covered by a rule enough to define the rule as one of “vast economic and political significance,” the Court has effectively written the “extraordinary circumstances” limitation out of its major rules doctrine precedent. Had the standard seemingly articulated in *Alabama Realtors* and *OSHA* been in effect when FERC’s landmark decisions discussed above (and likely many others) were issued, it is exceedingly difficult to see how judicial review of those decisions would not have been subject to the expanded major questions doctrine.

### **B. Would the Statutory Provisions Supporting Past FERC/FPC Rulemakings be Specific Enough Under *Alabama Realtors* and *OSHA*?**

The prior section of this article has explored how a number of past FERC/FPC policy decisions would have constituted agency action of “vast economic and political significance” under *Alabama Realtors* and *OSHA*. But even if these decisions would have been considered major rules, would they nonetheless have survived review as agency actions clearly authorized by Congress? Almost certainly not.

Open access, regulation of demand response, market-based rates, and area rates<sup>119</sup> are all policies of unquestionable vast economic and policy significance.

And all of these agency policies have been justified by reliance on broadly worded authority given to FERC under the NGA and FPA to regulate “transmission of electric energy in interstate commerce,”<sup>120</sup> to set “just and reasonable rates,”<sup>121</sup> to prevent “undue preference”<sup>122</sup> or to regulate “practices” “affecting or pertaining to” transmission and wholesale service,<sup>123</sup> and to take such actions as “it may find necessary or appropriate to carry out the provisions” of those Acts.<sup>124</sup>

FERC practitioners will be familiar with the notion that its authority under these types of statutory terms has been described as “at its zenith” when fashioning remedies.<sup>125</sup> Broad terms like “public interest,” “necessary and appropriate” and the like, however, are hardly explicit directions from Congress—certainly no more explicit than OSHA’s authority to enact temporary emergency rules to help protect worker health and safety, authority that the Court found insufficient to justify OSHA’s vaccine rule. But it was both long ago and not so long ago that the federal courts found ample evidence of Congress’s intent to delegate major policymaking powers to federal agencies from terms just like these.

Take, for example, the Supreme Court’s decision in *Nat’l Broad. Co. v. U.S.* discussed earlier.<sup>126</sup> The FCC’s “Chain Broadcasting Regulations” rules at issue in that case governed limitations on the ability of large radio networks, among other things, to own local radio stations, or restrict the ability of local stations to negotiate with non-network advertisers.<sup>127</sup> “The touchstone provided by Congress,” it noted, “was the ‘public interest, convenience, or necessity,’ a criterion which ‘is as concrete as the complicated factors for judgment in such a field of delegated authority

permit.”<sup>128</sup> “This criterion,” it emphasized, “is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power.”<sup>129</sup>

Consider, also, the D.C. Circuit’s dismissal, decades later, of challenges that FERC lacked sufficient statutory authority to adopt Order No. 436’s open access regulations:

While the Supreme Court’s decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* is not a wand by which courts can turn an unlawful frog into a legitimate prince, the case bolsters our conclusion. Congress has given the Commission in § 5 of the NGA a broad power to stamp out undue discrimination; in § 7 the power to approve certificates of service subject to “such reasonable terms and conditions as the public convenience and necessity may require”; and in § 16 the power to “perform any and all acts, and to prescribe ... such orders, rules, and regulations as it may find necessary or appropriate to carry out the [NGA’s] provisions.” The alleged negative restriction on this power is at best ambiguous, if indeed it exists at all. Under these circumstances, *Chevron* binds us to defer to Congress’s decision to grant the agency, not the courts, the primary authority and responsibility to administer the statute. The Commission’s view represents “a reasonable interpretation” of the Act, for which we may not substitute our view.<sup>130</sup>

Only a few years after the D.C. Circuit upheld Order No. 436, the late Justice Scalia noted that the Supreme Court had “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>131</sup> And it made this point again in its 2001 decision in *Whitman v. Am. Trucking Ass’n*.<sup>132</sup>

While the concurring opinion in *OSHA* cites *Whitman v. Am. Trucking Ass’n* as a “major questions” decision,<sup>133</sup> the two decisions could scarcely be more different in their implications. To be sure, the Court in *Whitman* found the use of “modest words” in a statute would be relevant in ascertaining the scope of the agency’s powers.<sup>134</sup> But it was *not* suggesting the inapplicability of *Chevron* in such instances. Rather, it simply pointed out that statutory silence or words of limited scope would be “one of the factors to be considered in determining whether there is ambiguity,” thus qualifying the agency’s interpretation for deference.<sup>135</sup> More importantly, *Whitman* reemphasized that broadly worded delegations of power to regulatory agencies are constitutionally sufficient to authorize agency actions of great consequence.

At issue in *Whitman* was a delegation challenge, i.e., the constitutional question “whether the statute has delegated legislative power to the agency” (in that case, the National Ambient Air Quality Standards).<sup>136</sup> In such cases, the question, in turn, is whether the legislation contains “an intelligible principle to which the person or body authorized to [act] is directed to conform.”<sup>137</sup> This, the Court made clear, was not a high bar.

“In the history of the Court,” it said, “we have found the requisite ‘intelligible principle’ lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’”<sup>138</sup> On the other hand, it recounted that an “intelligible principle” had been found in statutory

authority (1) for the Securities and Exchange Commission to establish holding company structures that are not “unduly or unnecessarily complicated,” (2) agency power to fix “fair and equitable” wartime commodity prices, (3) and to regulate in the “public interest.”<sup>139</sup> Reversing the D.C. Circuit, the Court found the EPA’s authority to set air quality standards “requisite” to protect public health “fits comfortably” within its Congressionally-delegated authority.<sup>140</sup>

The *City of Arlington* case mentioned earlier is perhaps the last full-throated endorsement by the Supreme Court of the *Chevron* doctrine. The Telecommunications Act of 1996 “requires state or local governments to act on wireless siting applications ‘within a reasonable period of time after the request is duly filed.’”<sup>141</sup> Relying on its general authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions,” the FCC issued a declaratory order defining how much time local governments would have to respond to wireless siting applications.<sup>142</sup> Several state and local governments challenged the FCC’s ruling. They argued that the FCC lacked authority to interpret ambiguous statutory provisions going to its jurisdiction.<sup>143</sup> But the Court emphatically rejected that argument. “The label [between jurisdictional and non-jurisdictional cases],” it admonished, “is an empty distraction because every new application of a broad statutory term can be reframed as a questionable extension of the agency’s jurisdiction.”<sup>144</sup>

Even after a cursory reading, it seems clear that under *City of Arlington*, the Court would only find *Chevron* inapplicable in the truly “extraordinary cases” of “deep economic and political significance” it would

later mention in *King v. Burwell*. Indeed, *City of Arlington* cites *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, as an example of a jurisdictional case in which the Court “applied the *Chevron* framework.”<sup>145</sup> This is the same case the OSHA concurrence inaccurately describes as an example of “consequential agency rules [that] have run afoul of the major questions doctrine.”<sup>146</sup> And, while it is arguably dicta, to illustrate why an agency’s claim to jurisdiction was entitled to *Chevron* deference, Justice Breyer, concurring in *City of Arlington*, cited the Court’s decision in *Brand X*.<sup>147</sup> As noted earlier, the question presented in that case—the scope of the FCC’s authority to regulate broadband—was ironically precisely the type of “major” question then Judge Kavanaugh would have declared to be beyond the FCC’s power to decide.<sup>148</sup>

All of the foregoing is to suggest that while FERC’s major regulatory initiatives “fit comfortably” within its authority under the delegation doctrine and under *Chevron* at the time they were issued, those initiatives might well have been struck down under the newly broadened contours of the “major questions doctrine.”<sup>149</sup> As discussed in the next section of this article, that redefined doctrine may well place some roadblocks in the way of major future initiatives by the agency.

### III. How Might the Court’s “Major Questions Doctrine” Stymie Future FERC Rulemaking Initiatives?

One need not search farther for examples of the impact the *Alabama Realtors* and OSHA cases may have on FERC’s authority to launch new initiatives than the preliminary injunction recently issued by a federal district court judge in *State of Louisiana, et al. v. Biden*



(referenced briefly earlier).<sup>150</sup> Citing the “major questions doctrine,” the Fifth Circuit’s ruling enjoining OSHA’s vaccine rule and Justice Gorsuch’s concurring opinion in *OSHA*,<sup>151</sup> District Judge Cain struck down a Presidential Executive Order that would have guided environmental review by a number of executive branch agencies, including EPA<sup>152</sup> and the Departments of Interior, Energy, Transportation and Agriculture.<sup>153</sup> While FERC, as an independent regulatory agency, may not be bound by executive orders,<sup>154</sup> in the past it has chosen to follow the guidance from executive orders, including those related to climate change.<sup>155</sup>

*State of Louisiana v. Biden* involved a challenge to Executive Order 13990 (“EO 13990”), issued by President Biden in the early days of his presidency. “EO 13990 reinstated the Interagency Working Group (“IWG”) on Social Costs of Greenhouse Gas Emissions (“SC-GGE”) and ordered the IWG to publish Interim Estimates for the Social Cost of Carbon, Nitrous Oxide, and Methane (collectively referred to as “SC-GHG Estimates”) for agencies to use when monetizing the value of changes in greenhouse gas emissions resulting from regulations and other relevant agency actions.”<sup>156</sup>

