Transcript of CleanLaw Episode 22: Ari Peskoe and Matt Christiansen Talk about the Federal Power Act, May 23, 2019

To return to our website click here.

Robin Just: Welcome to CleanLaw from the Environmental and Energy Law Program at Harvard Law School. In this episode, Electricity Law Initiative Director, Ari Peskoe talks with Matt Christiansen, legal advisor to FERC commissioner Richard Glick. Ari and Matt discuss recent Federal Power Act litigation, and a Law Review article written by Matt and Commissioner Glick entitled FERC and Climate Change. We hope you enjoy this podcast.

Ari Peskoe: This is Ari Peskoe, Director of the Electricity Law Initiative, and I'm pleased to be joined today by Matt Christiansen, legal advisor to FERC Commissioner Rich Glick. Matt, thanks for joining us.

Matt Christiansen: Thanks, Ari. It's a pleasure to be here.

Ari: So, Matt, I invited you today to talk about two main topics. One is the recent federal court decisions about zero emission credits, and what they tell us about the Federal Power Act. And the second is your recent article with Commissioner Glick in the Energy Law Journal, FERC and Climate Change. But before we get there, I just want to clarify something. As I said, you're a legal advisor to a FERC Commissioner. Are you here today speaking on behalf of the commission or any particular commissioners?

Matt: I absolutely am not doing that. Any views I express today are entirely my own, and not necessarily the views of Commissioner Glick, any other commissioners or the commission staff.

Ari: Thank you for that clarification. So you're just here today as a guy who likes talking about the Federal Power Act?

Matt: Yes. A guy who's weirdly interested in this area of the law.

Ari: I'm here today in a similar capacity. All right, so let's get into it. Start talking about ZEC. So I'll just briefly describe the policy for those who have not been following this saga. In 2016 two states, New York and Illinois, enacted zero mission credit policies. And basically these two States recognized that nuclear plants are large sources of emission free power, and these plants had been earning their revenue selling to FERC regulated wholesale markets, but prices had been low and these plant owners said they might put take the plants offline because they weren't

profitable. And so the States decided to award these plants zero emission credits, which basically compensate the plants for their emission free power. The state set the price at roughly $17 a megawatt hour, which means for every megawatt hour of energy these plants generate, they have an opportunity both to sell it and to sell the zero emission credits that utilities are mandated to buy by the state. So that's the outline of the policy.

Ari: So, Matt, why is this policy legally interesting to Federal Power Act wonks like us? And then we'll get into why it matters for the power industry, but I want to start with the legal issues. Why was this case interesting?

Matt: So the ZECs cases, and there are two of them, there's one in the second circuit coming out of New York and one in the seventh circuit coming out of Illinois, are interesting because they represent the latest round of litigation on what is arguably, and I think pretty clearly, the most interesting question in federal electricity regulation. So the Federal Power Act, the statute, the primary federal statute that regulate the electricity sector, gives the federal agency, in this case, the Federal Energy Regulatory Commission, broad jurisdiction to regulate many aspects of the sector. At the same time though, when Congress enacted the Federal Power Act, it very clearly carved segments of the electricity sector out of federal jurisdiction, and reserved those segments for exclusive jurisdiction and regulation by the states.

Matt: At the time that Congress enacted that statute in the mid-thirties that the jurisdictional divisions are pretty clear. The term of art that's come up in court cases is that Congress drew bright lines between federal and state jurisdiction. But over the 80 years that that statute has been around, the so-called bright lines have become fuzzier, particularly in the last 30 or so years as wholesale energy markets have developed, and as the technologies that participate in those markets have developed and changed very rapidly. The formerly clear jurisdictional lines have become much more difficult to assess, I guess it's the best way to put it. The Supreme Court has weighed in on these jurisdictional lines a couple of times, but even after those Supreme court decisions, there've been a lot of open questions about where the real boundary between federal and state authority is. And the ZECs cases are the first time that the federal courts have really weighed in on where that boundary is following those Supreme Court cases.

