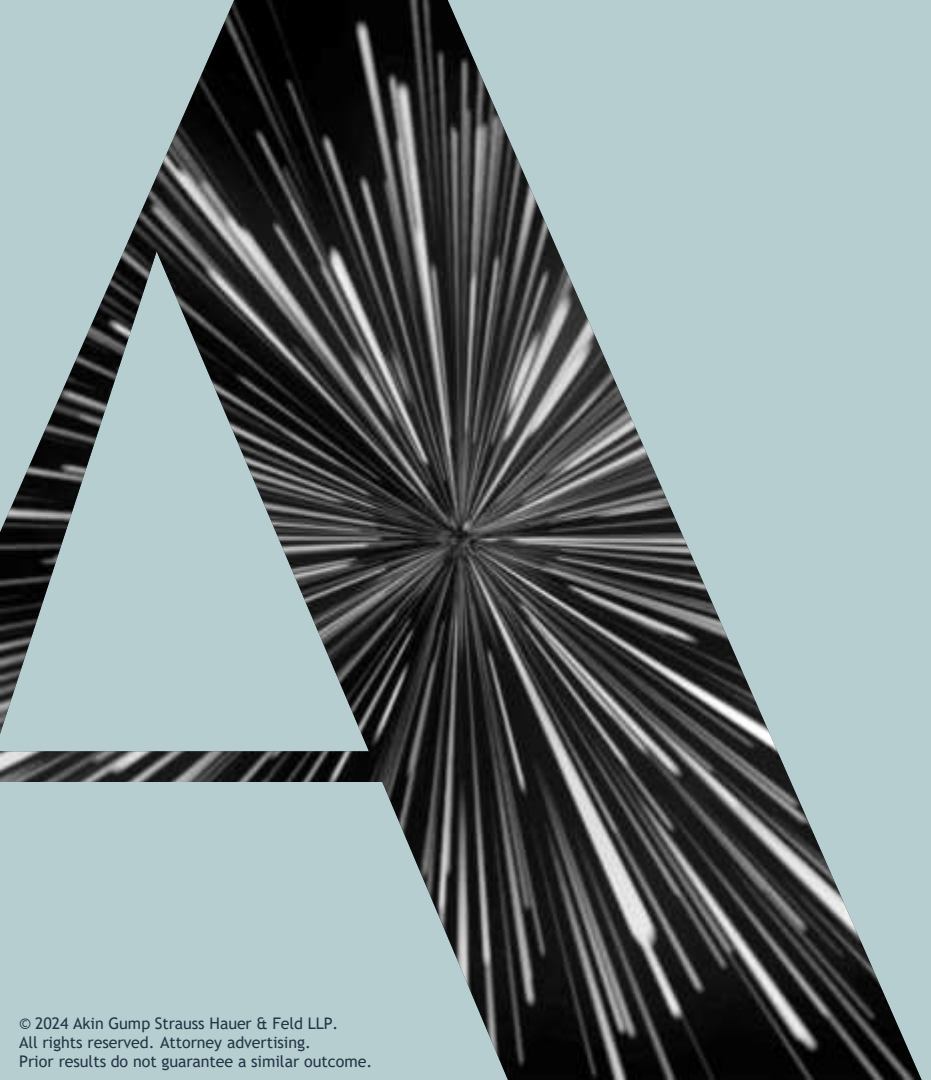

Session 5: Basics of Energy Law and the Energy Transition

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100+ Years of Energy Regulation

- **Interstate Commerce Act of 1887**
  - Concepts of the “public interest” and rates that are “just and reasonable” date back to British common law controlling monopoly power.
  - Extends Congress’s Commerce Clause authority to address railroad monopolies and regulate their rates and conditions of service.
  - Extended to interstate oil pipelines in 1906 and fundamentally unchanged since then.
  - The basis for every major consumer protection statute: FPA, NGA, Communications Act

- **Federal Water Power Act of 1923**
  - Reaction to perceived need to regulate interstate hydroelectric facilities to fill gaps in regulatory oversight
  - Contains language on restraining trade that parallel the Sherman Act
  - Becomes the basis for and Part I of the Federal Power Act of 1935

