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The Supreme Court Has Just Dismantled Traditional Energy Regulation and Created a Whole New Paradigm Dominated by the Judiciary Rather Than Administrative Agencies

By Clinton A. Vince, Emma F. Hand and Simon Steel*

In this article, the authors explain that recent decisions by the Supreme Court will have significant ramifications for the regulation of energy by the Federal Energy Regulatory Commission.

In two Supreme Court rulings at the end of June, the Court signaled its intention to restrict federal agency authority and discretion – and combat what Chief Justice Roberts, in a 2013 opinion, called "the danger posed by the growing power of the administrative state . . . with hundreds of federal agencies poking into every nook and cranny of daily life" – by asserting the power of the federal judiciary in a manner that will have significant ramifications for the regulation of energy by the Federal Energy Regulatory Commission (FERC).

In *Loper Bright Enterprises v. Raimondo* (*Loper*), the Court ruled that in cases governed by the Administrative Procedure Act (APA), courts must exercise their independent judgment in deciding questions of law, including whether an agency has acted within its statutory authority, expressly overruling the longstanding *Chevron* doctrine that required courts to defer to an agency's permissible interpretation of its governing statute if the statute's language is ambiguous.

In *Securities and Exchange Commission v. Jarkesy* (*Jarkesy*), the Court significantly limited the ability of agencies to try certain types of cases in-house by holding that when the Securities and Exchange Commission (SEC) seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial.

And in *Corner Post v. Federal Reserve* (*Corner Post*), the Court held that in APA cases, petitioners have six years from when they are injured by an agency action – not just six years from the agency ruling itself – to petition for judicial review.

These cases together represent a significant blow to federal agency authority, and portend a substantial increase in administrative law litigation. While *Corner Post*'s impact on FERC will be limited, given the Federal Power Act and Natural

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Gas Act provisions regarding rehearing and review of FERC decisions, the other two cases will certainly have a significant impact on FERC.

THE *CHEVRON* CASE

The overruling of the *Chevron* doctrine in *Loper* means that judges, not FERC, will decide what the federal energy statutes mean. The forty-year-old *Chevron* doctrine, established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] required courts to use a two-step framework to interpret statutes administered by federal agencies – the court must first assess whether the statute is clear with respect to the question at issue, then, if the statute is silent or ambiguous with respect to the question at issue, the court must generally defer to the agency's formal interpretation if it was based on a permissible construction of the statute, even if the court reads the statute differently than the agency did.

Under *Chevron*, there could be a range of reasonable interpretations of a statute, and two conflicting interpretations – often adopted by an agency before and after a change in power in Washington – would sometimes both be upheld in court. *Chevron* was founded on the notion that in writing ambiguous statutes on regulatory and especially technical subjects, Congress probably intended ambiguities to be resolved by a single federal agency deploying its specialist expertise rather than by whatever judges the case came before. The Supreme Court in *Loper*, however, found that this deference could not be squared with the APA's command that courts decide "all relevant questions of law,"[2] which, it explained, implements traditional understandings of courts' role under Article III of the Constitution. Under the APA, the Court held, courts must determine the single best answer to what a statute means, without deferring to agencies.

CAVEATS

While *Loper* represents a significant shift of interpretive responsibility from agencies to courts, it is subject to several caveats that may, subject to how they are refined in further litigation, limit its effect.

First, *Loper* expressly retains the older doctrine of *Skidmore v. Swift & Co.*,[3] which had been largely overshadowed by *Chevron*. Under *Skidmore*, and now *Loper*, agency interpretations are entitled to respect and should be consulted, along with other traditional tools of statutory interpretation, to the extent that they are "made in pursuance of official duty," embody "experience and

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[1] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[2] 5 U.S.C. § 706.

[3] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

informed judgment," and have the "power to persuade." Precedents applying *Skidmore* suggest that the agency's "power to persuade" will be greatest when the issue is highly technical, when the agency interpretation was adopted shortly after the statute was enacted and has remained consistent – certainly not when it varies with changes in Administration – and when the agency interpretation cannot be characterized as expanding its own jurisdiction.