Ari: So I think what's really important about the case, you just hinted to one thing, which is one, it's the first... These are the first litigation after Hughes, which is a 2016 Supreme Court case. And that case is really notable because it's the only Supreme Court case that deals with this jurisdictional line in the context of these RTO power markets, these interstate power markets that are regulated exclusively by FERC. And the issue really is, how can States exercise their historic

authority to pick the generation resource mixes within their States, or the ones... Or the generation that their utilities are drawing from? How does that state authority fit in with first exclusive authority over wholesale rates? And so this is the first case after Hughes. What's the lesson from the Supreme Court in that 2016 case?

Matt: Sure, so let me maybe start by just giving a little bit of background on that case. So Hughes involved a program by the state of Maryland that was designed to incentivize a natural gas generator in that case to be built and operate within the state. Simplifying a little bit, the way the state went about doing this is it offered a so-called contract for differences. And the contract for differences basically provided that the generator that signed that contract and guaranteed rate for energy and capacity that that generator sold through the wholesale market. In this case, the wholesale market is the PJM Interconnection. The way the contract worked is it, as I said, it guaranteed the generator of specific rates, so this if the market clearing rate was, let's just make up a number, was $9 in the contract, guaranteed a rate of $10, then utilities within Maryland would chip in and give the generator some extra money such that it effectively received $10 for all energy, or capacity, that cleared in the PJM market.

Matt: Conversely, if the market clearing price was $11, then the generator would refund that difference between 11 and 10 for every unit sold to the utility. So basically the generator made $10 million regardless of what the market clearing price was. There was a pre-emption challenge brought against that contract. As we mentioned, the challenge went all the way up to the Supreme Court, and the Supreme Court held that that contract was pre-empted under the Federal Power Act.

Ari: So it effectively... It nullified the state program, just to be clear.

Matt: That's exactly right.

Ari: The reason that case was interesting is because it was a state subsidy for generation, but in the context of a market that was also paying that particular generator. And what then did the Supreme Court say about state authority in the context of the RTO market?

Matt: So I think the fairest reading of the Hughes case, it was a little unclear exactly what the court said. As we said, it held that the contract was pre-empted by the Federal Power Act. But at different points, it noted slightly different reasons, at least as I read it, why the contract was pre-empted. At one point it said that the contract was pre-empted because it effectively set a wholesale rate. At other points, the court noted that the so-called, and this is... I'm quoting now from the courts, "The fatal flaw with that contract is that it required the generator to bid its

energy and capacity into the PJM market, and was therefore tethered to the market."

Ari: I agree with you that there was some debate after the court issued this opinion as to what it meant, and then when the ZEC cases were filed, which was in fact just... The New York case was filed just a few months after the court issued its Hughes opinion. The ZEC cases raised the question of, how does the Hugh's decision get interpreted by lower courts? Because when you have an ambiguous Supreme court decision, it's really the lower courts that ended up giving it meaning when they apply it to different factual situations. And the ZEC case is particularly interesting I think from my perspective, because the court was going to apply Hughes to a state clean energy program, because what the state compensating generators for in the ZEC program was the zero emission attribute of the power.

Ari: So the question really was, is that payment for the environmental attributes going to be pre-empted under the logic of Hughes or not? And maybe we should clarify. So actually, there were two different pre-emption arguments. Can you get into the... Maybe just outline what it means for something in this case to be field pre-empted, versus what it means to be conflict pre-empted? What those two arguments are?

Matt: Sure. So under the supremacy clause of the US constitution, federal law is the supreme law of the land, which means that the federal law can displace a state law under certain circumstances. And pre-emption actually comes in three different flavors. There's express pre-emption, when Congress, for example, says state regulation, or state laws, in this area are explicitly pre-empted. That's usually the easiest type of pre-emption to determine. But even where Congress doesn't say anything explicit.

Matt: There are few doctrines of implied pre-emption, and those are the two doctrines that you mentioned. Field pre-emption and conflict pre-emption. Field pre-emption is when Congress comprehensively regulates an area. The term of art in the case law is Congress occupies the field, such that any additional state regulations beyond the federal regulation, even state regulation that is arguably consistent with the federal goals is pre-empted. By contrast, conflict pre-emption applies when a state is permitted to regulate in an area, so Congress has not occupied the field, but when that state regulation conflicts with the federal law, or the federal regulations. Again, the judicial term of art is an obstacle to those regulations. Then that state law or regulation is pre-empted, even though the state is allowed in some instances to regulate within that field.

