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Chevron 'Sleeps with the Fishes': US Supreme Court Sinks Deference to Agency Interpretation of Statutes

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On June 28, 2024, in *Loper Bright Enterprises v. Raimondo*, the U.S. Supreme Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which for 40 years required court deference to reasonable agency interpretations of federal statutes in certain circumstances, even when the reviewing court would read the statute differently. The Court ended "*Chevron* deference" and held that courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." In doing so, the Court upended a longstanding principle of administrative law that is likely to make agency decisions more susceptible to challenge in the courts.

Chief Justice Roberts authored the 6-3 conservative majority opinion, which undercuts the principal of agency deference and rejects the premise that subject matter experts at federal agencies are better equipped to interpret complex statutes. The Court reframed the term "expert," moving away from the notion that complicated statutory schemes require technocratic expertise, to one where courts are best equipped to resolve statutory ambiguity. Writing for the majority, Chief Justice Roberts stated that "delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise." Courts, and not the executive branch, are better informed to interpret statutes. Justices Kagan, Sotomayor and Jackson dissented, lamenting the demise of a "cornerstone of administrative law" that has "allocat[ed] responsibility for statutory construction between courts and agencies" in thousands of cases.

While the precise effects of the *Loper* decision remain uncertain, there is little doubt that it will significantly affect the federal government and regulated industries, including the energy industries regulated by the Federal Energy Regulatory Commission (FERC or Commission). Indeed, *Loper* is already making waves in the energy regulatory space. For example, on July 2, 2024, the Supreme Court granted *certiorari* in *Edison Electric Institute v. FERC*, S. Ct. Case No. 22-1246, which sought review of a U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) decision upholding FERC's interpretation of the limitation on the maximum permissible size for qualifying facility status under the Public Utility Regulatory Policy Act of 1978 (PURPA). Because the D.C. Circuit relied on *Chevron* deference in upholding FERC's decision, the Court vacated the D.C. Circuit's judgment and remanded the case to the D.C. Circuit "for further consideration in light of *Loper*." The pipeline industry is also taking note in light of challenges to natural gas infrastructure projects based on more modern readings of the Natural Gas Act (NGA) to include environmental review obligations.

Background

Loper arose from a petition filed on behalf of herring fisherman challenging regulations enacted by the National Marine Fisheries Service purportedly under the Magnuson-Stevens Act (MSA) to protect Atlantic coast fisheries from overfishing. Both the district court and the D.C. Circuit upheld the regulations as a "reasonable" interpretation of the MSA under *Chevron*. Petitioners did not argue that the lower court's application of *Chevron* was incorrect, but that *Chevron* itself was unconstitutional because it resulted in courts abdicating their Constitutional duty to interpret the law by reflexively deferring to agency judgement. The Supreme Court majority agreed with this characterization. In doing so, it explicitly overruled *Chevron*, a 40-year-old judicially created doctrine that has been used to uphold hundreds of administrative regulations, including regulations implemented by FERC under PURPA, the Federal Power Act (FPA), NGA and the Interstate Commerce Act.

Holding and Reasoning

Until now, *Chevron* required courts to use a "two-step" approach when reviewing agency action. Step one had courts assess whether Congress spoke directly to the precise question at issue. If congressional intent was clear, that would be the end of the inquiry. The agency's fidelity to the unambiguously expressed intent of Congress would be assessed. Under step two, if the court determined that the statute was silent or ambiguous with respect to the specific issue at hand, the agency's interpretation would receive deference, provided it was a

reasonable construction of the statute. *Loper* characterized *Chevron*'s "two-step" approach as a "dizzying breakdance" of clarifications and exceptions. It found that the test has "become an impediment, rather than an aid, to accomplishing the basic judicial task of say[ing] what the law is." Rather than adhere to an agency's statutory interpretation, as *Chevron* might recommend, *Loper* brings power back to the courts to "effectuate the will of Congress subject to constitutional limits" and subject to recognized "constitutional delegations."

Loper also found *Chevron* deference to be at odds with the Administrative Procedure Act (APA), a statute enacted as a check on agency authority, and the primary vehicle that litigants use to seek judicial review of agency action. The Supreme Court held that the APA necessitated the courts to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." While the agency's judgment could inform the court's inquiry, the APA does not permit deference to agency interpretation "simply because a statute is ambiguous." Instead, the APA requires courts to decide all relevant questions of law when reviewing agency action, regardless of whether the law is ambiguous. The Court acknowledged that agencies could aid in a court's interpretation of a statute, provided that on questions of law, the courts retained the final word. This is consistent with the APA's adherence to "reasoned decisionmaking" as the standard for assessing whether an agency's action is lawful.

