
**In this Issue:**



# Courting FERC

Most of the time, court-watching is only slightly more relevant than bird watching in the day-to-day practice of energy regulatory lawyers specializing in FERC work. As I've observed before, only a small percentage of FERC cases (just a dozen last year) are appealed. Moreover, of those cases that reach the federal circuits, there's not a whole lot of suspense regarding the outcome given that FERC overwhelmingly prevails. As for FERC cases that reach the Supreme Court, they're few and far between. Finally, most federal district courts are spared the monotony, er, intricacies of FERC litigation by the filed rate doctrine and primary jurisdiction.

But over the past few months, I've noticed a break in past precedent with court cases and policy assuming more dominance in FERC practice. So fittingly, "Courting FERC" is the theme for this month's newsletter. We'll discuss the implications of the Supreme Court's ruling in Arlington v. FCC which held the Chevron doctrine applicable to agencies' jurisdictional determinations and cover the clash between and state regulators in Maryland federal district court over whether Maryland's "contracts for differences" program for subsidizing new generation unconstitutionally encroaches on PJM's federally-approved reliability pricing model (RPM) which sets wholesale capacity rates through an auction mechanism. We'll also provide an update on the existing vacancy crisis on the D.C. Circuit and what it means for the industry -particularly with review of two major rules (Orders No. 745 and 1000) pending before the Court, not to mention the sudden upward jolt in the number of split decisions out of FERC in the year since Commissioner Clark's appointment.

Here's hoping that this edition of *Courting FERC* appeals to you.

Until next time,

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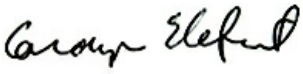
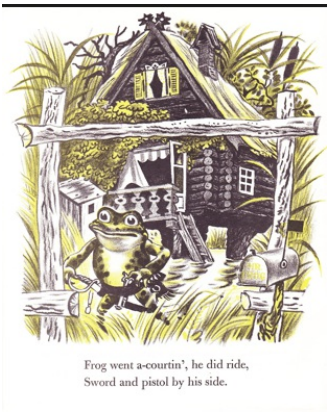


Carolyn Elefant

# SCOTUS Ruling Clarifying the Scope of Chevron Jurisdiction Won't Change Much for FERC Practitioners




Last week, in City of Arlington, Texas v. FCC, the Supreme Court resolved a long-running dispute in the field of administrative law concerning whether agencies such as FERC are eligible for deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. when interpreting the scope of their own jurisdiction. The answer is yes. As the majority opinion, authored by Justice Scalia explains, all cases involving review of agency orders boil down to the question of whether the agency has stayed within the bounds of its statutory authority." Framed this way, there is little distinction between non-jurisdictional interpretations of statutory provisions (where *Chevron* has long mandated deference to the agency's interpretation) and jurisdictional interpretations. As such, rather than force courts to waste time "in the mental acrobatics needed to decide whether an agency's interpretation of a statutory provision is "jurisdictional" or "non-jurisdictional," *Chevron* should simply apply in all scenarios, the majority reasoned.

Don't expect *City of Arlington* to change the outcome of FERC appeals, though. For starters, the D.C. Circuit -which reviews the majority of FERC orders -long ago held what *City of Arlington* just clarified: that Chevron applies to agency assertions of jurisdiction. *See* TAPS Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000)("it is the law of this circuit that the deferential standard of *Chevron* … applies to an agency's interpretation of its own statutory jurisdiction.") Moreover, in many of the cases where FERC unlawfully exceeded the scope of its jurisdiction, it did so in grand fashion -by ignoring the plain language of the statute (or Step 1 of the *Chevron* analysis) rather than through unreasonable interpretation of ambiguous statutory terms. *See, e.g.* Piedmont Environmental Council v. FERC (vacating FERC's assertion of transmission siting jurisdiction over proposals rejected by state agency as inconsistent with Congress' clear intent to limit FERC jurisdiction to actions where review is withheld); City of Anaheim v. FERC (ruling that FERC lacks jurisdiction to set rates retroactively because plain language of Section 206 does not so authorize). Because Chevron deference only kicks in when a statute is ambiguous, *City of Arlington* won't save FERC when it runs afoul of clear statutory limits on its authority.