Ari: And as applied here then, the first case, the field pre-emption case was, is the state actually regulating the rate by awarding these ZECs? Is that effectively

changing the rate in a way that Hughes would disallow? That's my take on the field pre-emption question. Is that how you see it too?

Matt: I think that's right. I think FERC has exclusive jurisdiction to regulate wholesale, the rate for wholesale sales of electricity. And I think there was an argument made in these cases that the ZECs amounted to regulations of those rates, and therefore we're field pre-empted.

Ari: And then what about the conflict pre-emption argument? How did the ZECs, according to the opponents of ZECs, how did they conflict with federal regulation?

Matt: I think the best way of characterizing their argument is that FERC has chosen to rely on, primarily on, wholesale markets with auctions to set the types of wholesale rates that are relevant here, and that by providing an additional payment outside of those auctions, the ZEC program conflicted with the FERC program that was designed to rely on these competitive auction mechanisms.

Ari: So this is why these two questions, this field pre-emption question in the conflict pre-emption question, this is why the case was interesting to Federal Power Act wonks like us, because the Supreme court had left some ambiguity in Hughes as to precisely where these lines were. And now we're going to have two federal courts. As you mentioned, there was a case in Illinois and a case in New York, and we're going to have to weigh in on this jurisdictional question, but what were the bigger implications here for the development of the power industry going forward?

Matt: And this goes back to what we talked about at the outset. These two cases deal with the fundamental question in federal electricity law right now, which is what is the boundary between state and federal authority? States have always been involved in shaping the generation mix, and in fact the regulation of generation facilities is one of the areas of exclusive jurisdiction that the Federal Power Act reserves to the states. Now, while states have always been involved in this area, there's an argument that states are becoming more involved, particularly over the last few years, and particularly in certain states that are attempting to exercise that authority they have over the generation next to do something about climate change.

Ari: I think States have been involved, certainly since the industry's earliest days when utilities were actually the ones building the generation. But the state involvement has changed somewhat over time. And the ZEC program isn't just about citing the plant, or regulating its operations, but there's actually a financial component in the ZEC program. And that's the part that's really interesting, and something that states have been doing now for a couple of decades now, which is providing

certain payments to plants for their environmental attributes. And this is the first time that really this sort of state program had really been squarely challenged in federal court.

Matt: I think that's a very good way of putting it.

Ari: So I got involved in this case when it was appealed up to the seventh circuit. That was the Illinois case. And I coauthored a brief on behalf of 20 energy law professors from around the country. And the reason I did that is because I was particularly concerned about this aspect of state authority to provide payments to generation resources for their environmental attributes. State renewable portfolio standards, which have been enacted by almost 30 states across the country are premised on requiring utilities to buy renewable energy credits, which is essentially a revenue stream for renewable generators.

Ari: And what we did in our brief is we compared that program to the ZEC and we tried to put it in historic context, and argue that this was well within historic state authority to have this sort of program. And the other thing we did in the brief was we looked at what FERC had done about RECs, renewable energy credits, and we demonstrated that in fact FERC had accommodated these state payments in various regulatory programs over the past couple of decades. And we cited a dozen or so FERC orders where for cut actually recognized that these payments exist, and actively sought to accommodate them, either in its markets or in its transmission regulation in other programs. The seventh circuit ended up asking for the US government's opinion, and so FERC and the Department of Justice co-signed a brief that was filed in the seventh circuit. Can you give us a summary of what FERC's position was in this case?