The Court also held open the possibility of reversing agency action subject to clear congressional delegation, if it deemed the delegation to fall outside of constitutional limits. However, it noted that *Loper*'s decision to overrule *Chevron* did not mean that prior cases decided under the *Chevron* framework were also reversed. Any challenge to the holdings in those cases would remain subject to statutory *stare decisis*. In practice, however, the decision in *Loper* is likely to provide the foundation for future challenges to prior decisions affirming agency action as consistent with law based on *Chevron*.

Implications for Review of FERC Action

Courts regularly have relied on *Chevron* in upholding FERC action. The courts have recognized that the just and reasonable standard set out in the FPA and NGA are "obviously incapable of precise judicial definition"[1] and thus have found that courts should "afford great deference" to FERC's ratemaking decisions under *Chevron*.[2] Courts also have applied a "*Chevron*-like" analysis when reviewing FERC's interpretation of tariff provisions and prior Commission

orders, deferring to reasonable agency interpretations of unclear or ambiguous tariff provisions and precedent.[3] Collectively, the result has been a highly deferential standard of review in which FERC action is more likely to be affirmed than remanded.

Loper clearly envisions a more active and less deferential role for the courts in scrutinizing whether actions by FERC and other agencies are consistent with the relevant governing statutory framework. This does not mean that FERC and other agencies will not enjoy any deference in the courts. For instance, the APA requires that a reviewing court defer to FERC's factual findings if they are supported by substantial evidence.[4] Nevertheless, the result of *Loper* may be courts that are more willing to second guess FERC's determination of whether a rate is just and reasonable as well as FERC's interpretation of ambiguous tariff provisions and its own regulations.

While *Loper* overturns *Chevron*, the Court's decision appears to leave at least some room for FERC to argue that the courts should continue to assign significant weight to FERC's interpretations and findings. For instance, the majority opinion in *Loper* recognizes that the courts may "seek aid from the interpretations of those responsible for implementing particular statutes" when exercising the judgment required by the APA. Such interpretations, the Court explained, "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA.

Loper also appears to acknowledge that it may be appropriate for courts to take a more limited and deferential posture when Congress has granted the agency discretion to exercise its judgment as to how to provide substance to the statutory scheme at issue. *Loper*'s recognition that courts must give effect to statutory provisions providing agencies with discretion may prove useful to FERC in arguing that the courts should continue to take a more limited role in evaluating FERC's decisions. For instance, FERC may argue that the just and reasonable standards set out in the FPA and NGA are intended to provide FERC with discretion over ratemaking matters. The language of the FPA and NGA also explicitly provide FERC with authority to establish rates in at least some cases. For instance, after determining that an existing rate is unjust and unreasonable, Section 206 of the FPA authorizes FERC to "determine the just and reasonable rate . . . to be thereafter observed[.]"[5]

FERC commissioners already are arguing about the implications of the decision for some of FERC's most recent policy initiatives. For instance, shortly following the Court's decision, FERC Commissioner Christine issued a statement arguing that *Loper* renders legally indefensible

FERC's recent Order No. 1920, a landmark Final Rule on transmission planning and cost allocation, because the precedent underlying FERC's "claim of legal authority" to issue Order No. 1920 rests on the "foundation of sand known as '*Chevron* deference.'"[6] FERC Chairman Willie Phillips quickly responded that nothing in *Loper* undermines FERC's "authority to regulate [areas such as] regional transmission planning and cost allocation," which he describes as "essential to the Commission's ability to ensure that customers have access to reliable, affordable supplies of electricity—our most fundamental statutory responsibility."[7] Thus, while the ultimate result of these differing views remains to be seen, it is clear that the meaning of *Loper* will figure prominently in the rehearing and eventual judicial review of Order No. 1920 and other major agency actions in the years and months to come.

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1 *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1.*, 554 U.S. 527 (2008).

2 *Id.*

3 *La. Pub. Serv. Comm'n v. FERC*, 10 F.4th 839, 845 (DC Cir. 2021).

4 16 U.S.C. § 825l(b).

5 16 U.S.C. § 824e.

6 *Comm'r Mark Christie's Statement Concerning Order No. 1920 and U.S. Supreme Court's Overruling of* Chevron *Deference* (July 28, 2024), https://ferc.gov/news-events/news/commissioner-mark-christies-statement-concerning-order-no-1920-and-us-supreme ("Christie Statement").

7 *Chairman Willie Phillips' Statement Concerning Order No. 1920* (July 2, 2024), https://ferc.gov/news-events/news/chairman-willie-phillips-statement-concerning-order-no-1920 ("Phillips Statement").

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