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Five Things to Know About Justice Kavanaugh and FERC

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By **Norman C. Bay and Thomas R. Millar** | April 1, 2019

On Oct. 6, 2018, Justice Brett M. Kavanaugh was confirmed to the U.S. Supreme Court. Before becoming a justice, he was on the U.S. Court of Appeals for the D.C. Circuit for 12 years. According to the Congressional Research Service, Judge Kavanaugh adjudicated more than 1,500 cases and authored a majority, concurring or dissenting opinion in 306 cases.

As a historical matter, the Supreme Court hears few cases involving the Federal Energy Regulatory Commission (FERC). Yet this may change given the blurring of the line between wholesale markets, which are FERC jurisdictional, and retail markets, which the states oversee. In 2015-16, the court decided a trilogy of cases—*Oneok v. Learjet*, 135 S. Ct. 1591 (2015), *Federal Energy Regulatory Commission v. Electric Power Supply Association*, 136 S. Ct. 760 (2016), and *Hughes v. Talen Energy Marketing,* 136 S. Ct. 1288 (2016)—that navigate the line between state and federal jurisdiction. Moreover, concern over climate change, the convergence of environmental and energy policy and jurisdictional conflict between FERC and bankruptcy courts over wholesale power contracts may result in litigation that winds its way to the Supreme Court.

With the possibility of FERC Supreme Court litigation on the horizon, an examination of Kavanaugh's FERC jurisprudence is instructive, especially when combined with a review of his legal scholarship.

He has significant FERC experience.
Kavanaugh brought more FERC experience than most of his colleagues to the Supreme Court. Only Justice Ruth Bader Ginsburg spent more time on the D.C. Circuit (1980-1993) before being elevated to the Supreme Court. Four justices came from other circuits that hear fewer FERC matters, though Justice

Stephen Breyer taught and wrote on administrative law, including energy regulation. Kavanaugh decided a wide variety of FERC issues while on the D.C. Circuit, including 55 cases in which FERC was a party. Thirty-six cases involved the Federal Power Act (FPA), including regional transmission organizations, wholesale rates and hydropower licenses. Eleven cases dealt with the Natural Gas Act, including gathering services, pipeline rates and National Environmental Policy Act studies. Eight cases addressed oil pipelines and the Interstate Commerce Act. Of those 55 cases, he authored the majority opinion in 13 of them.

He was often deferential to the agency and affirmed.
In a keynote address at Notre Dame Law School in 2017, Kavanaugh criticized the *Chevron* doctrine as "encouraging agency aggressiveness on a large scale," but noted one exception of particular relevance to an agency like FERC that has rate-setting authority:

For example, Congress might assign an agency to prevent utilities from charging "unreasonable" rates. In such a case, what counts as "unreasonable" amounts to a policy decision. So courts should be hesitant to second-guess that decision. In that circumstance, Congress has assigned the decision to an executive branch agency that makes the policy decision. So the courts should stay out of it for the most part, Keynote Address: "Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions," 92 Notre Dame L. Rev. 1907, 1912-13 (2017).

In a series of cases, Kavanaugh's opinions reflect deference to FERC on matters involving the reasonableness of rates, terms, or conditions of service, when the commission's action is being reviewed under the Administrative Procedure Act's arbitrary and capricious standard.

In *Blumenthal v. FERC*, 613 F.3d 1142 (D.C. Cir. 2010), FERC denied a challenge to ISO-NE's executive compensation plan. In upholding the commission, Kavanaugh explained that "FERC, not the Judiciary, has the principal statutory role in determining the reasonableness of rates … Our role is only to determine whether FERC's contrary approach was so unreasonable as to violate the APA's deferential arbitrary and capricious standard. In light of the judicial restraint we must exercise when applying that standard, we cannot say that FERC's decision jumped the rails of reasonableness."

Similarly, in *North Baja Pipeline v. FERC*, 483 F.3d 819 (D.C. Cir. 2007), a pipeline appealed FERC's rejection of its force majeure provision. Kavanaugh again upheld the commission, noting that the arbitrary and capricious standard of review required FERC's conclusions to be "reasonable and reasonably explained." In *North Baja*, the commission did so. Moreover, he explained, "we are 'particularly deferential to the commission's expertise in ratemaking cases, which involve complex industry analyses and difficult policy choices,'" (quoting *Exxon Mobil v. FERC*, 430 F.3d 1166, 1172 (D.C. Cir. 2005)). As in *Blumenthal*, Kavanaugh examined the record to ensure that it supported the commission's determination.

But he did not hesitate to call the commission to task.
In several cases, Kavanaugh authored unanimous opinions vacating commission orders. Two themes run through these decisions. The first is the primacy of statutory text. In the 2013 Sumner Canary Lecture at Case Western Reserve University School of Law, Kavanaugh explained that the "bread and butter" of the D.C. Circuit's docket is administrative litigation, with "very complicated administrative records" requiring the application and interpretation of "very complex statutes," Lecture: 2013 Sumner Canary Memorial Lecture: The Courts and the Administrative State, 64 Case W. Res. L. Rev. 711, 716 (2014). To resolve these cases, Kavanaugh quoted Justice Felix Frankfurter's "threefold imperative to law students": "'Read the statute; read the statute; read the statute.'" The second theme is evidentiary in nature: the record must provide adequate support for the commission's determination. Thus, in any administrative matter before the Supreme Court, Kavanaugh will carefully examine the statute and the record.