Matt: Sure, and I should just probably reiterate that I had no role in drafting the brief. The brief was drafted by the commission staff, as I understand it, and not by any of the individual commissioner's offices. I will note though that the attorney who drafted and signed the brief, Anand Viswanathan, is actually doing detail in Commissioner Glick's office right now, and is it a brilliant attorney. So it's probably no surprise that the brief that FERC filed along with the Department of Justice was an excellent brief in my opinion and provided a very cogent analysis of how the Hughes case, and other Supreme court cases applied to the ZECs program. What the brief did is it picked up on that fatal flaw language in the Hughes case that I alluded to earlier, which is to point out that unlike the contract for differences in Hughes that required the generator at issue in that case to bid all this energy and capacity into the PJM markets, there was no similar requirement in any of the ZEC schemes, either the Illinois scheme or the New York scheme.

Matt: Instead, what ZEC schemes did is they provided a payment to the nuclear generators for every unit of emissions free electricity that they generated. And what the FERC brief argued is that that was a very different situation. At that point, the states were no longer effectively regulating the wholesale rate the way the contracts for differences did in Hughes, but instead were directing their regulations at the environmental consequences of electricity generation, which as I noted as one of the areas of exclusive state jurisdiction that the FPA preserved for the States. In other words, the brief concluded that the States were not aiming at the wholesale market, and regulating a wholesale sale that necessarily took place in the wholesale market, but rather regulating the environmental consequences of electricity generation.

Ari: So that argument seems to me to get at the field pre-emption argument we talked about earlier, which is FERC was saying that the state wasn't regulating a wholesale rate. What about the argument that ZEC opponents had that even if you accept that premise, that the States aren't regulating a rate, they're still impermissibly conflicting with FERC's market regulation. What did FERC say about that?

Matt: So FERC disagreed with that argument as well. It said there is no conflict. It recognized that States have this type of authority. And the brief also concluded that FERC has mechanisms under its statutory authority to deal with any of these conflicts, should they arise.

Ari: I think it's fair to say that in the seventh circuit, which issued its opinion two weeks before the second circuit, that FERC's brief may very well have been the decisive factor. And the reason why the seventh circuit sided with the states, and you know ZECs were upheld as a permissible policy. So then the second circuit ended up doing the same thing a couple of weeks later, and so ZECs are upheld, and are being enforced by New York and Illinois today, and New Jersey has adopted a somewhat similar policy as well. But putting ZECs aside, what do you see as the implications of the court's decisions here?

Matt: I think both decisions recognize the very important role that states play in shaping the generation mix. One thing I'll note is that I remember reading when the decisions came out in a couple of different areas that this is a win for clean energy. I think that might be true in that particular case, but I think what was really going on is that the courts... It wasn't necessarily a clean energy or not clean energy issue, the courts recognized the significant authority that the States retained to shape the generation mix. Both courts, I think, as I read them, although the second circuit spend a little bit more time on this, went out of their way to note how much authority the states retain to regulate generation facilities in this case. And that as long as the States are exercising their authority, and not intruding on the exclusive federal jurisdiction over wholesale rates, the fact that

there will be consequences, inevitable consequences is not... Is not the kind of thing that gives rise to a pre-emption argument.

Matt: The courts pull in this observation that the Supreme Court has made in different ways in those cases that I mentioned at the outset, and that is that the federal and state spheres of jurisdiction are not hermetically sealed to use Justice Kagan's language. And so the courts recognize that while there would be inevitable consequences of the States taking action that will provide a subsidy to generators that were struggling financially, those consequences are not necessarily a problem for the purposes of the FPA's jurisdictional scheme.

Ari: Yeah. And when I talked to economists about these cases, they get somewhat frustrated because they want courts to take an economic view of the law, and they want to see this, what they characterize as state interference with the market, they would like to see courts pre-empt that. And so there's another perspective on FERC's jurisdiction, which is that in a sense it's rather narrow. You had characterized the Federal Power Act earlier in our conversation as reserving certain authorities for the states, and it clearly does do that. But another way of looking at it is that it only grants FERC authority over a limited aspect of the electricity industry, which is transmission and wholesale sales in interstate commerce. And one thing that the second circuit pointed out is that states have authority over energy production. And so they characterized ZECs as regulating production, and not wholesale sales.

Matt: I think that's right. And it's probably gets maybe a little too weedsy, but there are a number of cases in the second circuit that court relied on in particular, that bolster that particular theory and make it very persuasive, particularly within that circuit.