The plaintiff states argued, and Judge Cain agreed, that by implementing EO 13990’s directive to incorporate revised estimates of the social cost of greenhouse gases and to consider the global effects the affected agencies would be in violation of the Administrative Procedure Act.<sup>157</sup> More specifically, and relevant here, the district court agreed that even though EO 13990 was an order by the President and not an action by an administrative agency, the major questions doctrine nonetheless required the court to determine “(1) if the assertion of Executive authority

implicates matters of vast economic and political significance, and (2) if Congress has expressly and specifically delegated authority over the issue to the Executive.”<sup>158</sup> Finding that the EO would reduce oil revenues to the plaintiffs substantially and that the EO, by taking global effects into account would “alter the regulatory scheme” without clear direction from Congress, the court ruled that the President lacked authority from Congress to issue the EO.<sup>159</sup>

To be sure, Judge Cain’s decision may well be an outlier. A similar complaint filed in Missouri was thrown out by the district court judge for lack of standing and ripeness. As the judge in that case noted, the Executive Order itself did not change any agency rules or policies.<sup>160</sup> The appropriate place to challenge the policies underlying the executive order, the court held, would be when and if they were applied by the agencies themselves.<sup>161</sup> And a unanimous Fifth Circuit panel later vacated Judge Cain’s preliminary injunction, agreeing with the government that the plaintiff states lacked standing.<sup>162</sup>

But while the preliminary injunction did not survive, there will likely be major rule doctrine challenges to agency action taken to implement EO 13990. Indeed, the Missouri district court decision presages as much with respect to future *FERC* cases. Citing FERC’s February 2021 Notice of Inquiry on “the use of Social Cost of Carbon (SCC) analysis by [FERC] in its consideration of certificate applications,”<sup>163</sup> the court noted that the State of Missouri had submitted comments in the FERC proceeding and that if they were ignored, “Plaintiffs may seek relief in the appropriate court, after exhausting any applicable administrative remedies and complying with any applicable statutory authority.”<sup>164</sup>

Other potential FERC rulemaking initiatives may face “major question” challenges as well. The Commission, for example, has launched a major notice of proposed rulemaking that would revamp its Order No. 1000 transmission planning and cost allocation rules.<sup>165</sup> Depending on the statutory authority the agency may rely upon and the scope of the changes planned, FERC may well draw challenges under the major questions doctrine. Technological advances may accelerate our nation’s reliance on hydrogen as a low carbon or carbon-free fuel. Might the major questions doctrine be invoked to stymie any FERC initiatives to explore its regulatory authority to address the transition from carbon-based natural gases to hydrogen? Where interests adverse to FERC policies exist, those challenges are easy to envision.

These examples are not meant to be exhaustive, nor even to touch upon the implications for major question challenges to the operations of other federal administrative agencies.<sup>166</sup> But they are meant to highlight the reasons for concern about the doctrine’s apparently expanded scope.

#### IV. Conclusion

The *Alabama Realtors* and *OSHA* decisions were not—technically, at least—rulings on the merits of the issues presented. As orders on preliminary injunctions, they were rather determinations that the parties seeking the injunctions were *likely* to succeed on the merits.<sup>167</sup> Yet, as Judge Cain’s decision invalidating President Biden’s executive order on measuring the social cost of greenhouse gas emissions illustrates, lower courts may well begin treating these decisions as binding. And if they do, the consequences for regulatory agency flexibility to tackle big and urgent questions may well

be substantial. This author can only hope that when conducting full merits review of regulatory agency decisions, courts will consider the dramatic implications of an expansive major questions doctrine so malleable that it could be invoked to invalidate nearly any regulation of consequence. Perhaps on further reflection the Court will walk back its pronouncements and reaffirm the long line of precedents according administrative agencies the discretion to apply broadly worded regulatory schemes to the ever-changing circumstances in which they must operate to protect and advance the public interest.

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<sup>1</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>2</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>3</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

<sup>4</sup> *Allegheny Def. Project v. FERC*, 964 F.3d 1, 11-12 (D.C. Cir. 2020).

<sup>5</sup> *Jacoby v. NLRB*, 233 F.3d 611, 614 (D.C. Cir. 2000) (“*Chevron* does not help an agency that rests its decision on a misinterpretation of Supreme Court precedent”); *Id.* at 618 (“An agency action, however permissible as an exercise of discretion, cannot be sustained ‘where it is based not on the agency’s own judgment but on an erroneous view of the law’” (quoting *Sea-Land Service v. Dept. of Transportation*, 137 F.3d 640, 646 (D.C. Cir. 1998) (quoting *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985))). *See also* *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 944 (D.C. Cir. 2021) (*Chevron* deference inapplicable where agency’s decision was not based on its own judgment, but on mistaken belief that the “interpretation is compelled by Congress”).

<sup>6</sup> *Hunter v. FERC*, 711 F.3d 155, 156-57 (D.C. Cir. 2013).

<sup>7</sup> *Braintree Elec. Light Dep’t v. FERC*, 667 F.3d 1284, 1288 (D.C. Cir. 2012); *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498-99 (D.C. Cir. 2003).

<sup>8</sup> *See, e.g.*, Cass Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475 (2021) [hereinafter Sunstein]; Natasha Brunstein & Richard L. Revesz, *The Trump Administration’s Weaponization of the “Major Questions” Doctrine*, THE REGULATORY REVIEW (May 10, 2021),

<https://www.theregreview.org/2021/05/10/brunstein-revesz-trump-administrations-weaponization-major-questions-doctrine/> [hereinafter Brunstein & Revesz, *Weaponization of the “Major Questions” Doctrine*]; Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 317 (2022) [hereinafter Brunstein & Revesz, *Mangling the Major Questions Doctrine*]; Kevin O. Leske, *Major Questions About the “Major Questions” Doctrine*, 5 MICH. J. ENV’T & ADMIN. L. 479 (2016). While commentators have referred to the “major questions doctrine,” the Supreme Court itself has not referred to this “doctrine” until the term appeared this year in the concurring opinion of Justices Gorsuch, Alito, and Thomas in *Nat’l Fed’n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 667-68 (2022) (Gorsuch, J., concurring) [hereinafter *OSHA*]. Justice Gorsuch previously referred to the “major questions doctrine” in his dissenting opinion in *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (“[W]e apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”).

<sup>9</sup> “The seldom-used major questions doctrine is a canon of statutory interpretation that has been described as an exception to *Chevron* deference.” In *Re MCP No. 165*, 21 F.4th 357, 372 (6th Cir. 2021), *rev’d on other grounds*, *OSHA*, 142 S. Ct. 661.

<sup>10</sup> The Court explains its rationale in limiting use of the major questions doctrine to extraordinary cases involving questions of deep economic and political significance as follows:

In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.

This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. 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. This is not a case for the IRS.

*King v. Burwell*, 576 U.S. 473, 485-86 (2015) (internal citations omitted); *see also* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

<sup>11</sup> *King*, 576 U.S. at 486 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

<sup>12</sup> *Id.* (where statutory question is one of “deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.”).

<sup>13</sup> I will discuss, *infra*, some of the momentous Federal Energy Regulatory Commission (FERC) and Federal Power Commission (FPC) rulemakings that would easily fit this category. But it is clear enough from *Chevron* itself that the agency decisions qualifying for *Chevron* deference—by Congressional design—would have “political significance.” *See Chevron*, 467 U.S. at 865 (the “agency to which Congress ha[d] delegated policymaking responsibilities” was the appropriate *political* actor to resolve the competing interests at stake, “within the limits of that delegation.”). And billion-dollar rate cases surely have “deep economic ... significance.” *King*, 576 U.S. at 486 (internal quotations omitted).

<sup>14</sup> *Brown & Williamson*, 529 U.S. at 144 (evaluating the FDA’s claim to have authority to regulate nicotine against the FDA’s own “repeated statements that it lacked authority under the [Food, Drug, and Cosmetic Act] to regulate tobacco absent claims of therapeutic benefit by the manufacturer” and noting that “Congress considered and rejected bills that would have granted the FDA such jurisdiction.”).

<sup>15</sup> *Id.* at 125-26.

<sup>16</sup> *King*, 576 U.S. 473.

<sup>17</sup> *Id.* at 486.

<sup>18</sup> Sunstein, *supra* note 8, at 482.

<sup>19</sup> *King*, 576 U.S. at 485-486; *Brown & Williamson*, 529 U.S. at 132-33.

<sup>20</sup> *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2485 (2021).

<sup>21</sup> *OSHA*, 142 S. Ct. 661.

<sup>22</sup> *Ala. Realtors*, 141 S. Ct. 2485.

<sup>23</sup> *OSHA*, 142 S. Ct. 661.

<sup>24</sup> *Id.*

<sup>25</sup> Sunstein, *supra* note 8, at 477.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 479-80.

<sup>28</sup> Prior to his retirement, Justice Kennedy suggested that the Court should reconsider *Chevron*. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring).

<sup>29</sup> See, e.g., *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2015).

<sup>30</sup> *Baldwin v. United States*, 140 S. Ct. 690 (2020) (Thomas, J., dissenting from the denial of certiorari).

<sup>31</sup> The “shadow docket” refers to the use of emergency orders and summary decisions by the Supreme Court of the United States without oral argument. See *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting); see also *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1348-49 (2022) (Kagan, J., dissenting) (criticizing the use of shadow docket to establish precedent).