Second, while overruling *Chevron*, *Loper* stated that specific decisions upholding specific statutory interpretations under *Chevron* generally remain protected by stare decisis.

Third, the Court made clear that nothing prevents Congress from writing a statute that expressly delegates discretionary power, including the power to define specific statutory terms, to an agency.

IMPACTS ON FERC

How *Loper* will impact FERC remains to be seen. The courts have often deferred to FERC's technical expertise under *Chevron* and will likely continue to respect that expertise under *Skidmore* in traditional technical areas, like ratemaking, in which Congress' intent to give FERC jurisdiction and broad discretion is clear.

For example, in a post-*Loper* decision, *Tenaska Clear Creek Wind, LLC v. FERC*,[4] a 3-judge District of Columbia Circuit panel unanimously upheld a FERC order finding an RTO's transmission cost allocation "just and reasonable," rejecting a challenge by a wind power generator.

Loper, however, could have a significant impact on FERC's ability to further the government's effort to make the clean energy transition where statutes are silent or ambiguous as to the treatment of new energy resources, particularly battery storage, demand response, and energy efficiency. New and ambitious agency efforts to address climate change and other evolving societal challenges have repeatedly received a skeptical reception in the Roberts Court under its doctrine that statutes should not be read to confer broad discretion on agencies to address "major questions" with large policy and economic impact unless Congress has done so clearly and explicitly, and *Loper* adds another major tool for judges to combat "the growing power of the administrative state" in such cases.

UPCOMING CASES

Two upcoming cases are likely to provide early indications of how *Loper* will impact FERC.

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[4] Tenaska Clear Creek Wind, LLC v. FERC (D.C. Cir. July 19, 2024).

On July 2, the Supreme Court GVR'd (granted certiorari, vacated the decision below, and remanded) *Edison Electric Institute v. FERC*,[5] instructing the District of Columbia Circuit to reconsider, in light of *Loper*, its 2-1 decision in *Solar Energy Indus. Ass'n v. FERC*,[6] applying *Chevron* and deferring to FERC's decision that a 160MW solar-battery project in Montana could be treated as a "qualifying facility" under the Public Utility Regulatory Policies Act even though it exceeds that act's 80MW eligibility limit because the 160MW plant is only capable of injecting 80 MW onto the grid.

A vigorous fight on judicial review also seems inevitable respecting FERC's Order 1920 (issued on May 13 and currently subject to rehearing requests at FERC), which, on a divided vote, requires transmission providers to engage in long-term regional transmission planning at least 20 years in advance, apply at least 7 factors in evaluating and selecting long-term regional transmission facilities, and hold a 6-month engagement period for relevant state entities before filing a cost allocation method for a chosen project with FERC; it also sets new transmission cost allocation standards.

Since *Loper*, Commissioner Christie and Chairman Phillips have issued conflicting statements, with Commissioner Christie contending that *Loper* is fatal to Order 1920, which he contends exceeds agency power and improperly favors green energy projects[7] while Chairman Phillips argues that Order 1920 falls within the stare decisis caveat in *Loper* given the 2014 District of Columbia Circuit decision that applied *Chevron* to uphold a prior FERC order regulating regional transmission planning and cost allocation practices.[8]

IMPLICATIONS OF *JARKESY*

The Court's ruling in *Jarkesy* could have an even more striking effect on FERC's ability to impose civil penalties, particularly with respect to fraud.

In *Jarkesy*, the Court concluded that a statutory provision authorizing the SEC to adjudicate and assess civil penalties for fraud-related claims violates the Seventh Amendment; the SEC must instead bring such cases in court, where the defendant has a right to jury trial. The case involved delineating the distinction between "suits at common law," which are subject to the Seventh Amendment, and matters of "public right," which can be adjudicated by an agency, subject to judicial review.