Ari: Yeah, that's a good point. Each of these courts have their own set of decisions that they have to look to as well. And the second circuit in particular had some Federal Power Act cases that were very helpful to the state of New York. So I think another implication of this is that as states continue to enact clean energy programs. And we've seen states just in the past year enact more aggressive renewable portfolio standards, we've seen offshore wind procurement programs, that it doesn't look like these ZEC cases are going to be helpful to anyone who tries to challenge those programs. At least the programs that I've seen so far.

Ari: And these cases suggest that what states have to be careful about is an explicit requirement that any generation resource receiving a state subsidy, or state contract, shouldn't have... They should avoid any requirement that those resources bid into FERC regulated RTO markets. But apart from that, it seems like States do have fairly wide freedom to require their utilities to buy clean energy resources, or buy energy from clean resources.

Matt: I think that's a good characterization of the cases. I'd also note that, and you alluded to this a little bit earlier as well, the ZEC program is modeled on the renewable energy credit programs that a lot of states, I think maybe even the majority of states, have had in place for some time. And I think there was a concern among a lot of people that were watching these cases that if the ZEC programs were pre-empted, then it would be a straight line to finding the REC programs pre-empted. And the fact that the ZEC are emphatically not pre-empted under these two decisions I think probably provides a lot of certainty for the various REC programs around the country.

Ari: Yeah, I agree with that. And that was one of the motivations for the law professors brief that I mentioned earlier. So that covers the ZEC cases. I want to turn now to the article that was recently published by the Energy Law Journal that you wrote with Commissioner Glick. It's called FERC and Climate Change, and I appreciate that you resisted the temptation to come up with a very long title as many legal articles have. Pretty straightforward as to what this is about, and you break down FERC's various responsibilities into basically two major categories. There's a few others, but I think most of the article focuses on two things. One is FERC's authority to regulate wholesale power markets, the ones that we've been alluding to. And the other is FERC's authority to site infrastructure.

Ari: And so I want to take those one by one. With regard to FERC's authority over power markets, Federal Power Act is clear, FERC has to make sure that all wholesale market rates and rules are just and reasonable, and not unduly discriminatory. At a high level, how does that connect at all to climate change mitigation?

Matt: Sure. So maybe let me answer that a little bit elliptically by talking about what our goals were in putting the article together.

Ari: Sure.

Matt: So there are really two. One is to lay out the ways in which FERC, through its broad jurisdiction over the energy sector, takes actions that have effects on GHG emissions and thus climate change. That was the broad overarching goal, to just discuss that and explain a little bit how that happened. But then the second goal was to get into specific areas of the commission's jurisdiction, and discuss how, although FERC is not a climate regulator, actions that the commission has taken pursuant to what we would described as its core jurisdiction, can, and actually have had beneficial effects for GHG emissions. The way we described it as, although addressing GHG emissions was certainly not the intent of those commission actions, the effect was evident.

Ari: And I think it's important to underscore the point that FERC is not an environmental regulator. That's not its primary function. That's really the job of EPA, the states and other entities. By what you're saying, is that inevitably because FERC is regulating the energy sector, there are environmental consequences of what FERC does.

Matt: That's exactly right. So under wholesale markets, in wholesale markets, for example, one of the commission's most important responsibilities is breaking down barriers to competition, and ensuring that market rules are not unduly discriminatory. We spend a fairly significant portion of the article talking about different rulemakings that the commission has issued over the course of the last 10 years or so that have sought to break down barriers to competition, and eliminate market rules that injured new technology's ability to participate in wholesale markets.

Matt: Now the commission's rationale in taking these actions is very, very clearly tied to its core statutory responsibilities over wholesale rates and promoting competition. Nevertheless, we argue that because a lot of the market rules that the commission addressed were designed at a time, many years ago when conventional generation technologies dominated the electricity sector, breaking down these rules actually had the benefit of committing newer technologies that happen to be relatively clean to participate more effectively in wholesale markets.

Ari: Two of the examples you highlight are demand response, which is something the commission required market operators to bring into the market about a decade ago, and much more recently energy storage. So maybe you could just tell us a little bit about how those two technologies fit within this framework that you're talking about.