<sup>32</sup> The operative phrase from *Alabama Realtors*, as Berkeley law professor Dan Farber notes, is an agency’s exercise of “vast economic and political significance,” a phrase reappearing in the Court’s *OSHA* opinion. Dan Farber, *Another Worrisome Signal from the Supreme Court*, LEGAL PLANET (Aug. 30, 2021), <https://legal-planet.org/2021/08/30/another-worrisome-signal-from-the-supreme-court/>. “What is a question of ‘vast economic and political significance,’” he asks. “The answer,” as he aptly observes, “seems to be somewhat in the eyes of the beholder.” *Id.*

<sup>33</sup> *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 472 (2001). The Supreme Court has defined a “delegation challenge” as one posing “the constitutional question . . . whether the statute has delegated legislative power to the agency.” *Whitman*, 531 U.S. at 472. Because “Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States’” and because “[t]his text permits no delegation of those powers, . . . when Congress confers decisionmaking authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’” *Id.* (emphasis in original) (internal citations omitted). As discussed later in this article, the *Alabama Realtors* and *OSHA* cases effectively conflate the “limiting principle”—something the Supreme Court has only rarely found missing in legislative enactments—with a requirement that the delegation be stated “clearly.” And the concurrence goes so far as to say that the absence of a clear statement, not merely the absence of an “intelligible principle” (which need not be so explicit) would violate Constitutional separation of powers. *OSHA*, 142 S. Ct. at 668-70 (Gorsuch, J., concurring). The latter “clear statement principle” has generally been applied in the administrative agency context, not to replace the “intelligible principle” standard for measuring fidelity to the delegation doctrine, but to federal agency rules that would preempt a core state function. See, e.g., *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004); *Tennessee v. FCC*, 832 F.3d 597, 610-11 (6th Cir. 2016) (striking down FCC orders that would have preempted state laws barring municipalities from forming their own cable and telecommunications utilities).

<sup>34</sup> *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) (emphasis added).

<sup>35</sup> Brunstein & Revesz, *Weaponization of the “Major Questions” Doctrine*, *supra* note 8.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* As examples, the authors cited the Trump [www.eba-net.org](http://www.eba-net.org)

Administration’s challenge to the Clean Power Plan on grounds that it was too costly to have been contemplated by Congress, even though the Supreme Court had upheld a more costly plan in *Michigan v. EPA*. *Id.* (citing *Michigan v. EPA*, 576 U.S. 743 (2015)). And, they noted, the Department of Justice made a similar “too big” argument in challenging the legality of the Deferred Action for Childhood Arrivals (DACA) program on grounds that it potentially covered 1.7 million people, never acknowledging, as the authors write, “that many longstanding regulations have much larger numbers of beneficiaries.” *Id.* (citing Brief for Petitioner at 36, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (No.18-587)).

<sup>38</sup> *Id.*

<sup>39</sup> Not long after I began working on this article, attorneys general from Louisiana, Alabama, Florida, Georgia, Kentucky, Mississippi, South Dakota, Texas, West Virginia, and Wyoming obtained a preliminary injunction from Louisiana Federal District Court Judge James D. Cain, Jr. blocking President Biden’s Executive Order 13990. *Louisiana ex rel. Landry v. Biden*, No. 2:21-CV-01074, 2022 WL 438313 (W.D. La. Feb. 11, 2022), *appeal filed*, 2022 WL 866282 (5th Cir. Mar. 16, 2022) (staying preliminary injunction pending appeal). That executive order directs executive branch agencies to use an accurate measure of the social costs of greenhouse gas emissions in their decisionmaking on environmental impacts. *Id.* at \*1-2 (citing Exec. Order No. 13,990, 86 Fed. Reg. 7073 (Jan. 20, 2021)). The district court ruled that the executive order “violates the major questions doctrine.” *Id.* at \*16. A Missouri federal district court dismissed a similar, Republican-led lawsuit brought by 13 states in August, a decision which is being appealed at the Eighth Circuit. Humberto J. Rocha, *Biden Admin.’s Carbon Social Cost Metric Barred by Judge*, LAW360 (Feb. 11, 2022, 4:36 PM), <https://www.law360.com/articles/1464453/biden-admin-s-carbon-social-cost-metric-barred-by-judge>. See *State ex rel. Schmitt v. Biden*, 558 F. Supp. 3d 754 (E.D. Mo. 2021), *appeal filed*, No. 21-3013 (8th Cir. Sept. 08, 2021). These cases and their implications are discussed in more detail, *infra*.

<sup>40</sup> *Ala. Realtors*, 141 S. Ct. 2485.

<sup>41</sup> *Id.* at 2486 (citing Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244 (Aug. 6, 2021)).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 2486-87.

<sup>44</sup> *Id.* at 2487.

<sup>45</sup> *Id.* at 2488.

<sup>46</sup> *Id.* at 2489 (quoting Util. Air Regul. Grp., 573 U.S. at 324) (emphasis added) (internal quotations omitted).

<sup>47</sup> *OSHA*, 142 S. Ct. at 665.

<sup>48</sup> Dictum has been defined as a statement “made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.” *Dictum*, BLACK’S LAW DICTIONARY (7th ed.1999).

<sup>49</sup> Interestingly, while the Court in *OSHA* reiterates the “vast economic and political significance” quote from *Alabama Realtors*, 141 S. Ct. at 2489, it does not repeat *Alabama Realtors*’ reference to the quote’s source—*Utility Air Regulatory Group v. EPA*, which itself was quoting *Brown & Williamson*. The Court does not explain this omission (it includes only the parenthetical “internal quotation marks omitted”), but this author can speculate. First, *Brown & Williamson* included the qualifier that a



rule would be considered one of vast economic and political significance only in “extraordinary cases.” *Brown & Williamson*, 529 U.S. at 159. Second, the *Utility Air Regulatory Group* case was, by the Court’s account, extraordinary; it involved EPA’s claim to “power that it *admits* the statute is not designed to grant.” *Utility Air Regul. Grp. v. EPA*, 573 U.S. at 324 (emphasis added).

Indeed, the agency had described its rule as resting on an interpretation that would have been “unrecognizable to the Congress that designed’ it.” *Id.* (internal citation omitted).

<sup>50</sup> Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (2018).

<sup>51</sup> 29 U.S.C. § 655(c)(1).

<sup>52</sup> *Id.*

<sup>53</sup> 29 U.S.C. § 655(f). *Compare* Federal Power Act, 16 U.S.C. § 825(b) (2018), *with* Natural Gas Act, 15 U.S.C. § 717r(b) (2018).

<sup>54</sup> *OSHA*, 142 S. Ct. at 670 (Breyer, J., dissenting).

<sup>55</sup> *Id.* at 672.

<sup>56</sup> *Id.* at 670 (quoting COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402, 61,408 (Nov. 5, 2021)).

<sup>57</sup> *Id.* at 672.

<sup>58</sup> *Id.* at 674.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 671.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* Providing employers an opportunity to apply for variance is required by the Act. *See* 29 U.S.C. § 655(d).

<sup>63</sup> *OSHA*, 142 S. Ct. at 665 (citations omitted).

<sup>64</sup> *Id.* at 666.

<sup>65</sup> *Id.* As an illustration of OSHA’s “indiscriminate” approach, the Court maintains—against the agency’s express exclusion of outdoor workers—that “linemen face the same regulations as do medics and meatpackers.” *Id.* at 664. The Court’s distinction between everyday risks and workplace risks came under heavy fire both from the dissenters and numerous commentators. The dissent recounts, for example that there are numerous “everyday” hazards that are also workplace hazards that have been regulated for decades by OSHA. *Id.* at 673-74 (“OSHA has issued, and applied to nearly all workplaces, rules combating risks of fire, faulty electrical installations, and inadequate emergency exits—even though the dangers prevented by those rules arise not only in workplaces but in many physical facilities (e.g., stadiums, schools, hotels, even homes).”). *Id.* at 673.

<sup>66</sup> *Id.* at 666. Somewhat confusingly, the Court observes that a “vaccination ... cannot be undone at the end of the workday.” *Id.* at 665 (quoting *In re MCP No. 165*, 20 F.4th 264, 274 (6th Cir. 2021) (Sutton, C. J., dissenting)) (internal quotations omitted). If an employee in a crowded workplace goes to work unmasked or unvaccinated and infects fellow workers (a workplace risk the Court says *is* within OSHA’s power to regulate), that cannot be undone at the end of the workday, either.

<sup>67</sup> *OSHA*, 142 S. Ct. at 667-68 (Gorsuch, J., concurring).

<sup>68</sup> *Id.* at 667.

<sup>69</sup> *Id.* at 668 (emphasis added).

<sup>70</sup> *Am. Trucking Ass’n v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397, 416 (1967).

<sup>71</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (quoting *Permian Basin Area Rate Cases*,

390 U.S. 747, 784 (1968)) (emphasis added).

<sup>72</sup> *OSHA*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (citing *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)). Justice Gorsuch refers to the elimination of the rate-filing requirement at issue in *MCI Telecomms. Corp. v. AT&T* as one “less consequential” agency rule.

<sup>73</sup> *Id.* at 669 (citing *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017)). The concurrence also cites *Whitman* as an application of the major questions doctrine, quoting its famous passage that “Congress does not usually hide elephants in mouseholes” to support its conclusion. *Id.* But in granting OSHA broad emergency powers, Congress was hardly hiding major authority in “mouseholes.”

<sup>74</sup> *MCI*, 512 U.S. at 229.