- Lag time between technological changes and statutory changes remains constant

Federal Power Act Fundamentals

- Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, vests FERC with jurisdiction to regulate "public utilities" making sales of electricity at wholesale (*i.e.*, sales for resale) or transmitting energy in interstate commerce
  - Wholesale sales = sales for resale (i.e., not to end use customer)
  - Transmission = delivery of electricity (excludes distribution)
- FERC has an obligation to ensure that the rates, terms, and conditions of wholesale sales and transmission of electricity are just, reasonable, and not unduly discriminatory or preferential

Natural Gas Act First Principles

Natural Gas Act, 15 U.S.C. § 717 *et seq*.

- **Public Interest**:
  - The business of transporting and selling natural gas for ultimate distribution to the public is affected with a **public interest**
- **Consumer Protection**:
  - Rates must be "just and reasonable"; practices may not be unduly discriminatory or preferential.
  - Market exit and entry guided by principles of "public convenience and necessity."

For nearly 70 years, compliance focused on "natural gas companies"

Post 2005/Western Energy Crisis, compliance extended to marketers and traders

- Anti-market manipulation and price transparency authorities added to NGA
- Civil penalties increase exponentially from $25,000 to ~$1.5 Million

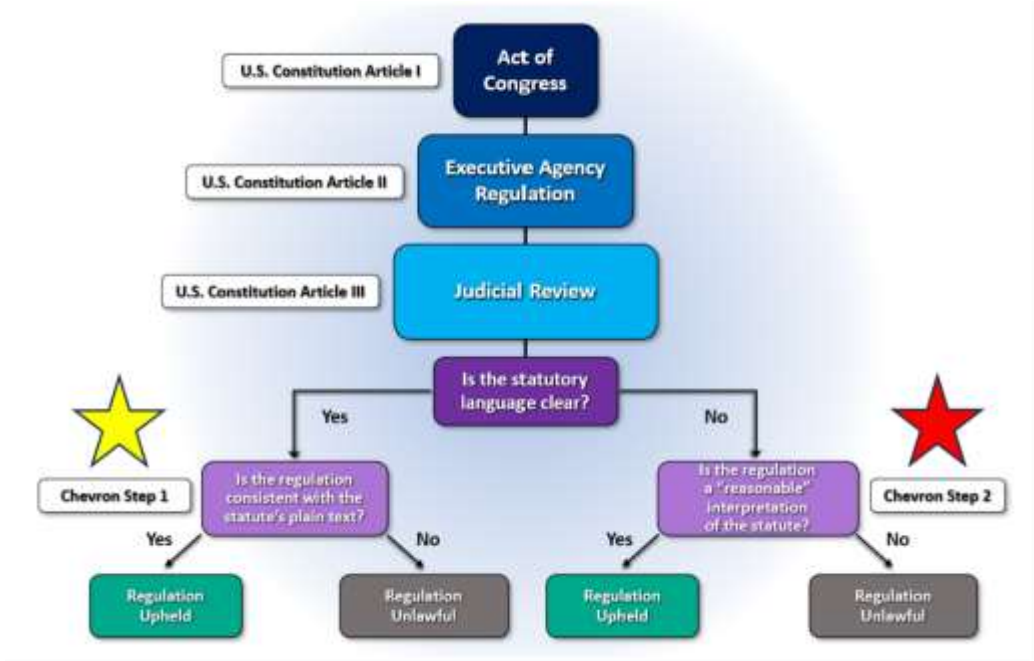
Energy Regulation 101 – We're in the Economy Era

