Can the ITC Control Issues on Review in the Federal Circuit

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"No," says the Federal Circuit, but the implications are not entirely clear.

An Administrative Law Judge (ALJ) initially resolved several issues, but the Commission considered only one on intramural review. The court disputes the ITC's claim that it may consider only that issue, concluding instead that it may review them all. General Elec. Co. v. ITC, 670 F.3d 1206, 1218 (Fed. Cir. 2012).

Under 37 C.F.R. § 210.42, ALJs determinations become those of the agency if not timely appealed. Moreover, 37 C.F.R. § 210.45(c) provides: "On review, the Commission… *may take no position on specific issues or portions of the initial determination of the administrative law judge*." Based on italicized language added in 2008 and Beloit Corp. v. Valmet Oy, 742 F.2d 1421 (Fed.Cir.1984), the Commission maintains that remaining issues are not subject to judicial review. 670 F.3d at 1218.

Language in *Beloit* suggests as much: "[T]his court does not sit to review what the Commission has not decided. Nor will it review determinations of presiding officers on which the Commission has not elected to provide the court with its views. The court has not been constituted a 'Surrogate Commission' to review portions of a presiding officer's determination on which the Commission has 'taken no position.'" *Beloit*, 742 F.2d at 1423. *GE*, however, regards such pronouncements as dicta: "This court held [only] that the prevailing party had no right of appeal, and that issues which had not been reviewed by the Commission were not appealable by the party that prevailed in the Commission." 670 F.3d at 1220.

Beloit's 1984 observations seem to reflect judges' then-prevailing views of the exhaustion requirement. The Administrative Procedure Act (APA), however, provides in part, "[F]inal agency action… [is] subject to judicial review.…. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section… unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704.

Not until nine years after *Beloit*, and 45 years after passage of the APA, did the Supreme Court fully consider APA § 704 in Darby v. Cisneros, 509 U.S. 137 (1993). Having done so, it concludes, "prudential doctrines of judicial administration" aside, "When an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is 'final for the purposes of this section' and therefore 'subject to judicial review' under the first sentence." *Id*. at 146.

How should *Darby* play out when agencies review only portions of initial determinations? Prudential considerations warrant delaying judicial review of any issue until all have become final. That aside, it is not surprising that *GE* says, "issues decided by initial determination and not substantively reviewed by the full Commission are deemed determinations of the Commission… entitled to appeal in accordance with 19 U.S.C. § 1337(c)." 670 F.3d at 1220-21.

On intramural review, the ITC found only that GE did not satisfy the domestic industry requirement. The court reverses on that point, apparently leaving untouched initial determinations that the patent in question was valid, enforceable and infringed by imported turbines. *Id*. at 1218. If, despite not being addressed by the ITC, those final determinations were adequately presented for judicial review, it seems necessary to remand only for fashioning relief. It is, thus, perplexing that the court remands instead

"for undefined further proceedings" *Id*. at 1220.

One other matter is also perplexing. *GE* dwells on the inadequacy of notice preceding the 2008 amendment to 19 C.F.R. § 210.45(c) noted above, mentioning that comments of involved parties reflect no inkling of what the agency apparently had in mind. *Id*. at 1219-20. Yet misleading signals would seem to give rise to justiciable harm only if 19 U.S.C. § 1335 requires notice and comment rulemaking.

Section 1335 says simply, "The commission is authorized to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties." *Id*. Had the rule been substantive rather than procedural, APA § 553 might obligate the ITC to provide notice adequate to generate meaningful comment. But that section contains several exceptions; the one relevant here is for, "rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A).

Were the ITC's rule (or perhaps more accurately its interpretation) consistent with 19 U.S.C. §§ 1335 and 1337(c), that might be the end of the matter under Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) or Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The former holds, courts may not "overturn ... on the basis of the procedural devices employed (or not employed) by the [agency] so long as [it] employed at least the statutory minima." 435 U.S. at 549. Similarly, the latter opinion holds, "[T]he Court of Appeals misconceived the nature of its role… Once it determined ... that Congress did not actually have an intent regarding the… [meaning of statutory language], the question before it was… whether the Administrator's view… is a reasonable one." 467 U.S. at 845 (citations omitted).

As reflected in both of those opinions, rules that warrant judicial deference must be, at a minimum, consistent with applicable statutes. But *GE* finds the ITC's approach unsupportable because it would lead to delay and be at odds with a congressional desire for urgency. Indeed, 19 U.S.C. 1337(b)(1) states: "The Commission shall conclude any such investigation and make its determination under this section *at the earliest practicable time*." (Emphasis added.)

Moreover, to the extent that the Commission intended to forestall or preclude judicial review, that objective would also be very much at odds with APA § 704, quoted above. In short, the APA as interpreted by the Supreme Court in *Darby* mandates that any matter finally resolved and no longer subject to internal review is subject to judicial review following the agency's ultimate decision.

Note: Excerpts from *Darby*, *Vermont Yankee*, and *Chevron*, as well as other cases dealing with exhaustion, finality, rulemaking requirements and deference to administrative views are included in Chapters 4.B, 8.B, 9.A, and 12.B of my book, Introduction to Administrative Process, (2010). It may be downloaded for non-profit reproduction.