<sup>75</sup> Most likely, the concurring opinion in *OSHA* was focused on the passage in *MCI* stating that it was “highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.” *Id.* at 231. At best, however, that passage was an embellishment of the opinion’s immediately preceding discussion, not a decision to invoke the major questions doctrine. On the contrary, its statement that “rate filings are, in fact, the essential characteristic of a rate-regulated industry” was hardly different from the Court’s 1974 pronouncement in *FPC v. Texaco* that when Congress has decided to regulate an industry, the agency charged with doing so could not decide that regulation was no longer necessary. *Compare MCI*, 512 U.S. at 231, *with FPC v. Texaco*, 417 U.S. 380, 400 (1974). There, similar to the FCC in *MCI*, the FPC had adopted a rule relieving small gas producers “of almost all filing requirements.” *Texaco*, 417 U.S. at 382. Similarly, in *Farmers Union Central Exchange v. FERC*, the D.C. Circuit, citing *FPC v. Texaco*, rejected the agency’s *de facto* deregulation of oil pipeline rates, finding that in its prohibition of only “grossly exploitative rates” FERC had “abdicated its statutory responsibilities” to set “just and reasonable” rates. *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1503-04 (D.C. Cir. 1984). Here, OSHA did the opposite, far from abdicating its obligations to protect the health of workers it acted in furtherance of those core obligations.

<sup>76</sup> *United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D. C. Cir. 2016).

<sup>77</sup> *See United States Telecom Ass’n v. FCC*, 855 F.3d 381, 384 (D.C. Cir. 2017) (Srinivasan, J., concurring in the denial of rehearing en banc).

<sup>78</sup> *Id.* at 417-18 (Kavanaugh, J., dissenting from the denial of rehearing en banc). As Justice Kavanaugh explained his thinking:

If a statute only ambiguously supplies authority for the major rule, the rule is unlawful .... If an agency wants to exercise expansive regulatory authority over some major social or economic activity—regulating cigarettes, banning physician-assisted suicide, eliminating telecommunications rate-filing requirements, or regulating greenhouse gas emitters, for example—an ambiguous grant of statutory authority is not enough. Congress must clearly



authorize an agency to take such a major regulatory action.

*Id.* at 419, 421.

<sup>79</sup> *City of Arlington v. FCC*, 569 U.S. 290, 297-301 (2013).

<sup>80</sup> *U.S. Telecom Ass'n*, 855 F.3d 381 (Srinivasan, J., concurring).

<sup>81</sup> *Id.* at 384. It is worth mentioning that Justice Thomas, who penned the *Brand X* decision, has since stated that he regretted his vote, but not because he thought the statute unambiguous or the agency's interpretation unreasonable. Rather, as he read his own decision in *Brand X*, it stood for the proposition that "a court must abandon its previous interpretation in favor of the agency's interpretation unless the prior court decision holds that the statute is unambiguous." *Baldwin v. United States*, 140 S. Ct. 690 (2020) (Thomas, J., dissenting from the denial of certiorari) (citing *Brand X*, 545 U.S. at 982). His change of heart, as he explains, came from his conclusion that *Brand X* would improperly force courts that had previously interpreted the statute in question to give way to a subsequent reasonable, but different interpretation by an agency. *Baldwin*, 140 S. Ct. at 694-95. In the interest of full disclosure, this author made a similar, successful argument for *Brand X* before the Ninth Circuit in the case later reversed by the Supreme Court. In an earlier case arising out of a private cause of action—and thus not involving *Chevron* deference to an FCC interpretation, the Ninth Circuit had adopted a different interpretation than the FCC's later interpretation that *Brand X* had appealed. See *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). *Brand X* argued, and the Ninth Circuit agreed, that *Chevron* was thus inapplicable since the panel was bound by its own precedent. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1128, 1130-31 (9th Cir. 2003), *rev'd sub nom.* *Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Of course, the circumstances in the *Brand X* case were unusual—the Communications Act contemplates certain private causes of action. A similar situation—involving an interpretation of a Federal Power Act or Natural Gas Act provision by a federal court outside review of FERC decisions—is much harder to envision. It appears, however, that Justice Thomas's objections to *Chevron* are broader than the particular circumstances of the *Brand X* case.

<sup>82</sup> *OSHA*, 142 S. Ct. at 665 (emphasis added).

<sup>83</sup> *City of Arlington*, 569 U.S. at 293, 307.

<sup>84</sup> The focus of this article is on the implications of *Ala. Realtors* and *OSHA* for FERC's rulemaking initiatives, but the impact of these decisions will likely be felt by other regulatory agencies as well. Would a court applying the broader "major questions doctrine" have found clear Congressional authority, for example, in the Communications Act's broad power to set "just and reasonable" rates or to prevent "undue discrimination" sufficient to give the FCC authority to order AT&T to allow its competitors to attach terminal equipment to AT&T's system? See *Use of the Carterfone Device in Message Toll Tel. Serv.*, 13 F.C.C.2d 420 (1968). Would that power have been deemed a clear enough delegation to authorize the FCC to require AT&T's regional utilities to provide access to AT&T's long-distance competitors? See *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1095 (7th Cir. 1983) (citing *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971)). These FCC decisions—plainly of vast economic and political significance—preceded

one of the biggest antitrust cases of all time, the breakup of AT&T in the 1980s. *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

<sup>85</sup> "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Realtors*, 141 S. Ct. at 2489 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324) (internal quotations omitted).

<sup>86</sup> *Brown & Williamson*, 529 U.S. at 159.

<sup>87</sup> *Ala. Realtors*, 141 S. Ct. at 2487.

<sup>88</sup> *OSHA*, 142 S. Ct. at 663.

<sup>89</sup> *Id.* at 666.

<sup>90</sup> Sunstein, *supra* note 8, at 478.

<sup>91</sup> *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943).

<sup>92</sup> *Id.* at 193-94.

<sup>93</sup> *Id.* at 219.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Am. Trucking Ass'ns*, 387 U.S. at 416.

<sup>97</sup> *Id.*

<sup>98</sup> *FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 453 (1972).

<sup>99</sup> *Fla. Power & Light Co.*, 404 U.S. 453.

<sup>100</sup> See, e.g., Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1789 n.21 (2016); *Electricity Regulation in the US: A Guide*, REGUL. ASSISTANCE PROJECT 15 (Mar. 2011), <https://www.raponline.org/wp-content/uploads/2016/05/rap-lazar-electricityregulationintheus-guide-2011-03.pdf> ("Because 47 states (excluding ERCOT, Hawaii, and Alaska) have interconnected transmission networks, FERC sets the rates and service standards for most bulk power transmission.").

<sup>101</sup> *Florida Power & Light* was an adjudication, not a rulemaking proceeding. But because agencies generally have broad discretion whether to develop policy via rulemaking vs. adjudication, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), precedent set in individual cases can often have the same impact—the same "vast economic and political significance"—as that established through the rulemaking process. It therefore seems logical, and likely, that the Court would apply the same "major questions doctrine" to review of major agency policies established in individual cases that it would apply to review of rulemakings.

<sup>102</sup> *Assoc. Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987) (*AGD*).

<sup>103</sup> *Id.* at 993 (referring to "the passage of the Natural Gas Act ... in 1938, the imposition of price controls on independent producers' wellhead sales under *Phillips Petroleum Co. v. Wisconsin*, and adoption of the Natural Gas Policy Act ... in 1978.") (internal citation omitted). To be sure, one way to interpret the Court's thinking is to see *Alabama Relators* and *OSHA* as examples of an agency acting outside its "lane"—evictions in the case of the CDC and broader vaccine rules in the case of an agency tasked with ensuring workplace safety. But the Court could easily have reached the same conclusions with less sweeping pronouncements. Instead, by their terms, the *Alabama Relators* and *OSHA* opinions would easily encompass FERC regulations that, by their nature, have broad economic impacts beyond the energy sector. Especially given the tenor of the concurrence, this author concludes that the Court intended the more sweeping reading.

<sup>104</sup> *Id.* at 1001 (citation omitted).

<sup>105</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 75 F.E.R.C. ¶ 61,080 (1996) [hereinafter Order No. 888].

<sup>106</sup> *Id.* at 3.

<sup>107</sup> *Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 822 (D.C. Cir. 2008).

<sup>108</sup> *Transmission Access Pol’y Study Grp. v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000).

<sup>109</sup> Order No. 888, *supra* note 105, at 3.

<sup>110</sup> *Transmission Access Pol’y Study Grp.*, 225 F.3d at 687 (“In *AGD*, we concluded that FERC reasonably interpreted the NGA’s ambiguous antidiscrimination provisions as giving it broad authority to remedy unduly discriminatory behavior through a generic open access requirement. Given the FPA’s similar language, we can only reach the same conclusion with respect to Order 888.”), *aff’d sub nom.* *New York v. FERC*, 535 U.S. 1 (2002) (internal citation omitted).

<sup>111</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 F.E.R.C. ¶ 61,051 (2011), *order on reh’g*, Order No. 1000-A, 139 F.E.R.C. ¶ 61, 132, *order on reh’g and clarification*, Order No. 1000-B, 141 F.E.R.C. ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) [hereinafter Order No. 1000].

<sup>112</sup> *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 58-59 (2014) (affirming that “consistent with the deferential standard in step two of the *Chevron* analysis that the Commission reasonably interpreted Section 206 to authorize the Final Rule’s planning mandate”).

<sup>113</sup> *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016). The Federal Power Act gives FERC the authority “to regulate the sale of electric energy at wholesale in interstate commerce, including both wholesale electricity rates and any rule or practice affecting such rates.” *Id.* at 762 (internal quotations omitted).

<sup>114</sup> As the Court explained it, “demand response” is a practice “in which operators of wholesale markets pay electricity consumers for commitments *not* to use power at certain times.” *Id.* at 767 (emphasis in original).