# D.C. Circuit Vacancies Generate Uncertainty for Electricity Practice


For the first time since 2006, FERC appellate practitioners will see a new face on the D.C.

Circuit bench: Sri Srinivasan, a (now) former deputy solicitor general and Obama judicial nominee confirmed by the Senate by a 97-0 vote on May 23, 2013. With three vacancies remaining, the President plans to take a more aggressive approach by nominating three candidates all at the same time for the open slots. Most observers, however, aren't optimistic and expect strong Republican opposition to stymie some, if not all of the potential nominees. In a worst case scenario, the D.C. Circuit could continue to operate at less than full capacity for the duration of Obama's presidency.

The ongoing D.C. Circuit stalemate couldn't have happened at a worse time for the energy industry with two significant and controversial FERC rulings -Order No. 745 (establishing locational marginal pricing (LMP) as just and reasonable compensation methodology for demand response resources in wholesale markets) and Order No. 1000 (requiring transmission owners to engage in transmission planning and develop cost allocation mechanisms for new transmission projects)-still pending before the D.C. Circuit with no imminent hope of resolution. Although briefing on Order No. 745 concluded at the end of last year, the Court has not yet scheduled oral argument and typically does not schedule cases for the summer. Meanwhile, petitioners just filed opening briefs in the Order No. 1000 appeal on May 28.

Meanwhile, because implementation of Order No. 745 and Order No. 1000 haven't been stayed, affected parties have continued to move forward with compliance filings. Ordinarily, the prospect that companies might have to "undo" subsequent compliance measures approved during the pendency of an appeal is largely theoretical because - well, let's face it -FERC almost always prevails on review. Here, I wouldn't count on an all-out win for FERC since Commissioner Moeller dissented from each ruling (arguing in Order No 745 that LMP overcompensates for DR resources and in Order No. 1000, that elimination of rights of first refusal in Order No. 1000 could discourage regional solutions by perversely incentivizing more local projects). Statistically speaking ,divided rulings don't fare as well on appeal as unanimous FERC orders.

But wait -it gets worse. With Commissioner Clark's appointment to the Commission last July ,Commissioner Moeller's views have now found added reinforcement in his colleague's sharp and articulate dissents. In the past two months alone, the pair dissented from five Commission orders on compliance filings; three involving Order No. 1000 (NEISO, PJM and MISO) and two related to implementation of Order No. 745 demand response compensation (NYISO and MISO). The growing number of split decisions will embolden parties to appeal more FERC rulings.

In this context, the current D.C. Circuit vacancies are particularly troubling since FERC orders remain open-ended for a much longer time -creating regulatory uncertainty for the industry, not to mention a huge mess (and lots of legal fees) if reversal requires FERC to return the proverbial genie back to her bottle." (Can you say California energy crisis?). Filling the three open seats would not only lead to quicker resolution of cases (after all, many hands, or more accurately robes, make light work) but a full bench would reduce the substantial lag time -as much as six months - between completion of briefing and oral argument. Think about it -three open seats mean that the court is down a full panel -which sitting just three times a month would hear an additional 12 arguments (assuming 4 arguments per sitting) or 108 cases for a September through May term. That's significant.

Bypassing the D.C. Circuit in favor of another venue for appeal won't solve the problem. Other federal circuit courts also have vacancies (though not as serious as the D.C. Circuit) not to mention heavier caseloads (albeit often on simpler matters). But more seriously, decisions out of other circuits could potentially create even more uncertainty since these courts aren't as familiar with "FERC work" as the D.C. Circuit, and could issue rulings that don't fully align with established precedent, therefore raising as many questions as they resolve.

With a hobbled D.C. Circuit and the "new normal" of split decisions, FERC practice just got a little harder as companies, consumers and their counsel must make decisions in the face of multiple moving parts with little immediate guidance from the courts. Welcome to dynamic practice.

## Maryland Versus the Markets

What happens when a state -dissatisfied with the price signals set by FERC-regulated wholesale electric markets intended to simulate efficient development of new generation resources -takes matters into its own hands by creating an incentive program to build a plant that economically satisfy the state's reliability needs? Back in the day before organized markets, states traditionally had full authority over power procurement without impunity. But now, as Maryland (and New Jersey) are learning, it's not so easy for a state to stimulate new supply without, quite literally, making a federal case out of it .

