

IN MEMORIAM: JUDGE ISAAC DAVID BENKIN

“Stand behind the yellow line”

On July 13, 2024, Judge Isaac David Benkin passed away from heart failure following a brief illness. He had just turned 89.

He was a brilliant judge and lawyer and an even better individual. But these words only begin to describe who he was.

David Benkin was a titan of the energy bar. He served as an Administrative Law Judge at FERC for about two decades, joining the agency when it was still operating as the Federal Power Commission. He was highly regarded by his colleagues. Lawyers who appeared before him could expect that he would know the law better than they did and that he would conduct his hearings efficiently, fairly, and with humor. Strongly committed to advancing federal energy regulatory practice, he worked tirelessly as an editor and contributor to the *Energy Law Journal* and on behalf of the Charitable Foundation of the Energy Bar Association. For those fortunate enough to be his law clerk, such as myself, he provided a mentorship experience that was invaluable and the opportunity to form a lifelong friendship.

To me he was always “Judge Benkin,” even though I knew him for the full forty-plus years of my legal career, beginning with the very first day that I started working as his law clerk at FERC. Nobody could have asked for a better teacher. Eventually, we became colleagues in three different firms. Throughout, he served as an invaluable sounding board for me, always willing to puzzle through a difficult issue and providing solid counseling on topics that went well beyond matters of law.

He had a frighteningly good memory. Sometimes, just for the sport of it, lawyers upon realizing his extraordinary intellect might ask Judge Benkin if he knew of a case on a particular legal issue. Typically, he would immediately recall a decision on point by name – with a page reference and quote thrown in for extra flourish.

He was a terrific writer. His decisions as an ALJ are a joy to read. They are clearly written, well-reasoned, always insightful, and sprinkled with unforgettable turns of phrases and literary references to liven-up the reading experience. Likewise, the articles Judge Benkin contributed to the *Energy Law Journal* remain as fresh as the day they were written. Take a moment and skim something—anything—he crafted, and I am certain you will agree. You might wish to sample these: Initial Decision, *Long Island Lighting Co.*, Docket No. FA85-63-002, 42 FERC ¶ 63,005 (Jan. 15, 1988) and *The Inconsistent Lady: Discovery in Administrative Adjudications and the Evidentiary Use of Its Fruits*, 4 ENERGY L.J. 201 (1983).

His humor was sharp and memorable. Once, I asked Judge Benkin what he considered to be the best thing he had ever authored. Without hesitation, he responded that one of his *most effective and widely read* written pieces was "For your safety, please stand behind the yellow line while the bus is in motion." This warning was posted on public buses during the 1980s and was something that he had drafted earlier in his career while serving as an attorney for the Federal Highway Administration. Another time, I asked him who the smartest person in his law school class was, wondering whether he might mention himself. Judge Benkin had gone to Harvard College at the age of sixteen and then directly on to Harvard Law School, graduating in the class of 1959. He said he would not be able to answer that because the smartest person in his class had left after the first year. Taking the bait, I pressed him. "Well, who was that?" "Ruth Bader Ginsberg," he responded with a smile.

Judge Benkin tried to teach me about baseball, a lifelong passion of his. Few knew more about America's pastime than he did. We would occasionally go to games together, and Judge Benkin would patiently explain the intricacies of the sport to me even though I would frequently drift off, baseball's charm eluding me. Fortunately, when my kids were young, he was happy to have me bring them along, and he would regale them with baseball lore during some of the lulls. I was never able to gain his love of the game, but my kids did.

Isaac David Benkin was born July 5, 1935, in Brooklyn, New York. After graduating law school, he served as a Judge Advocate in the Air Force. When his tour was over, he came to Washington to be the law clerk for Judge Samuel E. Whitaker of the U.S. Court of Claims. He then joined the trial staff of the Court of Claims Section of the Department of Justice and from there joined the legal staff of the Federal Highway Administration, where he was appointed Chief Counsel in 1970.

He became an ALJ with the Federal Power Commission in 1975, and in 1980, he was appointed Deputy Chief Judge of the agency after it became the Federal Energy Regulatory Commission. Upon retiring from FERC, Judge Benkin practiced as a lawyer before the agency in several law firms. He proudly served in the Air Force Reserve throughout most of his professional years, retiring as a Colonel and recognized with a Distinguished Service Award and an Air Force Legion of Merit. He leaves two children, Josh and Jeremy, a grandchild, and a devoted partner who was with him during his last years, Becky Adler.