Matt: Sure. So I think those two technologies are perfect examples. Those can both play an important role in, among other things, providing energy, capacity, ancillary services, and really increasing the competition in the wholesale market. And that is what the commission focused on in enacting rules that ensure that demand response resources and storage resources can participate on a relatively level playing field with other resources.

Matt: We argued that while that is properly the entire and sufficient rationale for enacting, those rules, a consequence of those rules is that resources that are going to be very important in integrating variable renewable resources, like wind and solar, were given greater access to the market. Again, that's not why the commission took the actions that it did and the demand response rules and the storage rules, but it is an important consequence and shows how actions that

FERC takes pursuant to its core jurisdiction can have important consequences for GHG emissions down the road.

Ari: Right. There's these inevitable consequences, but there's almost this happy coincidence that the newer technologies that are coming into the market just happen to be cleaner. And FERC's goal isn't really do enable cleaner technologies, it's just to enable all technologies. And it just so happens that they're clean.

Matt: Exactly. FERC's primary rationale for these rules Is to promote competition. It just so happens that the barriers to competition are largely, although perhaps not entirely, arrayed against these new relatively clean resources.

Ari: And by just sticking to its core mission of facilitating, and providing this open platform for all technologies, FERC is inevitably going to help clean up the electricity sector.

Matt: That's our argument.

Ari: So one area that has been controversial recently is where people have different ideas as to what a competitive market means. And some traditional generators have argued that allowing resources that are getting paid for their clean energy attributes, so for example, the plants that we just talked about that are receiving ZECs, or rather being compensated for selling ZECs, that allowing those plants into the market, or into certain types of markets, may actually be anti-competitive. So how do you deal with that in your article in trying to balance this open competition with respecting the role of states to choose their resource mix?

Matt: What the article argues is this... And as you say, this ties back to the discussion we had at the beginning, the decision about whether or not... Whether to subsidize a resource or not subsidize a resource, or how to shape the generation mix is really properly a decision that's reserved for the state. To us, that comes from the express reservation of authority over generation facilities to the state. And what we argued, the proper role for the commission is to accommodate or facilitate states choice. And not to second guess those choices, or really to exercise any jurisdiction over what is properly a state matter.

Matt: I want to be somewhat careful of the fact that there are some pending proceedings before the commission right now that raised this question, and I can't speak to any of those details because they are, as I said, pending before the commission, but at a very high level of generality, what the article argues is that those decisions that you're talking about are decisions that are properly made by the States, and it's not FERC's responsibility to decide whether the states exercise that authority that's reserved to them under the Federal Power Act properly or improperly.

Ari: So, that covers one of the major topics in your article. But the other major topic that you discuss is FERC's authority over infrastructure siting. And this is authority that FERC has under the Natural Gas Act, which has been a big issue these days at the commission. Because FERC has authority to site interstate natural gas pipelines, and LNG terminals. And so there's been some debate at the commission about whether, or how, the commission should account for greenhouse gas emissions associated with that infrastructure. Can you give us just a high level perspective on that debate?

Matt: Sure. So under the Natural Gas Act, in order to build an interstate pipeline, the pipeline developer needs to get a section seven certificate of public convenience and necessity from the commission before it can begin any construction. One of the issues that has come up in these section seven proceedings is the extent to which the commission does or has to consider greenhouse gases, and the consequences for climate change in deciding whether to issue a section seven certificate.

Ari: What's your perspective, your and Commissioner Glick's perspective, in the article and in the dissents and other concurrences that he's written over the past couple of years?

Matt: Right. So as you alluded to, this has been a pretty controversial issue before the commission. My boss, Commissioner Glick has dissented on a number of these section seven certificates, arguing that the commission has not done enough to consider greenhouse gas emissions. And a lot of his arguments have relied heavily on a relatively recent DC circuit case that instructed the commission to consider the downstream effects of issuing the section seven certificate. Now in that particular case, the pipeline was being built to supply gas to electric generation facilities, gas fired electric generation facilities, and the court held that the combustion of that gas and the release of GHGs was a reasonably foreseeable consequence of building the gas pipeline, and therefore something that the commission had to consider in determining whether to issue the section seven public convenience and necessity standard.