<sup>115</sup> *OSHA*, 142 S. Ct. at 665 (“The Secretary has ordered 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense. This is no ‘everyday exercise of federal power.’”).

<sup>116</sup> *Nat’l Broad. Co.*, 319 U.S. at 217.

<sup>117</sup> *City of Arlington*, 590 U.S. at 296.

<sup>118</sup> Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 355(d) (2018). See also *The FDA’s Drug Review Process: Ensuring Drugs Are Safe and Effective*, FDA (Nov. 24, 2017), <https://www.fda.gov/drugs/information-consumers-and-patients-drugs/fdas-drug-review-process-ensuring-drugs-are-safe-and-effective>.

<sup>119</sup> *Permian Basin Area Rate Cases* involved the FPC’s establishment of area wide rates for natural gas, replacing the case-by-case determination of just and reasonable rates for individual producers. *Permian Basin Area Rate Cases*, 390 U.S. at 756-57. Talk about major rules. The Supreme Court, which noted that the proceeding “began a new era in the regulation of natural gas producers,” *id.* at 755, scheduled two full days of oral argument in that case.

<sup>120</sup> Federal Power Act § 205(b)(1), 16 U.S.C. § 824(b)(1) (2018). See also 15 U.S.C. § 717(b) (governing the “transportation of natural gas in interstate commerce”).

<sup>121</sup> 16 U.S.C. § 824d(a); 15 U.S.C. § 717c(a).

<sup>122</sup> 16 U.S.C. § 824d(b); 15 U.S.C. § 717c(b).

<sup>123</sup> 16 U.S.C. § 824d(a). See also 15 U.S.C. § 717d(a) (governing practices of natural gas companies).

<sup>124</sup> 16 U.S.C. § 825h; 15 U.S.C. § 717o.

<sup>125</sup> *Env’tl. Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991) (“[A]gency discretion is, if anything, at zenith when the action assailed relates ... to the fashioning of policies, remedies and sanctions”) (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)). See also *La. Pub. Serv. Comm’n v. FERC*, 551 F.3d 1042, 1045 (D.C. Cir. 2008).

<sup>126</sup> *Nat’l Broad. Co.*, 319 U.S. at 216.

<sup>127</sup> *Id.* at 193-94.

<sup>128</sup> *Id.* at 216 (citation omitted).

<sup>129</sup> *Id.*

<sup>130</sup> *AGD*, 824 F.2d at 1001 (internal citations omitted).

<sup>131</sup> *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

<sup>132</sup> *Whitman*, 531 U.S. 457.

<sup>133</sup> *OSHA*, 142 S. Ct. at 669.

<sup>134</sup> *Whitman*, 531 U.S. at 468.

<sup>135</sup> *Id.* at 468-69 (quoting *Christensen v. Harris County*, 529 U.S. 576 (2000)).

<sup>136</sup> *Id.* at 472. The specific delegation issue was whether Section 109(b)(1) of the Clean Air Act gave the Environmental Protection Agency the authority to promulgate national ambient air quality standards permissibly constrained by an intelligible principle. *Id.* at 463.

<sup>137</sup> *Id.* at 472 (citation omitted).

<sup>138</sup> *Id.* at 474.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 476.

<sup>141</sup> *City of Arlington*, 590 U.S. at 294 (quoting 47 U.S.C. § 332(c)(7)(B)(ii)).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 295.

<sup>144</sup> *Id.* at 300.

<sup>145</sup> *City of Arlington*, 590 U.S. at 303 (citing *MCI*, 512 U.S. at 224, 229, 231).

<sup>146</sup> *OSHA*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

<sup>147</sup> *City of Arlington*, 590 U.S. at 310-11 (Breyer, J., concurring).

<sup>148</sup> See *supra* note 78 and accompanying text.

<sup>149</sup> In reviewing an earlier version of this article, Amy Marshak suggested that it would be worth addressing the argument some might make about the scope of *Alabama Realtors* and *OSHA*: what troubled the Court in both cases was that Congress had already taken a variety of COVID-related actions but did not expressly authorize the type of agency action being challenged. That is hardly a comforting thought, however, as it would not distinguish those cases from the FERC initiatives previously discussed. For example, in the case of FERC’s Order No. 888 open access rule, Congress, only a few years earlier had given FERC express authority in the Energy Policy Act of 1992 to compel utilities to transmit power from competing electricity suppliers, but FERC found the case-by-case authority granted by that Act insufficient to protect competition and instead invoked the 1935 Power Act’s antidiscrimination provisions as authority for its rule. See Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L.J. 243, 256 (2005); *New York v. FERC*, 535 U.S. 1, 7-8 (2002). And, in the

years leading up to Order No. 436 (FERC's gas industry open access rule), Congress had similarly considered, but never granted FERC broad power to order pipelines to transport their competitors' gas supplies. *See* Harvey Reiter, *Competition and Access to the Bottleneck: The Scope of Contract Carrier Regulation Under the Federal Power and Natural Gas Acts*, 18 LAND & WATER L. REV. 1, 18-19 (1983). In both cases, moreover, Congress had considered, but rejected including common carrier provisions in the original versions of the Federal Power and Natural Gas Acts. *See, e.g., AGD*, 824 F.2d at 997-98; *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

<sup>150</sup> Landry, 2022 WL 438313.

<sup>151</sup> *Id.* at \*15-16. The Fifth Circuit's stay, *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021), was subsequently dissolved by the Sixth Circuit, *In Re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021), but the injunction was reinstated in *OSHA*, 142 S. Ct. 661.

<sup>152</sup> As Brunstein and Revesz note in *Mangling the Major Questions Doctrine*, the Trump Administration, joined by several state attorneys general, invoked the doctrine to challenge the EPA's Clean Power Plan. Brunstein & Revesz, *Mangling the Major Questions Doctrine*, *supra* note 8, at 317. But, as they note, under the arguments these parties have made, "all greenhouse gas regulations could be suspect on major question grounds." *Id.* Some of these arguments were raised before the Supreme Court at oral argument in *West Virginia v. EPA*. *See* *West Virginia v. EPA*, 142 S. Ct. 894 (2022). There, West Virginia argued that the Court should reverse the D.C. Circuit's opinion striking down the Trump Administration's Affordable Clean Energy Rule, maintaining that if the lower court's ruling were upheld, it would resurrect the Obama Administration's Clean Power Plan. And that rule, West Virginia argued, would violate the major questions doctrine. Juan Carlos Rodriguez, *Justices Appear Skeptical of EPA Air Power Fight – For Now*, LAW360 (Feb. 28, 2022), [https://www.law360.com/energy/articles/1468786/justices-appear-skeptical-of-epa-air-power-fight-for-now?nl\\_pk=40d69452-8e5c-4843-84a9-c930f7d15a17&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=energy](https://www.law360.com/energy/articles/1468786/justices-appear-skeptical-of-epa-air-power-fight-for-now?nl_pk=40d69452-8e5c-4843-84a9-c930f7d15a17&utm_source=newsletter&utm_medium=email&utm_campaign=energy). But the government maintained that the states lacked standing, as the EPA had announced that when the 2019 rule was vacated, it did not revive the 2015 Clean Power Plan. *Id.*

<sup>153</sup> Landry, 2022 WL 438313, at \*1.

<sup>154</sup> *National Grid, LLC*, 165 F.E.R.C. ¶ 61,031 at P 64 (2018) ("We note that although the EA does consider potential project impacts on minority or low-income populations as part of the assessment of socioeconomic effects, it does not do so pursuant to Executive Order No. 12898, as that order does not apply to independent agencies such as the Commission.").

<sup>155</sup> *Revisions to Auxiliary Installations, Replacement Facilities, and Siting and Maintenance Regulations*, F.E.R.C. Statutes and Regulations ¶ 31,351 at P 64 (2013); *Updated Policy Statement on Certification of New Interstate Natural Gas Facilities*, 178 F.E.R.C. ¶ 61,107 at PP 16-17 (announcing intention to follow E.O. 13985 and 14008, requiring agencies, respectively (1) "to conduct Equity Assessments to identify and remove barriers to underserved communities and "to increase coordination, communication, and engagement with community-based organizations and civil rights organizations" and (2) "to develop "programs, policies, and

activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.") (internal citations omitted). FERC subsequently designated the updated pipeline certificate policy statement as a draft and invited public comment. *Certification of New Interstate Natural Gas Facilities*, 178 F.E.R.C. ¶ 61,197 (2022).

<sup>156</sup> Landry, 2022 WL 438313, at \*1.

<sup>157</sup> Landry, 2022 WL 438313.

<sup>158</sup> *Id.* at \*15 (internal citations and quotations omitted).

<sup>159</sup> *Id.* at \*15. Citing the National Environmental Policy Act's directive to agencies to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings" and to consider the "public welfare" of the United States in conducting oil and gas lease sales, the district court reasoned that consideration of "global effects" was somehow so lacking a clear Congressional directive as to violate the major questions doctrine. *Id.* (emphasis in original).

<sup>160</sup> *Schmitt*, 558 F. Supp. 3d at 769-71.

<sup>161</sup> *Id.* at 769-70.

<sup>162</sup> *Louisiana ex rel. Landry v. Biden*, 2022 WL 866282 (5th Cir. Mar. 16, 2022) (staying preliminary injunction pending appeal).

