

PENNSYLVANIA: All eyes on politics, technicalities in ongoing Act 13 challenge *(Monday, August 13, 2012)*

Ellen M. Gilmer, E&E reporter

As controversial provisions of Pennsylvania's new oil and gas law work their way through the judicial wringer, attention is on the political makeup of the state's Supreme Court.

The court is evenly split between three Republicans and three Democrats, while a seventh judge, Justice Joan Orié Melvin, is suspended. Though the issues at stake -- gas development and local self-government -- don't give way to clean breaks on party lines, the absence of conservative Orié Melvin may prove inconvenient to supporters of the Republican-passed Act 13.

In dispute is the constitutionality of a section of the law that bans municipalities from relegating natural gas operations to specific zones. The Pennsylvania Commonwealth Court struck down those provisions last month in *Robinson Township v. Commonwealth*, along with another measure in the law that would allow the state to waive certain environmental safeguards for gas drillers.

The Pennsylvania Public Utility Commission and Department of Environmental Protection immediately filed an appeal of the 4-3 decision, sending it to the state Supreme Court for consideration. The court has not yet said whether it will take up the case, but attorneys on both sides expect it to.

No specific timetable is known at this point. Lawyers for the state and for the municipalities have pushed for expedited review, requesting that the court take up the appeal during an October session in Pittsburgh. Otherwise, the case would hold until the November-December session in Harrisburg or be delayed longer.

"I would be surprised if the Supreme Court does not accept the request," said Scott Coburn in an online presentation last week. Coburn is general counsel for the Pennsylvania State Association of Township Supervisors (PSATS), a group that supported Act 13's passage in February.

Also speaking during the Act 13 presentation, hosted by Penn State Extension Service, was Scranton-based energy attorney Steve Saunders, who said the makeup of the court will add a challenge to the state agencies' appeal.

"There's going to be an enhanced burden on the Commonwealth parties ... to prevail," he said, "because in order for them to overturn or reverse the decision of the Commonwealth Court, they're going to have to get four votes."

And that means winning over at least one of the liberal-leaning judges.

"Judges aren't supposed to make decisions on that basis," he acknowledged later in an interview with *EnergyWire*, "but it's a possibility that that may enter into it."

If the Supreme Court splits the decision 3-3, the lower court's ruling would stand.

Arguing precedent

Coburn, of PSATS, said the court is left to decide on four main issues: whether the challengers to Act 13 have legal standing; whether the issues are actually political questions best left to legislators instead of the court; whether the Commonwealth Court was correct in its interpretation that the zoning provisions of the law are unconstitutional; and whether the court was correct in its interpretation that the waiver provision is unconstitutional.

Potentially significant to both sides' arguments will be the precedent set by the state Supreme Court in the 2009 decision *Huntley & Huntley Inc. v. Borough Council of Borough of Oakmont*, in which the court upheld a local ordinance that banned gas drilling in residential districts.

The court ruled that Pennsylvania's existing oil and gas law was constitutional in its pre-emption of communities' ability to regulate operational aspects of oil and gas development but that there was not enough legislative guidance for the law to pre-empt local control of oil and gas siting. In other words, communities could not regulate *how* gas operations occurred, but they could regulate *where*.

Attorneys for the state argue that Act 13 now provides that legislative guidance, giving the state license to pre-empt local zoning provisions. The petitioners argue that the provisions would amount to more than simple pre-emption by undermining the constitutionality of zoning across the board.

Tricky technicalities

A more immediate issue for case observers is a technicality that prompted municipalities to [ask](#) the Commonwealth Court to reaffirm an existing injunction on enforcement of the zoning provisions. That injunction was put in place during proceedings earlier this year.

Even though the Commonwealth Court's decision immediately nullified the zoning provisions, an abstract appellate rule allows for an injunction to be lifted in favor of the state during appeal. In other words, in the case of any appeal, the state has the advantage of automatic *supersedeas* -- setting injunctions aside until the higher court has ruled.

"Petitioners question the applicability of the rule because of its potentially draconian effect relative to injunctions," petitioners wrote in the request to ignore that rule or maintain the injunction.

They outlined a mock scenario in which a lower court enjoined a state from knocking down a building. Once the state appealed the court's decision, the injunction would be stayed, and the state

could knock down the building before the Supreme Court makes a ruling.

"It is plainly apparent that this convoluted outcome cannot be justified by the terms of the rule," the request says.

The attorneys are requesting the reaffirmation of the injunction out of "an abundance of caution" in case the state tries to act on automatic *supersedeas*. Pennsylvania courts have previously decided that the rule is not absolute, and the petitioners in this case believe the court will vacate it.

Reprinted from EnergyWire with permission from Environment & Energy Publishing, LLC.
www.eenews.net, 202-628-6500

ABOUT ENERGYWIRE

EnergyWire is written and produced by the staff of E&E Publishing, LLC. EnergyWire provides comprehensive coverage of the political, legal and business issues surrounding the rapidly evolving unconventional energy landscape. EnergyWire publishes daily at 9 a.m.



E&E Publishing, LLC
122 C St., Ste. 722, NW, Wash., D.C. 20001.
Phone: 202-628-6500. Fax: 202-737-5299.
www.eenews.net