Ari: And so here actually this is another statute that comes into play. So just to get a little bit deeper in the legal weeds here, certificate of public convenience and necessity is something that's required under the Natural Gas Act, but FERC also has an obligation under the National Environmental Policy Act, or NEPA, to consider an environmental consequences that are, as you said, reasonably foreseeable. So that's a second law that's coming into play here.

Matt: Yeah, that's right. And it's a good point to make there, because I think sometimes people blend the analysis. NEPA is a disclosure promoting good government statute, that requires federal agencies to consider the environmental

consequences of their actions. Commissioner Glick has argued that because the combustion of GHGs is a reasonably foreseeable consequence of building many interstate pipelines, NEPA requires the commission to consider those GHGs fulsomely in deciding whether or not to issue a section seven certificate.

Matt: But then there's also the separate determination under section seven of the Natural Gas Act about whether a certificate of public convenience and necessity is merited. The commission has sometimes likened that determination to have public interest standard, and the position that commissioner Glick has taken is that you cannot adequately evaluate whether a natural gas pipeline is in the public interest without adequately considering the greenhouse gas emissions that will be the reasonably foreseeable result of that pipeline. In other words, greenhouse gases are an integral part of that public interest determination.

Ari: I've taken a slightly different take on this issue, where I've looked at the history of the public convenience and necessity standard and looked at how the commission has interpreted it over the past 80 or so years, and found cases where the commission looks at the environmental consequences. Even before there was a NEPA enacted, that under that public convenience and necessity standard, FERC looked at environmental consequences. FERC also looks at all sorts of economic consequences as well.

Ari: And I think when you combine those two sorts of analysis, there's plenty of room under the public convenience and necessity standard alone, even without NEPA, and even without appealing to a public interest standard for the commission to analyze the greenhouse gas emission consequences of new infrastructure citing. But with all that said, in the article, as you said, you and Commissioner Glick focus on the public interest standard. And so what do you argue that FERC should be doing going forward?

Matt: Well, the article argues that the commission should be quantifying the greenhouse gas emissions that are reasonable for a reasonably foreseeable consequence of building a new interstate pipeline. And then the commission should be evaluating whether those greenhouse gas emissions are significant. As part of that determination, one of the things that the commission can do is it can evaluate mitigation options. As you alluded to, the commission considers a wide variety of different environmental consequences, land use consequences, traditional pollutants like NOX and SOX, and will often, although not always, but will often require as a condition of issuing the certificate that the pipeline developer does something to mitigate those GHG emissions. One thing that commissioner Glick has been very outspoken on is arguing that the same approach should apply to GHG. That is, the commission should consider whether there's something that can be done to mitigate GHG emissions that are reasonably foreseeable result of building that pipeline.

Ari: But right now, and just to be clear, the commission as a whole has not taken that approach. And so that's why this remains an issue that is controversial, and Commissioner Glick continues... Or has... Let's just say he has dissented in the past on several of these section seven orders.

Matt: Yeah, that's correct. I think the number is somewhere in the 20 to 25 range for the number of orders that he's dissented on, at least in part.

Ari: Well, we'll try to keep a running tally of that on Twitter. I think, as you said at the outset, one of the main purposes of this article is just to provide a summary of how FERC's regulation relates to ongoing efforts to reduce greenhouse gas emissions. I think it's a terrific summary of that, and it's helpful to see where a sitting FERC commissioner stands on these issues. So I think this article is really valuable, and I would encourage people who are interested in these issues to go and find it at the Energy Law Journal's website where it's available. Matt, anything else we should talk about with regard to this article?

Matt: No, I can't think of anything. The article does go into some other topics, like transmission facilities, and PURPA, but I think you have correctly identified probably the two issues that your listeners will find most important. And if they're interested in going in detail, the article is available.

Ari: Great. And again, I highly recommend everyone check out that article. Matt, thank you so much for joining us today. We really appreciate it.

Matt: Thanks, Ari. It's been a pleasure.

To return to our website click here.