<sup>163</sup> *Schmitt*, 558 F. Supp. 3d at 771 (citing Notice of Inquiry, *Certification of New Interstate Natural Gas Facilities*, 86 Fed. Reg. 11,268-72 (Feb. 24, 2021)).

<sup>164</sup> *Id.* at 772. The Commission has since issued two draft climate change-related policy statements – PL18-2 governing certification of natural gas pipeline facilities and PL21-3, the Commission's Interim Greenhouse Gas Policy Statement. *FERC Updates Policies to Guide Natural Gas Project Certifications*, FERC (Feb 17, 2022), <https://www.ferc.gov/news-events/news/ferc-updates-policies-guide-natural-gas-project-certifications>; *see also* *Certification of New Interstate Natural Gas Facilities*, 178 F.E.R.C. ¶ 61,197 (designating policy statements as drafts and inviting comments). While policy statements are generally not reviewable, rulemakings and adjudications applying policy statements are reviewable. *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974).

<sup>165</sup> Notice of Proposed Rulemaking, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 F.E.R.C. ¶ 61,028 (2022).

<sup>166</sup> Just prior to publication, a district court judge in Florida, relying in part on the "major questions doctrine," invalidated the CDC's "mask mandate" for passengers using interstate public transit. *See* *Health Freedom Def. Fund, Inc. et al. v. Biden*, No. 81-21-cv-1693-KKM-AEP, 2022 WL 1134138 (M.D. Fla. April 18, 2022). The court's rejection of the mask mandate turned on the meaning of "sanitation" found in the Public Services Health Act. *Id.* It acknowledged both that the term was undefined in the statute and had two plausible meanings— "active measures to cleanse something or to preserve the cleanliness of something." *Id.* at \*5 (emphasis added). But despite the ambiguity—and the court's agreement that "the latter definition would appear to cover the Mask Mandate"—the court then elected to determine for itself the best meaning. *Id.* It then dispensed with the need to analyze the reasonableness of the agency's interpretation under *Chevron* on three grounds. First, despite the two definitions of sanitation it recognized, the court concluded that the statute is nonetheless unambiguous. *Id.* at \*10. For good measure, it concluded that, even if ambiguous,



the agency's interpretation was nonetheless unreasonable. *Id.* Finally, and critical here, it argued that *Chevron* is wholly inapplicable because the regulation in question exceeds the agency's authority under the major questions doctrine. *Id.* at \*10-12 (citing *Ala. Realtors*, 141 S. Ct. 2485). The decision has since been appealed to the Eleventh Circuit by the government. *Health Freedom Def. Fund v. Biden*, No. 22-11287 (11th Cir. Apr. 21, 2022).

<sup>167</sup> See, e.g., *Cook Cnty. v. Wolf*, 962 F.3d 208, 234 (7th Cir. 2020) ("There would be no point in the merits stage if an issuance of a

stay must be understood as a sub silentio disposition of the underlying dispute."). See also *ACA Connects v. Bonta*, 24 F.4th 1233, 1249 (9th Cir. 2022) (Wallace, J., concurring) ("[A] disposition of a preliminary injunction appeal is not an adjudication on the merits and ... the parties should not 'read too much into' such holdings."). (internal citation omitted); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013) ("We have repeatedly emphasized the preliminary nature of preliminary injunction appeals.").

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# SPLIT (NON)DECISIONS: THE PRACTITIONER'S GUIDE TO SECTION 205(G) OF THE FEDERAL POWER ACT

BY ALAN J. RUKIN, STEVEN SHPARBER, OMAR BUSTAMI

## I. Introduction

In 2018, Congress enacted the Fair RATES Act adding section 205(g) to the Federal Power Act (FPA)<sup>1</sup> as a provision of America's Water Infrastructure Act of 2018.<sup>2</sup> In passing the Fair RATES Act, Congress addressed a perceived statutory deficiency identified in *Public Citizen, Inc. v. FERC*, in which the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) concluded that it lacked jurisdiction to review Federal Energy Regulatory Commission (FERC or Commission) inaction on a filing by ISO New England Inc. (ISO-NE) that went into effect by operation of law, pursuant to section 205 of the FPA, as a result of a split 2-2 vote by the FERC commissioners.<sup>3</sup>

Since enactment, the provisions of section 205(g) have been implicated three times. In 2019, FERC could not reach a quorum in another ISO-NE proceeding when two of the four sitting commissioners recused themselves.<sup>4</sup> Within a two-week period in 2021, an evenly divided FERC allowed two filings made pursuant to section 205 of the FPA to become effective by operation of law: (1) a filing by PJM Interconnection, L.L.C. (PJM) to revise the minimum offer price rule (MOPR) provisions in its tariff;<sup>5</sup> and (2) submissions by several utilities proposing to establish the Southeast Energy Exchange Market (SEEM).<sup>6</sup>

In this article, we provide a practical guide to navigating section 205(g) of the FPA and identify critical questions that remain unanswered.

## II. How Did We Get Here?

Section 205(d) of the FPA generally requires public utilities to file rate changes with FERC at least 60 days before the changes are to take effect.<sup>7</sup> If FERC does not act on a filing within the allotted time, the proposed changes go into effect by operation of law.

In the FERC proceeding underlying *Public Citizen*, ISO-NE sought FERC approval of the results of its eighth annual Forward Capacity Auction.<sup>8</sup> An evenly divided FERC deadlocked on ISO-NE's filing, and thus did not issue an order within the 60-day statutory period specified by section 205 of the FPA.<sup>9</sup> Instead, on September 16, 2014, FERC issued a Notice of Filing Taking Effect by Operation of Law acknowledging that ISO-NE's filing made pursuant to section 205 of the FPA had become effective by operation of law in the absence of FERC action on ISO-NE's filing.<sup>10</sup> Several entities, including Public Citizen, attempted to seek "rehearing" of the September 16, 2014 Notice pursuant to section 313 of the FPA.<sup>11</sup> FERC promptly issued a Notice of Dismissal of Pleadings.<sup>12</sup>

Public Citizen and the State of Connecticut then petitioned the D.C. Circuit for review of FERC's two notices. On October 25, 2016, the D.C. Circuit held that it did not have jurisdiction to consider the petitions under either the FPA<sup>13</sup> or the Administrative Procedure Act.<sup>14</sup> The court explained that FERC's deadlock and subsequent notices did not constitute reviewable agency action.<sup>15</sup> The D.C. Circuit continued by stating that "[n]ot only did the deadlock



prevent FERC from [reviewing the results of the auction], but the Commission Chairperson disclaimed authority to engage in any review whatsoever, so long as ISO-NE conducted the auction in accordance with its tariff.”<sup>16</sup> The court further held that while this “interpretation seems questionable at best .... without jurisdiction, we simply lack the power to assess its validity. *Any unfairness associated with this outcome inheres in the very text of the FPA. Accordingly, it lies with Congress, not this Court, to provide the remedy.*”<sup>17</sup> Congress answered the court’s call to action by enacting the Fair RATES Act.<sup>18</sup>

### III. How Does Section 205(g) Work Before FERC?

Section 205(g) of the FPA provides a right to request rehearing under section 313(a) of the FPA when a section 205 filing becomes effective by operation of law due to an evenly divided FERC or a lack of quorum, and it provides the right to petition a court for review if FERC fails to act on the rehearing requests for either of these same reasons. While these amendments may have addressed the circumstances that led to dismissal in *Public Citizen*, section 205(g) raises a number of procedural questions.

#### A. What Circumstances Trigger Section 205(g)?

Section 205(g) is triggered when two conditions are met in a FERC proceeding initiated pursuant to section 205 of the FPA:

- (1) When the 60-day period for FERC review expires without FERC issuing an order accepting or denying the change proposed by the public utility in the filing; *and*
- (2) The reason for the lack of FERC action is either an evenly divided FERC or the lack of a quorum.<sup>19</sup>

Section 205(g) would not be triggered if FERC *declined* to issue an order within the 60-day period provided by section 205 for a reason other than a 2-2 deadlock or lack of a quorum.

#### B. What Does Section 205(g) Do?

When applicable, section 205(g) of the FPA treats the failure of FERC to issue an order either accepting or denying a section 205 filing as an order for the purposes of requesting rehearing pursuant to 313(a) of the FPA.<sup>20</sup> Further, if the Commission fails to act on the merits of a rehearing request within 30 days as a result of a 2-2 deadlock or lack of a quorum, section 205(g) allows a person that requested rehearing to appeal under section 313(b) of the FPA.<sup>21</sup>

#### C. What Does Section 205(g) Require of the FERC Commissioners?

Section 205(g)(1)(B) requires each FERC commissioner to add a written statement to the record explaining his or her views with respect to the change filed by the public utility under section 205.<sup>22</sup> Section 205(g) seemingly affords FERC commissioners significant discretion on when to issue their statements. In the three proceedings to date in which section 205(g) has been triggered, the practice of the FERC commissioners has been to issue their statements prior to the rehearing request deadline, although the commissioners have not been consistent in the timing of issuing their statements. For example, Commissioner Danly issued his Fair RATES Act statement in the PJM MOPR docket only one day before the deadline to request rehearing.<sup>23</sup>

The FPA leaves unanswered questions about the *purpose* of a commissioner’s statement and *how long* a commissioner could wait to issue that statement. We think that Congress may have required these Fair

RATES Act commissioner statements with one or more audiences in mind. We can identify four potential audiences for the commissioners' statements. First, these statements could serve to formally communicate each commissioner's view to the remaining commissioners. Second, these statements communicate the commissioners' views to the public. Third, these statements communicate each commissioner's thoughts to the entities interested in the proceeding as they decide whether to request rehearing or petition an appellate court for review. Fourth, these statements could provide an analysis of the FERC record for a reviewing court.