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[5] Edison Electric Institute v. FERC, Case No. 22-1246 (U.S.).

[6] Solar Energy Indus. Ass'n v. FERC, 59 F.4th 1287 (D.C. Cir. 2023).

[7] https://www.ferc.gov/news-events/news/commissioner-mark-christies-statement-concerning-order-no-1920-and-us-supreme.

[8] https://www.ferc.gov/news-events/news/chairman-willie-phillips-statement-concerning-order-no-1920.

The majority first concluded that SEC civil penalties claims for fraud-related conduct are, for Seventh Amendment purposes, suits at common law, primarily because the remedy sought (civil penalties) is a monetary remedy that goes beyond the exercise of equitable powers to restore a preexisting status quo, and secondarily, because they broadly resemble fraud claims known to the common law. It then rejected the dissent's argument that statutory civil penalties claims brought by government agencies are "matters of public right," generally confining that "exception" to matters of immigration, international commerce, tribal rights, public lands, public benefits, pensions and patent rights. And it left explicitly unresolved whether *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*,[9] which approved administrative adjudication of civil penalties for statutory workplace safety violations, remains good law.

The implications of *Jarkesy* for FERC and other agency enforcement actions are uncertain, but likely dramatic. The unsettled fate of *Atlas Roofing* may be key: if the public rights exception still applies to permit administrative civil penalties proceedings when the substance of the case does not resemble fraud or another common-law action (which is far from certain and will no doubt be the subject of substantial further litigation), a significant range of administrative civil penalties jurisdiction may survive. But even on that narrow reading, *Jarkesy* appears to invalidate the provisions of the Energy Policy Act of 2005 that authorize FERC to impose civil and criminal penalties for the filing of false and fraudulent information relating to the price of electricity and natural gas and prohibiting any manipulative or deceptive device or contrivance as those terms are used in 15 U.S.C. §78j(b) of the Securities Exchange Act.[10]

Further, as Justice Sotomayor noted in dissent, FERC is one of several agencies that, unlike the SEC, has no general authority to pursue civil penalties in court – Congress only authorized it to do so through the administrative adjudication procedure that *Jarkesy* appears to prohibit.[11] FERC's ability to assess (and achieve settlements by threatening) civil penalties is now in question. That represents a highly significant change for FERC which, according to its Office of Enforcement, has assessed over $874 million in civil penalties since 2007.

That raises one more question about *Loper* and *Jarkesy*: How will Congress react? For 40 years, Congress enacted new legislation like PURPA – very consciously, according to the legislative history of several statutes – on the

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[9] Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442 (1977).

[10] 16 U.S.C. §§824u, 824v, 825o and 825o-1.

[11] See, e.g., 16 U.S.C. § 823b(c).

assumption that its legislation would be interpreted in accordance with *Chevron*, and for almost 50 years, it has relied on *Atlas Roofing* in authorizing agencies like FERC to pursue civil penalties through administrative adjudication. Some Democrats in Congress have criticized the Court's recent decisions and introduced a bill to restore *Chevron*.[12]

Conversely, some Republicans have introduced bills to review, overturn, or subset regulations upheld under *Chevron*[13] and demanded lists from agencies of their actions that have been upheld under *Chevron*.[14] Given the partisan divide in Congress, short-term prospects for such broad legislation in either direction do not look promising. But we expect to see some narrower proposals – to give FERC authority to seek civil penalties in court, like the SEC, to clarify the scope of discretion Congress intends FERC to have over particular statutory issues, or to legislate some policy details Congress had previously left FERC to fill in under *Chevron* – that might have a better chance of becoming law.

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[12] https://www.congress.gov/bill/118th-congress/house-bill/1507.

[13] https://www.congress.gov/bill/118th-congress/senate-bill/4641; https://www.congress.gov/bill/118th-congress/house-bill/8889.

[14] https://scalise.house.gov/press-releases/Scalise-Announces-Committee-Activity-in-Wake-of-Chevron-Reversal.