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After Chevron: 7 FERC Takeaways From Loper Bright

By **Norman Bay** (July 12, 2024)

On June 28, the U.S. Supreme Court overturned a decades-old precedent, known as Chevron deference, that favored federal agencies' rulemaking interpretations. In this Expert Analysis series, attorneys discuss the decision's likely impact on rulemaking and litigation across practice areas.

Commentators have long expected a conservative Supreme Court to overrule the Chevron doctrine, and on June 28, the court obliged in Loper Bright Enterprises v. Raimondo.[1]

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The Chevron doctrine gave deference to a federal agency's interpretation of its statutory authorities. In step one, Chevron asked whether Congress has "directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter."

If the statute is silent or ambiguous, however, in step two, the court would determine whether an agency's interpretation of its statute was reasonable.

If it was, the interpretation was upheld. As a result, Chevron deference became a powerful tool for every agency. What impact will its removal have on the Federal Energy Regulatory Commission? Here are seven takeaways.

First, Loper Bright is unlikely to affect the great majority of commission orders. Every year, the commission issues thousands of orders. Very few orders involve nuanced questions of the outer limits of the commission's statutory authority under the Federal Power Act or Natural Gas Act.

Instead, they involve myriad other questions, especially the routine application of tariff provisions, market rules and regulations, where the commission's authority is clear and congressional intent is unlikely to be at issue.

Structural and institutional factors also minimize Loper Bright's impact. The commission, unlike the U.S. Environmental Protection Agency or executive agencies, is an independent agency. It has five commissioners, divided between Democrats and Republicans, who serve staggered five-year terms. An order requires a majority vote.

As an institutional matter, the commission has typically sought consensus, and almost all orders are issued unanimously. Based on the commission's structure and the industries it regulates, which are highly capital intensive and require regulatory certainty, the commission tends to develop policy in a bipartisan, incremental fashion. Incrementalism, by definition, is less apt to rely on a leap in statutory interpretation.

The commission's process is another helpful factor. Rulemakings generally build extensive records for the commission to draw upon and to support its choices. To preserve an argument for appeal, a party must seek rehearing.

The rehearing process gives the commission the opportunity to correct mistakes and to buttress its position. The rehearings branch of the Office of General Counsel has some of the commission's most experienced and skilled lawyers.

Then there are the commission's authorities, which are written in unambiguously broad terms. Under the FPA and NGA, the commission has the authority to ensure that rates are just and reasonable and not unduly discriminatory or preferential, as well as the authority to regulate practices that affect rates.

Moreover, the commission possesses the power to issue such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of each act. Over the last 80-plus years, a rich body of precedent has developed upholding the commission's exercise of its authority in a wide variety of contexts.

Second, empirical evidence shows that most commission action is unlikely to be affected by Loper Bright. Since Chevron was decided in 1984, there have been approximately 1,100 reported circuit decisions in which the commission was a party. Only 213 of the decisions cite Chevron. The rest — more than 80% — do not.

In the Supreme Court, since Chevron was decided, the commission has been a party in only a handful of cases. In the most recent case, FERC v. Electric Power Supply Association in 2015, the Supreme Court upheld Order No. 745, based on the commission's authority over practices affecting rates. Notably, even though the commission asserted Chevron deference, the court said there was no need to consider it.[2]

Third, the Supreme Court's decision not to rely on Chevron in FERC v. EPSA was not an anomaly. A review of major commission orders shows that while some courts invoked Chevron deference, many did not.

For example, in upholding the commission's energy storage rule, Order No. 841, the U.S. Court of Appeals for the D.C. Circuit said in National Association of Regulatory Utility Commissioners v. FERC in 2020 that it did not need to rely on Chevron deference because FERC's authority over practices that affect rates was unambiguous.[3]

In other cases, even when Chevron was cited, it was often used as a backup argument. In upholding Order No. 451 in Mobil Oil v. United Distribution in 1991, which set a price ceiling on old natural gas, the Supreme Court stated, "Even had we concluded that ... [the Natural Gas Policy Act] failed to speak unambiguously to the ceiling price question, we would be compelled to defer to the Commission's interpretation."[4]

Concerning Order No. 436, which required interstate natural gas pipelines to provide open access, the D.C. Circuit said in Associated Gas Distributors v. FERC in 1987 that while Chevron was "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."[5]

In the same case, in rejecting the argument that Section 602 of the Natural Gas Policy Act barred open access, the D.C. Circuit again used Chevron as a backup argument. "[A]part from our independent conclusion that ... [Section 602] has no such purpose, we regard FERC's interpretation as reasonable."[6]

Then there are cases in which the court invoked Chevron to uphold part of an order.

In New York v. FERC in 2002, the Supreme Court upheld the landmark Order No. 888, which restructured the electric industry, based on statutory text "[t]hat unquestionably supports FERC's jurisdiction to order unbundling of wholesale transactions (which none of the parties before us questions), as well as to regulate the unbundled transmission of electricity retailers."[7]

But the court implicitly relied on Chevron to sustain the commission's decision not to regulate bundled retail transmission as "a statutorily permissible policy choice."[8]

Similarly, the D.C. Circuit upheld the most important aspects of the landmark Order No. 636, which restructured the interstate natural gas pipeline industry, without relying on Chevron. The one exception was an aspect of the order that included rate restructuring to the detriment of certain customer amounts.[9]

There are also cases in which the court has appeared to lean on Chevron.