#### **D. Who is a "Party" When Section 205(g) is Triggered?**

Unless an entity submits a timely, unopposed motion to intervene,<sup>24</sup> and subject to certain exceptions,<sup>25</sup> FERC must affirmatively grant party status to entities moving to intervene in a FERC proceeding in order for a "person" to become a "party" to the proceeding.<sup>26</sup> This rule applies to proceedings involving filings under section 205 of the FPA, as well as other types of FERC proceedings.<sup>27</sup> When section 205(g) of the FPA is triggered, FERC has not taken any such action, including the action necessary to grant opposed or untimely motions to intervene. Therefore, untimely or opposed movants may not have been granted party status by FERC when a filing becomes effective by operation of law. We note that in the Notices of Denial of Rehearing by Operation of Law in the ISO-NE<sup>28</sup> and PJM MOPR<sup>29</sup> proceedings, and in the Order Rejecting Rehearing Requests as Untimely in the SEEM<sup>30</sup> proceeding, FERC refers to the entities requesting rehearing as "parties" while simultaneously remaining silent with

respect to all of the outstanding motions to intervene filed in those three proceedings.

#### **E. Who Can Request a Rehearing?**

It appears that section 205(g) of the FPA may expand the potential pool of entities that are normally permitted to request rehearing. Following an order issued in FPA proceedings, section 313(a) of the FPA permits "[a]ny *person*, electric utility, State, municipality, or State Commission *aggrieved* by an order issued by the Commission in a proceeding under the [FPA] [who] *is a party* [to that proceeding to] apply for rehearing within thirty days after the issuance of such order."<sup>31</sup> Since section 205(g)(1) treats FERC non-action as an order for purposes of FPA section 313(a), it may be that the rehearing eligibility provisions of section 313(a) still apply. Section 205(g)(2) of the FPA can arguably be read, however, to implicitly permit *any* "*person* [to] seek[] a rehearing under section 313(a)."<sup>32</sup> In other words, such a "person" may not have to be a "party" to the Commission or "aggrieved" by FERC's non-action.

On the other hand, the reference in section 205(g)(2) only to a "person" that may appeal might be read to *limit* who can *appeal* FERC non-action. Section 313(a) of the FPA enumerates several categories of entities in addition to "[a]ny person" that can seek rehearing and subsequently appeal a FERC order. The omission of these other enumerated categories of entities, it might be argued, preclude them from being able to appeal where the rehearing request was submitted under the procedures established under FPA section 205(g).

It is also possible that Congress did not intend to inadvertently broaden the potential pool of entities eligible to seek rehearing and/or limit who can appeal.

Until FERC or a reviewing court decides whether these differences in statutory language are significant, “persons” interested in the outcome of a section 205 filing to which section 205(g) applies, but whose motions to intervene were not granted pursuant to FERC Rule 214 could consider requesting rehearing in order to have the ability to petition a court for review.

#### F. When Can Rehearing be Requested?

In December 2021, FERC issued an order in the SEEM proceeding that included additional explanation of the interactions between sections 205(g) and 313 of the FPA.<sup>33</sup> In the SEEM proceeding, a number of parties requested rehearing<sup>34</sup> of the SEEM Effective Notice. In its Order Rejecting Rehearing Requests as Untimely, issued on December 10, 2021 in the SEEM proceeding, FERC reiterated that “the Notice [of Filing Taking Effect by Operation of Law] is not a [FERC] ‘order’ for which rehearing is available.”<sup>35</sup> FERC also concluded that the rehearing requests were untimely. Explaining “the proper calculation of the deadline for rehearing requests” with respect to the application of section 205(g),<sup>36</sup> FERC stated that “the statutory period for [FERC] action established in section 205(d) expires on the later of *the day prior to* the effective date or the 60<sup>th</sup> day after the filing is made.”<sup>37</sup> FERC concluded that the 30-day period prescribed by section 313(a) of the FPA for those seeking rehearing “starts running on *the day after* the last day that [FERC] could have taken action” on the filing.<sup>38</sup> FERC stated that the last day it could have taken action on the SEEM filing was October 11, 2021, even though this date was a holiday.<sup>39</sup> The failure to act by that date, FERC reasoned, constituted an “order” for purposes of FPA section 205(g)(1)(A), which started the 30-day clock to file rehearing requests.<sup>40</sup> FERC deemed the

rehearing requests untimely because the parties sought rehearing thirty days after the October 12, 2021 notice of the rate taking effect by operation of law and not thirty days after the October 11, 2021 effective date.<sup>41</sup> On March 24, 2022, FERC issued an order on rehearing modifying the discussion in its December 10, 2021 order, yet continued to reach the same result.<sup>42</sup>

#### G. Section 205(g) and *Allegheny* Defense

When Congress passed the Fair RATES Act in 2018, FERC rarely, if ever, issued orders on rehearing within thirty days. FERC would instead issue tolling orders granting itself additional time to consider and act on the merits of timely filed rehearing requests, delaying the ability of parties to appeal the order for which rehearing had been sought. Rehearing requests submitted pursuant to section 205(g) of the FPA may have resulted in similar FERC tolling orders, except that FPA section 205(g)(2) specifically provides for a right to appeal if FERC fails to “act on the *merits* of the rehearing request”<sup>43</sup> within 30 days.<sup>44</sup>

When section 205(g) of the FPA was triggered for the first time in connection with ISO-NE’s Inventoried Energy Program filing, FERC did not issue a tolling order in response to rehearing requests, and instead issued a notice of denial of rehearing by operation of law after the 30-day period expired.<sup>45</sup> We note that FERC only invoked its authority pursuant to section 205(g) of the FPA in that notice and not section 313 of the FPA.<sup>46</sup>

The potential disconnect on the timing of appellate review was generally resolved in 2020 when the D.C. Circuit sitting *en banc* held that tolling orders did not extend the statutory deadline in the Natural Gas Act for FERC to issue a merits order on rehearing.<sup>47</sup> FERC extended the *Allegheny* Defense

decision to proceedings pursuant to both the Natural Gas Act and the FPA and stopped issuing tolling orders altogether. Now, if FERC does not issue an order on rehearing for *any* reason within the thirty-day window following a timely request for rehearing, any aggrieved party may petition a court for review of the merits order. When FERC issued the notice denying rehearing by operation of law in the PJM MOPR proceeding, FERC pointed to the thirty-day statutory period in section 313(a) of the FPA and not the similar thirty-day period in section 205(g)(2) as it did in the ISO-NE Inventoried Energy Program proceeding.<sup>48</sup>

#### **IV. How Does Section 205(g) Work Before a Reviewing Court?**

How will section 205(g) be applied in an appeal? Put simply, we don't know yet; no court has had the opportunity to reach a decision when reviewing a filing that triggered section 205(g). Section 205(g) of the FPA raises many questions that reviewing courts will need to decide.

##### **A. Who Can Petition a Court for Review?**

Section 205(g)(2) of the FPA explicitly grants appeal rights under section 313(b) of the FPA to “a *person*” who first seeks rehearing with FERC and FERC then fails to act within 30 days “because the Commissioners are divided two against two . . . or if the Commission lacks a quorum. . . .”<sup>49</sup> Because section 205(g) specifies that such person may appeal under section 313(b) of the FPA, the requirements of section 313(b) will presumably also apply, and, thus, the petitioner must be a “*party* to a proceeding under the [FPA] *aggrieved* by” the FERC inaction that is deemed to be a Commission “order” by section 205(g)(1)(A).<sup>50</sup> As we observe in section E above, however, section 205(g) of the FPA may permit an

expanded pool of potential parties eligible to petition a court for review.

##### **B. Who Can Intervene in a Proceeding Before a Reviewing Court?**

The rules for intervening in proceedings before appellate courts vary slightly by circuit, and we would expect that each circuit court's rules would continue to apply with respect to intervening in a proceeding initiated under section 205(g) of FPA.

Two parties that will always be present in a petition for review are: (1) the petitioner (granted appeal rights by virtue of section 205(g)(2) of the FPA) and (2) FERC. It is likely that the entity that made the underlying section 205 filing before FERC would seek to intervene and that the reviewing court would permit the entity to do so. Reviewing courts could also permit other parties to the FERC proceeding to intervene.