- Every "era" of energy regulation parallels the U.S. economy, culturally and technologically
  - **Early 20th Century:**
    - fear of monopoly power and overcoming constitutional limitations on state power, e.g., FPA, NGA, PUHCA
  - **Mid-Century (1940s - 1960s):**
    - Challenges to jurisdiction and governmental authority as regulations mature, e.g., *Hope Natural Gas*, *S. Cal. Ed. V. FPC*, *Fla. Power & Light v. FPC*, *Phillips* case, and *Permian Area Rate Cases*.
  - **1970s:**
    - Economic scarcity requires promotion of competition, e.g., Public Utility Regulatory Policies Act of 1978 and Natural Gas Policy Act of 1978
  - **1980s and 1990s:**
    - Emergence of deregulation and open access, e.g., Energy Policy Act of 1992 and Order Nos. 436, 636, 637
  - **Early 2000s:**
    - Pairing back excess to focus on enforcement and reliability, e.g., Energy Policy Act of 2005 and Order No. 717
  - **Today:**
    - Energy in transition and backlash vs. progress, e.g., Inflation Reduction Act, *WVa. v. EPA* and *Loper Bright v. Raimondo*

The Future of Energy Regulation in a Post-*Chevron* Deference World

Are FERC's Regulations Vulnerable in Court?

- How much deference will FERC's regulations get if the Supreme Court revises the 40-years-old *Chevron* doctrine?



Chevron USA, Inc. v. NRDC, 467 U.S. 837 (1984) was intended as a "check" on a liberal activist judiciary, overruled by conservative Supreme Court in *Loper Bright Enterprises v. Raimondo*

Chevron deference thrived in the gray space between what Congress intends and what the agency implements.

Chevron Sleeps with the Fishes

- National Marine Fisheries Service (NMFS) regulations implemented under the Magnuson-Stevens Act (MSA) require certain Atlantic Ocean fishing vessels to quarter federal observers tasked with ensuring compliance with fishery conservation and management regulations, and to pay fees to fund their salaries.
- D.C. Circuit upheld regulations under *Chevron*
- Impacted fishing vessels don't just ask for reversal of the D.C. Circuit, but wholesale rejection of *Chevron* doctrine.
- Argue that reflexive deference to agency judgement = abdication of Article III powers.

Chevron deference, an "abdication of the judicial duty"

Agency Deference Already in Peril

- Elevation of the Major Questions Doctrine in *West Virginia v. EPA*, already removed some semblance of agency deference.
- Case concerned interpretation of CAA Section 111(d)
- Decisions on issues of "vast economic or political significance," must be supported by clear congressional authorization.
- Created a threshold for *Chevron* deference without disturbing it entirely.
- *Stare decisis* no longer seen as a barrier on SCOTUS

> "At this point, all that remains of Chevron is a decaying husk with bold pretensions

Energy Industry Takes Notice

- Push pull with fossil fuel industry regulations during energy transition/energy addition.
- Technological changes not contemplated when certain legacy energy and environmental statutes were enacted
  - CCUS
  - Green hydrogen
  - SAF
- Crafting modern regulations that interpret early 20th Century statutes already challenging under Major Questions Doctrine, even more challenging without *Chevron* deference

LNG “Pause” in Peril

- Natural Gas Act (“NGA”) does not define “public interest”
  - Export to countries with FTA status deemed in the “public interest”
  - Export to non-FTA countries presumed to be in the public interest
  - Public interest analysis traditionally comprised of economic and national security implications; climate change and GHG emissions not central to analysis
- U.S. DOE is “pausing” LNG exports to non-FTA countries while it updates analyses on whether exports are in the “public interest.”
- Courts traditionally deferential to DOE interpretation of NGA may change course
- DOE gets no deference under NEPA even with *Chevron*

Will Order No. 1920 Stand Post-*Chevron ?*

- Adopts Long-Term Regional Transmission Planning requirements aimed at addressing inefficient and piecemeal build out of transmission infrastructure
  - Planning must evaluate transmission facilities that can alleviate constraints that are repeatedly identified through interconnection process
  - Transmission providers must adopt *ex ante* cost allocation methodologies
  - "Right-sizing" of transmission facilities
  - Consider advanced transmission technologies as more cost-effective solutions to address regional transmission needs
- Scathing dissent by Commissioner Christie
  - Too costly for consumers
  - Jurisdictional overreach by FERC.
  - Violates tenant of providing consumers with reliable power at lowest cost possible

Thank You!

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