A number of months ago, another former FERC law clerk, Miriam Swydan Erickson, and I approached Judge Benkin to write about his time serving as a FERC ALJ. Like myself, Miriam had remained close to Judge Benkin throughout her career, and the three of us would occasionally meet for lunch during his retirement years. He delighted in seeing and talking with us about our latest work activities and families. He was less interested in recalling his past; but after much nagging, he delivered the following short, reflective narrative that captures his spirit and style:

A RETIRED ALJ RECALLS LIFE IN THE OLD FPC

I joined the Administrative Law Judges Office of the Federal Power Commission in 1975. The Chief of the FPC's Office of Administrative Law Judges was Joe Zwerdling. After interviewing me, Judge Zwerdling introduced me to the Chairman of the Commission, John Nassikas. Mr. Nassikas was an old pol from New Hampshire. He thought it was very funny when I told him that he had gone very far for a graduate of Dartmouth.

At that time, the Office had only 18 ALJ's on board of the 21 or so that it was authorized to employ. So I was the first replacement for the judges who had recently retired. At first, I was asked to, and did, "clean up" after now-retired judges who had conducted hearings but did not prepare initial decisions.

Thereafter, I had my own docket.

My overwhelming impression of the job was amazement at the brilliance of my contemporaries and the attorneys who appeared before us. It was a steep learning curve for a brand-new ALJ who, until his appointment, had never seen an energy case before signing on with the Federal Power Commission.

At that time, the Commission's ALJ corps was mainly concerned with the so-called "curtailment" cases. The supply of natural gas available to the interstate market seemed to be drying up, threatening severe dislocations to America's economy. I drew the curtailment case involving Northern Natural Gas Company, which provided gas to the central part of the U.S. from Arkansas through Northern Minnesota. (At a later date Northern became a part of the Enron empire, but that's another story.) The hearing consumed many months and the resources of a large number of parties. One day, at the conclusion of our hearing on March 16, John O'Brien, Northern's general counsel, asked me to cancel the next day's session in honor of St. Patrick's Day. I declined to do so (we had witnesses scheduled for that day's hearing) but ruled that in honor of the occasion, all persons in the hearing room would wear a green tie tomorrow. When I opened the hearing on March 17, I noted for the record that everyone in the hearing room except O'Brien was wearing green. Mr. O'Brien got to his feet and said, "Judge, if you've got it, you don't have to flaunt it." We all broke up laughing at that.

The hearings were usually models of good will. Perhaps that was because the parties were, for the most part, large corporations and wealthy state and municipal entities who could afford to pay their legal counsels and expert witnesses. One of the rewards of sitting on the bench as an ALJ is that everyone laughs at your attempts at humor. The Commission's inability or unwillingness to decide most of the curtailment cases eventually led to its demise.

In time, Congress mooted the issue of curtailment policy by enacting its own set of priorities in the Natural Gas Policy Act of 1978.

There were instances in which I was required to determine the reasonable cost of equity capital for a jurisdictional pipeline or electric utility, not now but at some future date. I must confess that the process eluded me in several instances.

In general, however, the cases were fascinating. I am proud of the fact that my initial decision in favor of licensing the country's largest pumped storage facility (in Bath County, Virginia) was not appealed to the full Commission and so became the license under which that project was built and operated. Also, I have vivid memories of our visit to Alaska in connection with a case involving the expenditures to construct the Trans Alaska Pipeline System. (The case was settled, thank goodness). In addition, there were many cases in which I was required to determine the reasonable cost of equity capital for pipelines and jurisdictional electric utilities. How to do this accurately remains a mystery for me.

In time, Chief Judge Zwerdling retired, replaced by Curtis Wagner, and the Federal Power Commission morphed into the FERC that we still know today. Soon afterward, I was gone from the agency. I remain proud of much of the work we did, in spite of all the help we enjoyed from the Commissioners' suite.

Judge Benkin's wisdom, dedication, wit, and kindness will be missed. Perhaps, then, it is best simply to end with another one of his most highly read regulatory issuances through which his legacy lives on. It is a concise teaching that perfectly reflects the judge's character, and you will do well to always remember it: "Do not talk to the driver while the bus is in motion."

May his memory be for a blessing.