Alert

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COZEN O'CONNOR

The DAS Networks Fault Line: A Coming Earthquake in Pennsylvania Administrative Law?

On July 21, 2020, a unanimous Supreme Court of Pennsylvania issued its decision in *Crown Castle NG East LLC and Pennsylvania-CLE LLC v. Pennsylvania Public Utility Commission*, 2 MAP 2019 (July 21, 2020). Reversing the Pennsylvania Public Utility Commission (PUC), the court held that Distributed Antenna System (DAS) networks are public utilities. The case may be most significant, however, because of Justice David N. Wecht's concurring opinion expressing "deep and broad misgivings" about the concept of administrative deference. Justice Wecht's concurring opinion may herald a coming shift in the way that Pennsylvania courts treat state administrative agency interpretations of state statutes and regulations.

Background — DAS Networks and the Litigation Below

A DAS network provides telecommunication transport service to wireless service providers (WSPs). WSPs, in turn, provide commercial mobile radio service to retail end-users such as smart phone users. A DAS network receives radio frequency signals and converts them to optical signals, which are transported over the DAS network's fiber optic lines before being returned to the WSP customer. DAS networks increase the coverage or capacity of WSP customers' networks by collecting wireless traffic, transmitting it over the DAS network, and delivering it back to the WSP's network. A WSP may operate its own DAS network that serves only its customers, or it may lease a DAS network from a neutral host.

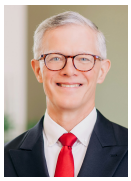
Between 2005 and 2015, the PUC granted a certificate of public convenience (certificate) to five DAS network operators, concluding that a DAS network is a "public utility" as defined in the Pennsylvania Public Utility Code (Code). In 2015, the PUC granted a certificate to a DAS network operator over the dissent of two commissioners who did not believe that DAS networks meet the Code's definition of a public utility.

The PUC subsequently opened proceedings to investigate the PUC's jurisdiction over DAS networks. The commission requested comments and reply comments from stakeholders. Without holding a formal hearing, the PUC issued a decision finding that a DAS network is not a public utility, in part, because the PUC construed the Code's definition of a "public utility" as excluding entities that own or operate equipment that facilitates the furnishing of commercial mobile radio service.

On appeal, a unanimous *en banc* Commonwealth Court of Pennsylvania reversed the PUC. The Commonwealth Court noted that the PUC conceded that the relevant section of the Code is not ambiguous. Therefore, it held the PUC should have interpreted that provision in accordance with the Code's plain language rather than adding words to expand the exclusion for entities that furnish commercial mobile radio service. The Commonwealth Court explicitly rejected the PUC's argument that it was entitled to substantial deference because of the highly technical nature of the Code. The Commonwealth Court noted that the pertinent Code provisions had not been revised, but the PUC had revised its prior interpretation of those provisions. The Commonwealth Court also found the PUC's interpretation of the Code inconsistent with prior Commonwealth Court precedent and the decisions of other jurisdictions.

Outcome in the Supreme Court

A unanimous Supreme Court agreed with the Commonwealth Court and reversed the PUC, holding that DAS networks are public utilities and do not fall within the exclusion for furnishing commercial mobile radio service. The Pennsylvania Supreme Court also found that the Commonwealth Court's decision was consistent with that court's prior decisions and with federal law.



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Deference to Administrative Agencies — The Opinion of the Court

The opinion of the court, authored by Justice Sallie Updyke Mundy, rejected the PUC's deference arguments. Justice Mundy wrote: "A court does not defer to an administrative agency's interpretation of the plain meaning of an unambiguous statute because statutory interpretation is a question of law for the court." Justice Mundy acknowledged that prior cases distinguished between agencies' legislative rulemaking power and their interpretative rulemaking power and afforded greater deference to the agency's interpretation when the agency exercised legislative rulemaking power. Nevertheless, the opinion of the court found that the pertinent Code provisions were unambiguous and held that deference never comes into play when a statute is clear.

The opinion of the court added that the level of deference is not affected by the consistency of the agency's interpretation of the statute; instead, "the touchstone is whether the agency's interpretation adheres to the clear meaning of the statute." Since the meaning of the statute was ultimately a question of law for the court, the PUC's interpretation of the Code was not entitled to deference.

Deference to Administrative Agencies — The Concurring Opinion of Justice Wecht

Justice Wecht joined in the court's opinion, but also wrote a concurring opinion expressing concern about "the perilous instability of the scaffolding that has been thrown together over time around the concept of 'administrative deference.'"

According to Justice Wecht, the Pennsylvania courts historically followed federal law regarding deference to administrative agencies. He described the three levels of deference that federal law applies to the review of agency interpretations of statutes, regulations and policies:

- The most deferential standard stems from *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Applying this standard, the courts first ask whether the statute is clear. If the answer is yes, no deference is afforded to the agency's position, but if the answer is no, the agency's interpretation is given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.
- A less deferential standard stems from *Auer v. Robbins*, 519 U.S. 452 (1972). *Auer* calls for judicial deference to an agency's interpretation of its own ambiguous regulations, unless that interpretation is plainly erroneous or inconsistent with the regulation.
- The lowest level of deference, described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), applies when a court is reviewing informal policies or practices that involve the agency's interpretations of its statutorily conferred duties.

Over time, Justice Wecht wrote, the Pennsylvania courts simplified the federal tripartite approach to only distinguish between substantive and interpretative rulemaking, as discussed in Justice Mundy's opinion of the court. The Pennsylvania courts apply something akin to *Chevron* deference to substantive rulemaking, but apply something approaching *Skidmore* deference to interpretative rulemaking.

Justice Wecht questioned "whether and to what extent this Court should rely upon federal law for purposes of assessing whether, when, and to what extent Pennsylvania courts should defer to Pennsylvania agency interpretations of their Pennsylvania enabling statutes." He criticized the "fundamental lack of clarity" concerning when each level of deference is appropriate. He also described the *Skidmore* analysis as "a hopeless muddle." Since *Skidmore* grants deference based on the agency interpretation's power to persuade, Justice Wecht stated: "*Skidmore* does nothing more than recite a judge's job description. As such, it is potentially confusing and essentially useless." He argued that, when a court reviews an agency's interpretative rule, probity rather than deference should dictate the success or failure of the agency's position.

Conclusion

The views expressed in concurring opinions sometimes become the basis for a subsequent opinion of the court. Justice Wecht's concurring opinion therefore may herald a coming shift in the

way that Pennsylvania courts treat state administrative agency interpretations of state statutes and regulations. The direction of that shift, however, is unclear at this time. The courts may try to clarify the meaning of each level of deference and the circumstances in which each level of deference is appropriate. The Pennsylvania courts could abandon the federal approach and develop a Pennsylvania-specific approach to deference. Another possibility is that the courts could abandon the concept of deference altogether and take Justice Wecht's advice by responding to "agency requests for deference by saying 'Don't command me. Convince me.'" Pennsylvania practitioners will have to keep their eyes on the appellate courts to see whether, and how, they modify their analysis of administrative agencies' requests for deference.