NRG Power Marketing v. FERC, 862 F.3d 108 (D.C. Cir. 2017) may be the most consequential FERC opinion authored by Kavanaugh because it impacts every filing the commission receives under Section 205 of the FPA. In *NRG*, PJM made a Section 205 filing to change several aspects of the minimum offer price rule that applied to its capacity market. The commission found parts of PJM's proposal unjust and unreasonable, but said that it would accept the filing subject to PJM's agreement to certain modifications. PJM agreed to the modifications, and on appeal the question was whether the commission had the authority to modify PJM's filing. Writing for the court, Kavanaugh held that the commission did not. Under Section 205, FERC has a "'passive and reactive role'" in which it can accept or reject the utility's proposal but cannot make modifications that are more than minor in nature, even if the utility consents, (quoting *Advanced Energy Management Alliance v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (per curiam)). In creating a new rate design, the commission had deprived the utility's customers of the opportunity to comment on the modifications before the order was issued or to comment on the request for rehearing. After *NRG*, the commission no longer has the discretion to make material changes to a utility's Section 205 filing.

City of Anaheim v. FERC, 558 F.3d 521 (D.C. Cir. 2009), illustrates Kavanaugh's focus on statutory text in interpreting the FPA. *Anaheim* asked whether the commission could retroactively adjust rates under Section 206 of the FPA. Kavanaugh, writing for the court, held that the commission lacked the authority to do so. "In the end, as in the beginning, the plain language of Section 206(a) controls." After finding a rate unreasonable, FERC must "'determine the just and reasonable rate … to be thereafter observed and in force,' and FERC 'shall fix' that rate by order." Thus, Section 206(a) allows the commission to fix rates, but only prospectively, not retroactively.

Other opinions highlight Kavanaugh's insistence that the record support commission action. In *National Fuel Gas Supply v. FERC*, 468 F.3d 831 (D.C. Cir. 2006), petitioners challenged the commission's application of the standards of conduct to the nonmarketing affiliates of natural gas pipelines, including producers, gatherers, processors and traders. To justify the order, the commission asserted the theoretical threat of undue preferences and a claimed record of abuse. The D.C. Circuit vacated the commission's order. Kavanaugh explained, "'Normally, an agency rule would be arbitrary and capricious if the agency has … offered an explanation for its decision that runs counter to the evidence before the agency,'" (quoting *Motor Vehicle Manufacturers Association of U.S. v. State Farm Mutual Automobile Insurance,* 463 U.S. 29, 43 (1983)). This was such a case. "Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking." Moreover, relying solely on a theoretical threat, unsupported by a record of abuse, would require FERC to justify "such costly prophylactic rules."

Similarly, Kavanaugh examined the record of a hearing before an administrative law judge to find that the commission had "jumped the rails" in denying an oil pipeline's request for market based rate authority. In *Mobil Pipe Line v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012), the question was whether the Pegasus pipeline possessed market power in its origin market for Western Canadian crude oil. In an administrative hearing, FERC staff had presented expert testimony that Pegasus's origin and destination markets were plainly competitive. Nevertheless, the commission found otherwise in denying market based rates. Kavanaugh disagreed. Pegasus did not possess market power, transporting only about 66,000 of the 2.2 million barrels of Western Canadian crude oil produced each day. "[W]hen an agency is statutorily required to adhere to basic economic and competition principles—or when it has exercised its discretion and chosen basic economic and competition principles as the guide for agency decisionmaking in a particular area … the agency must adhere to those principles when deciding individual cases."

His opinions reveal an underlying concern with the authority of independent agencies.
In two cases not involving FERC, Kavanaugh expressed concern with the authority of independent commissions, and this concern will undoubtedly inform his review of agency action. He noted that "independent agencies have huge policymaking and enforcement authority and greatly affect the lives and

liberties of the American people," yet are "democratically unaccountable—neither elected by the people nor supervised in their day-to-day activities by the elected president." *In re Aiken County*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring). That being said, Kavanaugh recognized that the Supreme Court upheld the constitutionality of independent agencies in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). That precedent was "entrenched" and "protected by stare decisis." "But," Kavanaugh wrote, "the fact that courts do and must accept *Humphrey's Executor* precedent does not require ignoring issues of accountability, liberty and government effectiveness raised by independent agencies."

Seven years after *Aiken County*, in *PHH v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), the D.C. Circuit upheld the constitutionality of the Consumer Financial Protection Bureau, which has a single Director appointed to a five-year term and removable only for cause. In doing so, the court overruled an earlier decision by Kavanaugh in which he had reached the opposite conclusion. In dissent, Kavanaugh again concluded that the CFPB violated Article II of the Constitution and described independent agencies as "a headless fourth branch of the U.S. government." "Because of their massive power and the absence of presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." Kavanaugh's remedy was not to strike down the CFPB in its entirety but to sever the for-cause removal provision. He also distinguished the CFPB from multi-member commissions with a chair appointed by the president, such as FERC.

His may become an influential voice at the Supreme Court on FERC.
While Kavanaugh heard his share of FERC matters that turned on the standard of review and deference to the commission, he is unlikely to hear that type of matter at the Supreme Court. It is often said that the court is not a court of error correction, and it takes four justices to grant a petition for certiorari. Some aspect of the petition must catch the attention of a plurality of the court. These are the hard cases that raise issues of national importance with the circuit courts often in conflict. While any advocate vying for his support would be well advised to focus on relevant Supreme Court precedent, the text of the statute, and administrative record, Kavanaugh may be particularly concerned with allegations of regulatory overreach that raise questions of accountability or separation of powers. Moreover, with his experience on FERC issues, Kavanaugh is well positioned to become an influential member of the court on any matter involving the commission.

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