In fact, that federal case, between a group of wholesale generators that participate in PJM markets and the Maryland Public Service Commission is now pending decision in federal district court in Maryland in *PPL et. al. v. Nazarian (Maryland PSC),* CPF, Docket No. 12-1286, following a six day trial held back in April. The issues are constitutional in nature: Does Maryland's "contract for differences" (CfD) program -requiring local utilities to enter into long term PPAs with a generator selected through an RFP at a cost equal to the difference between the PJM market clearing price and a contractually established benchmark -run afoul of the Supremacy Clause (i.e., preemption) or the Commerce Clause?

While I don't have time for a lengthy analysis, here's a quick (and hopefully neutral) run down of each side's position. You'll have to wait for my predictions (or for the actual outcome, expected any day) until the next issue of the newsletter. In the meantime, feel free to check out the post-trial briefs, here and here.

The challengers (wholesale generators who sell in PJM markets) argue that Maryland's CfD program isn't a contract, but rather a state-sponsored wholesale rate in disguise -in essence, Maryland has set rates for EDC's wholesale purchases from the generator. Because FERC preempts the field when it comes to wholesale ratemaking, Maryland's interference with FERC's exclusive function is unlawful. From the challenger's perspective, the Maryland's CfD program doesn't simply shift power from the feds to the state, but threatens to disrupt the delicate balance of wholesale markets. Because Maryland ratepayers make up the difference between PPA rates and the PJM clearing price, Maryland's plant could low bid in PJM markets and depress rates for all generators, distorting pricing signals and making it difficult to attract new generation in the long run.

The challengers also claim that Maryland's program violates the dormant commerce clause because the RFP required construction of the plant in Maryland (or the District of Columbia). These geographic restrictions constitute a prima facie violation of the dormant commerce clause which

prohibits a state from discriminating against out of state interests in favor of in-state commerce. (I've written about Commerce Clause issues vis a vis RPS standards here).

Meanwhile, CPV, the developer chosen in the Maryland RFP process, does the heavy lifting for Maryland's position. First, CPV argues that there's no preemption since the CfD isn't a rate at all, but merely a subsidy or hedge contract designed to ensure a sufficient stream of revenue to make a new plant viable. States, not FERC, have authority to establish these extra-jurisdictional devices and further, even in interstate markets, continue to retain primacy over procurement decisions. CPV disputes the challengers' position that Maryland's program impacts federal markets any more than demand response or DG programs which essentially remove power from wholesale markets (cue the butterfly effect!) These state programs too have impacts on wholesale markets but aren't accused of preempting federal control. In any event, says CPV, wholesale markets don't necessarily work as intended; as PSC Commissioner Nazarian famously testified the price signals are "a bunch of baloney" (never saw that jargon in a FERC case before). On the Commerce Clause issue, CPV asserts that while the state required a plant in Maryland or D.C. (in order to address reliability concerns), the RFP was open to in state and out of state developers alike, and therefore did not discriminate. And even if the in-state requirements did discriminate, continues CPV, on balance, the impacts are minimal and therefore permitted.

As I said, you'll have to wait until next time for my predictions. But here are a few overall comments. First, I thought that the quality of both principals' briefs was outstanding -minimal inside-baseball and acronyms and lots of context. Absolutely required reading for anyone new to the industry. At the same time, each side made missteps here and there (for example, with all due respect to CPV, no way does the CfD program qualify under the market participant exception to the Commerce Clause which only kicks in when the state spends its own money to participate in markets). Overall a close case -and hard for me to decide which side is right. I certainly don't envy Judge Garbus as the delicate federal-state balance in energy markets hangs in the balance in his courtroom.


## Meet, Greet & Eat - My Treat

If you're in the DC area, I hope you can join me for a casual Meet, Greet & Eat - My Treat on Tuesday June 11, 2013, 8 AM at Busboys & Poets on 5th & K. I'm looking forward to catching up with colleagues before summer vacation season is underway and trading ideas and predictions about the energy industry and law practice.

You can RSVP to me directly at carolyn@carolynelefant.com or here. There are only 20 spots, so participation will be first come, first served -but if enough people are interested, maybe we can make these kinds of casual meet ups a regular event.

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Our mailing address is:
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