

# How Supreme's Chevron Decision Impacts Utilities

Conversation with Dentons'  
U.S. Energy Practice Chair Clint Vince



Those involved in the energy and utilities industry have heard about the recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, which overruled *Chevron v. Natural Resources Defense Council*. By knocking down Chevron deference, the holding of *Loper Bright* makes clear that courts no longer must defer to agency interpretations of ambiguous statutes.

*Loper Bright* is a landmark decision and with expectations of big changes coming, the six to three ruling left many unknowns. One expected result, however, is that lots of litigation is coming regarding regulatory agency decisions.

To gain a better understanding of what the future holds, Public Utilities Fortnightly went to a top expert on energy legal issues. Dentons' U.S. Energy Practice Chair Clint Vince has over forty years of expertise as a leading energy litigator and provided insight as to what to expect post-Chevron.

**PUF's Steve Mitnick:** Why should the industry, utilities, and regulators, be interested and want to learn more about the Supreme Court decision on Chevron deference?

**Clint Vince:** The Chevron deference decision by the Supreme Court, called *Loper Bright*, is one of the most controversial and consequential rulings of the last term. It will impact nearly everyone, from utilities, to regulators and their staff, to Congress and its staff, to stakeholders and consumers.

It represents a sweeping change in the entire way that regulatory decision making by federal agencies will be reviewed, and a huge shift from the executive branch federal agencies to the judiciary.

**PUF:** Will the Chevron decision affect only new regulations, or what was issued in the past?

**Clint Vince:** The majority of the court, and Chief Justice Roberts, who wrote the opinion for the majority in this six-three decision, which went on party lines, said that under the doctrine of *stare decisis*, this will not affect prior decisions in which Chevron was considered.

In a dissent written by Justice Kagan it's less sanguine. The minority feel that clever litigators will find new ways to present these issues and will forum shop. That's to find courts with judges more aligned with the court's majority decision in *Loper Bright*, and there's opportunity to destabilize prior regulatory decisions.

The answer is, it's unknown right now, but almost everyone agrees there will be a huge amount of litigation resulting from this by all participants in all ideologies, so there will be a lot of turbulence. Another reason this will impact most energy and utilities people, is the question, "Will this impact regulatory certainty for investors?" It's a legitimate, unknown question.

I used to be part of an ocean racing team when I was younger for a couple of decades, and I've been in seas where there's been a sea change that usually comes after a big storm. It doesn't happen smoothly. There is a period of time with confused seas and waves from different directions. That's what I think we will see here.

**PUF:** Will the uncertainty slow down the clean energy transition?

**Clint Vince:** I've argued many Chevron cases. I don't think

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this will shut down the clean energy transition, but it will slow it down, especially while Congress is gridlocked. Chevron does leave an opening for Congress to give more clarity in its laws.

But that's not easy to do right now. The clean energy transition is encountering issues the Federal Power Act never anticipated.

Edison Electric Institute had a major case that the Supreme Court just remanded on the basis of *Loper Bright*, and that involved the question of, "What is the proper amount of battery storage for its definition under

PURPA," and whether that would be allowed or not.

I'm not sure that the agency's decision would've survived even without *Loper Bright*, but now there will be no deference given to the agency on this question. It will be for the court system ultimately to decide.

**PUF:** It's crucial to the energy transition to know whether hydrogen is going to have a big role or not, so it affects an array of issues.

**Clint Vince:** You are right. I'm working with a major hydrogen coalition led by former Secretary of Energy Ernie Moniz, in a contract with the Department of Energy, looking at these issues and trying to develop demand markets.

But taking a step back, the big picture is that Congress was used to writing laws more broadly and allowing the federal agencies to fill in on technical and scientific issues with their experts.



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For forty years, the paradigm was that courts would only intervene if they felt the statute was clear on its face and the agency violated the statute; otherwise, if it was ambiguous on Chevron deference, they would defer to the agency decision.

Now that's not the case, unless Congress going forward is very specific in asserting its intention.

That's another reason why, with this sea change, there'll be a lot of uncertainty before there is clarity.