##### **C. What Happens if the Reviewing Court Needs Additional Factual Development in the Record?**

Just like all petitions for review, if a reviewing court thought that additional facts were needed for it to reach a decision, section 313(b) of the FPA provides that the court may direct FERC to find additional facts.<sup>51</sup> It is also possible that a reviewing court could believe that it would not benefit from additional fact finding and then proceed to make a decision on the merits. Alternatively, a reviewing court could remand the matter to FERC for a decision on the merits. When testifying before Congress as it was considering the Fair RATES Act, then-FERC general counsel James Danly believed that this outcome “appear[ed] to be the Court's only option.”<sup>52</sup>

## V. What Happens After FERC Is No Longer Deadlocked or Regains a Quorum?

In the first FPA section 205(g) proceeding on review, the ISO-NE Inventoried Energy Program, the D.C. Circuit granted FERC's unopposed motion for voluntary remand once a quorum was restored.<sup>53</sup> This gave FERC another opportunity to issue an order addressing the initial filing. However, the court held the consolidated petitions for review in abeyance pending an order on remand from FERC.<sup>54</sup>

On remand, FERC issued an order finding "that the Inventoried Energy Program is just and reasonable and accept[ed] the proposed Tariff revisions, to become effective May 28, 2019."<sup>55</sup> In that order, FERC addressed "the initial comments and answers filed in this proceeding as well as the arguments raised in the requests for rehearing; however, because this order [was the] initial order on the merits, [FERC did] not make findings on the rehearing requests."<sup>56</sup> FERC also addressed motions to intervene for the first time in the proceeding.<sup>57</sup>

Following the order on remand, several parties requested rehearing before FERC, which were denied by operation of law. Parties then petitioned the D.C. Circuit for review of the order on voluntary remand. The proceedings at the D.C. Circuit resumed, with oral argument taking place on October 21, 2021. As of the publication of this article, a decision from the D.C. Circuit remains pending.<sup>58</sup>

In the SEEM proceeding, the D.C. Circuit issued an order on March 29, 2022<sup>59</sup> granting an unopposed

motion by FERC to hold the proceeding in abeyance on the basis that "the Commission ha[d] given notice that it intends to issue further orders on rehearing in the underlying Commission proceedings."<sup>60</sup>

In the PJM MOPR proceeding, as of the publication of this article, neither FERC nor any other participant has made a request for either voluntary remand or to hold the case in abeyance, and the proceeding is currently headed towards briefing and full proceedings before the Third Circuit.<sup>61</sup>

## VI. Conclusion

Section 205(g) of the FPA has been triggered a handful of times, and we think that, going forward, events will continue to trigger it relatively sparingly. Although, when 205(g) is triggered, it will be crucial for practitioners to be prepared for all potential procedural nuances that could arise in future proceedings.

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<sup>1</sup> Federal Power Act, 16 U.S.C. § 824d(g) (2018).

<sup>2</sup> America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 3006, 132 Stat. 3765, 3868-69 (2018).

<sup>3</sup> Pub. Citizen, Inc. v. FERC, 839 F.3d 1165 (D.C. Cir. 2016).

<sup>4</sup> ISO New England Inc., Notice of Filing Taking Effect by Operation of Law, FERC Docket No. ER19-1428-001 (Aug. 6,

2019) (ISO-NE Effective Notice), *reh'g denied by operation of law*, 169 F.E.R.C. ¶ 61,013 (2019).

<sup>5</sup> PJM Interconnection, L.L.C., Notice of Filing Taking Effect by Operation of Law, FERC Docket No. ER21-2582-000 (Sept. 29, 2021) (PJM Effective Notice), *reh'g denied by operation of law*, 177



F.E.R.C. ¶ 62,105 (2021), *pet. for rev. pending*, Elec. Power Supply Ass’n v. FERC, No. 21-3205, (3<sup>rd</sup> Cir. Nov. 29, 2021).

<sup>6</sup> *Ala. Power Co.*, Notice of Filing Taking Effect by Operation of Law, FERC Docket Nos. ER21-1111-002, *et al.* (Oct. 13, 2021) (SEEM Effective Notice), *order rejecting reh’g requests*, 177 F.E.R.C. ¶ 61,178 (2021), *order addressing arguments on reh’g*, 178 F.E.R.C. ¶ 61,196 (2022), *pet. for review pending*, Advanced Energy Econ. v. FERC, No. 22-1018 (D.C. Cir. Feb. 8, 2022).

<sup>7</sup> 16 U.S.C. § 824d(d) (providing that “[u]nless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days’ notice to the Commission and to the public.”).

<sup>8</sup> *Pub. Citizen*, 839 F.3d at 1167.

<sup>9</sup> *Id.* at 1168.

<sup>10</sup> *ISO New England Inc.*, Notice of Filing Taking Effect by Operation of Law, FERC Docket No. ER14-1409-000 (Sept. 16, 2014).

<sup>11</sup> 16 U.S.C. § 825l.

<sup>12</sup> *ISO New England Inc.*, Notice of Dismissal of Pleadings, FERC Docket No. ER14-1409-000 (Oct. 24, 2014).

<sup>13</sup> *Public Citizen*, 839 F.3d at 1169-72.

<sup>14</sup> *Id.* at 1172-74.

<sup>15</sup> *Id.* at 1170 (finding that “FERC did not engage in collective, institutional action when it deadlocked on FCA 8’s rates.

*Consequently, the Notices describing the effects of that deadlock are not reviewable orders under the FPA.”*) (citations omitted) (emphasis added).

<sup>16</sup> *Id.* at 1174.

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> Section 205(g) of the FPA provides in its entirety:

(g) Inaction of Commissioners

(1) In general

With respect to a change described in subsection (d), if the Commission permits the 60-day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum—

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

(2) Appeal

If, pursuant to this subsection, a person seeks a rehearing under section 825(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the

Commission lacks a quorum, such person may appeal under section 825(b) of this title.

16 U.S.C. § 824d(g). We note that Congress did not add a similar provision to the Natural Gas Act even though similar circumstances could arise in proceedings under Section 4 of that statute. *See* Natural Gas Act, 15 U.S.C. § 717c(d) (2018).

<sup>19</sup> 16 U.S.C. § 824d(g)(1).

<sup>20</sup> *Id.* § 824d(g)(1)(A).

<sup>21</sup> *Id.* § 824d(g)(2).

<sup>22</sup> *Id.* § 824d(g)(1)(B).

<sup>23</sup> *See PJM Interconnection, L.L.C.*, FERC Docket No. ER21-2582-000, Statement of James P. Danly (Oct. 27, 2021).

<sup>24</sup> *See* FERC Rules of Practice and Procedure: Intervention, 18 C.F.R. § 385.214(c)(1) (2022) (stating that fifteen days after filing a timely unopposed motion to intervene, the movant automatically becomes a party).

<sup>25</sup> *See id.* § 385.214(a)(1)-(2) (identifying governmental entities that become parties upon filing a “notice of intervention” as opposed to a motion to intervene).

<sup>26</sup> *See id.* § 385.214(a)(3) (“Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.”); *id.* § 385.214(c)(2) (“If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party *only when the motion is expressly granted.*”) (emphasis added).

<sup>27</sup> 18 C.F.R. § 385.101 (2022).

<sup>28</sup> 169 F.E.R.C. ¶ 61,013.

<sup>29</sup> 177 F.E.R.C. ¶ 62,105.

<sup>30</sup> 177 F.E.R.C. ¶ 61,178, at P 1.

<sup>31</sup> 16 U.S.C. § 825(a) (emphasis added).

<sup>32</sup> *Id.* § 824d(g)(2) (emphasis added).

<sup>33</sup> 177 F.E.R.C. ¶ 61,178.

<sup>34</sup> *Id.* at PP 6-7.

<sup>35</sup> *Id.* at P 16 n.30 (citing *Public Citizen*, 839 F.3d 1165).

<sup>36</sup> *Id.* at P 9.

<sup>37</sup> *Id.* at P 11 (emphasis added).

<sup>38</sup> *Id.* at P 14 (emphasis added).

<sup>39</sup> *Id.* at P 15.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at P 16.

<sup>42</sup> 178 F.E.R.C. ¶ 61,196.

<sup>43</sup> 16 U.S.C. § 824d(g)(2) (emphasis added).

<sup>44</sup> In contrast, FPA section 313(a) only specifies that FERC “act[]” on a rehearing request within 30 days to avoid the rehearing request from being denied by operation of law. *Id.* § 825(a).

<sup>45</sup> 169 F.E.R.C. ¶ 61,013.

<sup>46</sup> 169 F.E.R.C. ¶ 61,013, at n.2.

<sup>47</sup> *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020).

<sup>48</sup> *PJM Effective Notice*, *supra* note 5.

<sup>49</sup> 16 U.S.C. § 824d(g)(2) (emphasis added).

<sup>50</sup> *Id.* § 825(b) (emphasis added).

<sup>51</sup> *Id.*

<sup>52</sup> *Pending Legislation: Hearing Before the S. Comm. on Energy & Nat. Res.*, 115th Cong. (2017) (statement of James Danly, General Counsel, Federal Energy Regulatory Commission).

<sup>53</sup> *Belmont Mun. Light Dep’t v. FERC*, Order Granting Motion to Remand Record and Suspending Briefing, Nos. 19-1224, *et al.* (D.C. Cir. Apr. 21, 2020).

<sup>54</sup> *Id.*

<sup>55</sup> *ISO New England Inc.*, 171 F.E.R.C. ¶ 61,235 at P 2 (2020).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at PP 29-30.

<sup>58</sup> See *Belmont Mun. Light Dep't*, Nos. 19-1224, *et al.*

<sup>59</sup> *Advanced Energy Econ.*, No. 22-1018, Order Granting Motion to Hold Proceeding in Abeyance and Suspend Filing of the Certified Index to the Record, (D.C. Cir. Mar. 29, 2022).

<sup>60</sup> *Advanced Energy Econ.*, No. 22-1018, Unopposed Motion of Respondent Federal Energy Regulatory Commission to Hold

Appeal in Abeyance and to Suspend Filing of the Certified Index to the Record (D.C. Cir. Mar. 16, 2022).

<sup>61</sup> See *Elec. Power Supply Ass'n v. FERC*, No. 21-3068, *et al.*, Unopposed Proposed Briefing Schedule of Petitioner Electric Power Supply Association, (3rd Cir. Mar. 14, 2021); *Elec. Power Supply Ass'n v. FERC*, No. 21-3068, *et al.*, Order Directing Parties to File a Motion for Leave to file a Joint Deferred Appendix (3rd Cir. Apr. 4, 2021).



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