

Lucia v. SEC and the status of FERC ALJs

June 26, 2018

By: [David M. Perlman](#), [Paul S. Maco](#) and [Boris Shkuta](#)

On June 21, 2018, the Supreme Court held that the Securities and Exchange Commission's (SEC's) Administrative Law Judges (ALJs) are "officers of the United States" whose appointments are therefore subject to the Appointments Clause of the Constitution for their actions to be valid. [1] This decision by the nation's highest court naturally raises questions regarding the legitimacy of ALJs in other agencies of the federal government such as the Federal Energy Regulatory Commission ("FERC"). FERC's ALJs, however, come to their positions in a manner different from that of the SEC and have a somewhat different role, so that whether the holding in *Lucia* will apply to them is unclear.

The Appointments Clause provides that only the President, "Courts of Law," or the "Heads of Departments" can appoint "officers." [2] Writing for the majority, Justice Kagan held that the SEC's ALJs "are near-carbon copies" of the "special trial judges" (STJs) which were the subject of the Court's decision in *Freytag*. [3] Thus, she continued, the Court's analysis in *Freytag* "necessarily decides this case." Since the ALJ at issue was appointed by SEC staff and not by one of the constitutionally-prescribed methods of appointment, the Court vacated the ALJ's judgment and ordered a new administrative hearing to be held by a constitutionally-appointed officer. [4]

The Court conducted a two-factor analysis of the SEC's ALJs in determining their status as "officers of the United States": (1) whether the position is "continuing and permanent" rather than "occasional or temporary," and (2) whether it wields "significant authority." [5] Borrowing heavily from the language in *Freytag*, the Court concluded that the SEC's ALJs fit comfortably within the definition of "officers of the United States." [6] In deciding the appropriate remedy, the Court ordered a new hearing to be held either by the Commission itself or by a properly-appointed ALJ, as long as it is not the same ALJ that originally heard Lucia's case. [7]

Implications for FERC

FERC ALJs wield many of the same powers that the SEC's do. In their duty "to conduct a fair and impartial hearing," FERC ALJs may, for example: "regulate the course of" hearings, "administer oaths," "rule on and receive evidence," conduct discovery, and "rule on motions." [8] These similarities suggest that FERC ALJs exercise the type of "significant authority" that would qualify them as "officers" under the *Lucia* test.

Even with a finding that FERC ALJs are indistinguishable from those of the SEC for Appointments Clause purposes, FERC appoints its ALJs in a fashion substantially different from the process used by the SEC that the Court's opinion in *Lucia* relied upon. While the SEC delegated authority to its staff to appoint ALJs,^[9] the statutory authority to appoint FERC ALJs rests with the Chairman of the Commission.^[10]

Whether FERC ALJs have been properly appointed thus depends on whether the Chairman is a "Head[] of Department[]." The Supreme Court's decision in *Free Enterprise Fund* suggests that only the entire Commission qualifies as a "Head[] of Department[]" and not the Chairman alone.^[11] In its *Lucia* brief, the United States government implied that this interpretation was proper by stating that, aside from the President, only the "commission itself, as the constitutional Head of Department" could have appointed the SEC's ALJs.^[12] Justice Kagan cited this portion of the government's brief when addressing the term "head of a department."^[13]

While the implication of the *Lucia* ruling is that the full Commission should be viewed as a "Head of Department" for appointments clause purposes, unlike the SEC, the Chairman of FERC has been given exclusive authority to make such appointments pursuant to a statute.^[14] It is unclear whether that statute should now be viewed as unconstitutional or whether it renders the FERC Chairman the head of a department.

If a court were to find that FERC ALJs are "officers" who have been unconstitutionally appointed by the Chairman, it is not clear what the appropriate remedy would be and to whom it would be available. In *Lucia*, the Court held that relief would be granted to persons "who make a timely challenge to the constitutional validity of the appointment of an officer" who has adjudicated his case, and it held that *Lucia* made such a timely challenge to the Commission and subsequently to the federal courts.^[15] The proper relief for such persons is a new hearing before a properly-appointed officer, as long as it is not the same officer that initially heard the case, or before the entire Commission.^[16] Furthermore, the Court refused to rule on the constitutional implications of the SEC's decision to issue a blanket order, in the middle of this litigation, "ratifying" all prior ALJ appointments.^[17] In other words, it is unclear whether the SEC's attempt to properly appoint its ALJs by way of a blanket ratification order is enough to pass constitutional muster under the Appointments Clause.

It is not clear what the contours of a timely challenge to an ALJ appointment are.

- Must the challenge be made when a matter is set for hearing and an ALJ named to preside? It would seem that a challenge at this point would be timely.
- Can the challenge be made any time before the Commission acts on a matter? As the Commission has not yet decided the case, it may be viewed that there is an opportunity for remedial action prior to any Commission involvement in the disposition of the case rendering the challenge timely.

- Can the challenge be made retroactively even after a Commission ruling? While this would seem unlikely to be considered timely, there are occasions where the Commission has acted but its order has not been substantively implemented.

The Court has not given substantive guidance on the scope of a timely challenge. Thus, parties to FERC proceedings that wish to challenge whether an ALJ is properly appointed may try to demonstrate that their facts support a “timely” designation. It will be particularly interesting to see how matters that have not yet been decided by the Commission are treated.

Finally, as the status of FERC ALJs is ambiguous, will FERC attempt to remedy the issue by some sort of action (retroactive or prospective) which would clarify the issue going forward? If it does so will it implicitly be admitting its ALJs were improperly appointed?

[1] *Lucia v. SEC*, 585 U.S. ___, ___ (2018) (slip op., at 1).

[2] U.S. Const. art. II, §2, cl. 2; *Lucia*, slip op. at 2.

[3] *Id.*, slip op. at 6; *Freytag v. Commissioner*, 501 U.S. 868 (1991).

[4] *Id.*, slip op. at 12.

[5] *Id.*, slip op. at 5-6.

[6] *Id.*, slip op. at 8.

[7] *Id.*, slip op. at 12.

[8] 18 C.F.R. § 385.504 (2018).

[9] *Lucia*, slip op. at 3.

[10] 42 U.S.C. §7171(c). (“The Chairman shall be responsible on behalf of the Commission for the executive and administrative operation of the Commission, including functions of the Commission with respect to (1) the appointment and employment of hearing examiners in accordance with the provisions of title 5...”).

[11] *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 512 (2010).

[12] Brief for United States as Amici Curiae Supporting Petitioner at 38, *Lucia*, 583 U.S. ___ (2018) (No. 17-130).

[13] *Lucia*, slip op. at 5 n.3 (first citing Brief for United States at 38; then citing Brief for Petitioners at 50-51).

[\[14\]](#) 42 U.S.C. §7171(c).

[\[15\]](#) *Lucia*, slip op. at 12.

[\[16\]](#) *Id.*

[\[17\]](#) *Lucia*, slip op. at 13 n.6.