**PUF:** Should strategies be developed now on how to handle this going forward?

**Clint Vince:** Wise stakeholders have already begun to develop strategies. Most observers of the Supreme Court felt that Chevron would be dismantled.

I don't think people realized it would be quite this dramatic and comprehensive, but it's been planned for. The Inflation Reduction Act appears to have been written by a Congress that expected the Supreme Court to overrule Chevron.

My more specific response is that our clients are wanting advice, not simply from people like me who have tried these cases or from our Supreme Court analysts, but they want to hear from our team of public policy specialists who are really good at writing and shaping legislation, because that will be an important feature.

It will be important in administrative proceedings to participate and develop the evidentiary record, because agencies with a well-developed evidentiary record, especially with respect to technical and scientific issues, will have a better chance of their decisions being sustained, rather than agencies that are abstract in their decision making.

**PUF:** What should those stakeholders going before agencies be doing?

**Clint Vince:** It starts with the administrative proceedings, as I mentioned, helping to develop the evidentiary administrative record. That's a key starting point. Then, realize that the agencies will not be writing decisions relying on Chevron deference anymore.

They will rely more on the administrative record in explaining their decision and why they feel it's reasonable

and permissible under the statute. When the cases go to court, parties will need to intervene to express their points of view and the practical impacts on their constituents.

This decision is sweeping. It will affect every federal agency that's governed by the Administrative Procedure Act. It will affect water and air. It will affect the clean energy transition. It will affect how vehicles are regulated, air traffic control, communications.

Anyone who says right now, they know how this is going to turn out, is unwise, because there's a lot that's unknown right now. It will depend on the attitude of the busy federal judges that receive these cases.

**PUF:** What's going to happen next?

**Clint Vince:** There will be a lot more litigation and forum

shopping. Also, potentially less consistency in the judicial decision making. Clever litigation and appellate advocates will find ways to creatively frame questions they want the Supreme Court to reconsider, even if they've been considered in a different context earlier.

It's important to know that several cases were decided at the same time as *Loper Bright*. The Securities Exchange Commission versus *Jarkesy* found that the SEC cannot hold an administrative proceeding for securities fraud but must allow that case to be brought in court before a jury. That's a sea change also.

In the *Corner Post* Supreme Court case that also just came out, the Supreme Court said the statute of limitations on administrative decisions is not the six-year period from the time the regulation was developed, which was the status quo, but six years from the time the party allegedly was affected by the regulation. That opens a whole new opportunity for litigation.

**PUF:** Are there similar cases that could go to the Supreme Court?

**Clint Vince:** The short answer is yes, and it remains to be seen how those cases are framed. The Supreme Court indicated the preference of the majority conservatives, sort of libertarian wing, to cut back on what they call the administrative state.

It started in the New Deal with Franklin Roosevelt, and their intention is to destabilize administrative agency decision making in favor of the judiciary making final decisions.

**PUF:** How do you answer if a client asks, "What's the one thing I've got to worry about here?"

**Clint Vince:** I would tell her that it's a great question that requires a multifaceted answer. First, it depends on whether

she likes the outcome of the administrative decision or not. Depending on that comes how to frame a litigation strategy.

Also, she should have a concurrent public policy strategy in terms of the approach to Capitol Hill. What we haven't

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talked about but is crucially important, is I would ask, "What is the impact of state regulation and state reaction to the issue of importance to you?"

For example, when Congress is gridlocked, the states often innovate and get involved. So, will the states pass their own administrative review statutes? That is very possible, if they don't have them already.

I think you could predict which states would agree with the Supreme Court on

*Loper Bright* and which states would want to have more deference to agency decision making. That is an unknown now, but important. **PUF**

## Using Clean Energy Federal Funding

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lower-income households, this doesn't reduce their energy burden. It is key to apply rebates and other available funds so that total monthly costs go down meaningfully.

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We talk a lot these days about the affordability challenges facing many households. But back in the nineteen thirties, with the help of Reddy Kilowatt, the talk was more about electricity's impressive value broadly.