In South Carolina Public Service Authority v. FERC in 2014, the D.C. Circuit invoked Chevron to uphold three aspects of Order No. 1000: the final rule's requirement of regional transmission planning; the removal of the federal right of first refusal; and cost allocation reform.[10]

Similarly, in Solar Energy Industries Association v. FERC in 2023, the U.S. Court of Appeals for the Ninth Circuit relied on Chevron deference to uphold Order No. 872, which revised the commission's Public Utility Regulatory Policies Act regulations.[11]

That being said, it is hard to know how the courts would have decided issues in the absence of Chevron. Perhaps the courts would have grappled more with the text and structure of the statute and still found a way to affirm.

Fourth, all of this is not to say that Loper Bright will not affect the commission. It will, though perhaps not as much as many may expect. Indeed, on July 2, the Supreme Court vacated the D.C. Circuit's judgment in Edison Electric Institute v. FERC and remanded the case for further consideration in light of Loper Bright.[12]

This case raises the issue of whether "power production capability" under PURPA refers to a facility's maximum net output to the grid at any one time or the maximum amount of power that a facility can create.

Edison Electric Institute highlights that the orders most likely to be affected by the loss of Chevron deference are the ones relying upon a nuanced interpretation of statutory text that is arguably less than clear.

Fifth, the commission has lost an important fallback argument — a safety net — in defending itself in courts of appeals in matters involving an interpretation of its authorities. Not surprisingly, the commission often asserted Chevron deference in defending its rulemakings in court.

No longer can the commission make the twofold argument that its statutory authority is clear and that even assuming arguendo that it is not, the court should defer to the commission's reasonable interpretation of its authority.

The commission, which is typically careful and incremental in its approach to rulemaking, will likely become even more cautious. In that sense, Loper Bright may have a chilling effect

on the commission. The commission also strives to write thorough, well-reasoned and supported orders. Now, the commission may feel the need to write rulemakings even more carefully than in the past and to bolster its explanation for the statutory basis for its action.

Sixth, courts have also lost a safety net. They will be forced to decide whether or not congressional intent is clear. If it is, the commission will prevail. Conversely, if the statutory authorities are ambiguous, the commission will lose.

But a legal realist would note that it is not always easy to determine whether a statute is ambiguous or unambiguous. There will often be latitude for a court to anchor its holding in what it believes to be the proper reading of the statute.

For example, in Piedmont Environmental Council v. FERC, in the U.S. Court of Appeals for the Fourth Circuit in 2009, which gutted the commission's backstop transmission siting authority, the majority and the dissent both argued that the statute was clear but reached opposite conclusions.[13]

Finally, it remains to be seen whether litigants will use Loper Bright to call into question otherwise settled commission precedent, where the reviewing court relied on Chevron deference.

To some extent, the Supreme Court signaled that Loper Bright should not become a regulatory doomsday device. The court noted,

> We do not call into question prior cases that relied on the Chevron framework. The holdings of those cases that specific agency actions are lawful ... are still subject to statutory stare decisis despite our change in interpretive methodology. Mere reliance on Chevron cannot constitute a 'special justification' for overruling such a holding.[14]

But the circuit courts, not the Supreme Court, are usually the last word on cases involving the scope of FERC's authority. And the decision of one circuit court is not binding on another; it is only persuasive authority.

Will litigants unhappy with a circuit decision that relied on Chevron seek to relitigate the issue at the commission and then before another circuit? Such a strategy would take careful planning and years to unfold.

Under Title 28 of the U.S. Code, Section 2112, the petitioner selects the venue for an appeal, though other parties can seek transfer to a different circuit "[f]or the convenience of the parties in the interest of justice."[15]

Will the solicitor's office at the commission challenge clear attempts at forum shopping? And how will a reviewing court consider the Supreme Court's guidance in evaluating how much weight to ascribe to precedent that relied on Chevron?

All these issues and more will be addressed in the years to come.

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Disclosure: Norman Bay was chairman of FERC when FERC v. EPSA was argued and decided. He also issued the notice of proposed rulemaking that resulted in Order No. 841, concerning energy storage rulemaking.

[1] Loper Bright Enterprises v. Raimondo, No. 22-451 (U.S. June 28, 2024).

[2] FERC v. Elec. Power Supply Ass'n, 577 U.S. 261, 277 n.5 (2016).

[3] National Ass'n of Regulatory Utility Com'rs v. FERC, 475 F.3d 1277, 1279 (D.C. Cir. 2020).

[4] Mobil Oil Exploration and Prod. Se, Inc. v. United Distrib. Co., 498 U.S. 211, 225 n.5 (1991).

[5] Associated Gas Distrib. v. FERC, 824 F.2d 981, 1001 (D.C. Cir. 1987).

[6] Id. at 1003.

[7] New York v. FERC, 535 U.S. 1, 23-24 (2002).

[8] Id. at 28.

[9] United Distrib. Co. v. FERC, 88 F.3d 1105, 1166 (D.C. Cir. 1996).

[10] S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 58-59, 76, 84 (D.C. Cir. 2014).

[11] Solar Energy Indus. Ass'n v. FERC, 80 F.4th 956, 975 (9th Cir. 2023).

[12] Edison Elec. Inst. v. FERC, No. 22-1246 (U.S. July 2, 2024).

[13] Piedmont Envtl. Council v. FERC, 558 F.3d 304 (4th Cir. 2009).

[14] Loper Bright, at 34.

[15] 28 U.S.C. § 2112(a)(5).