FPA "Power Grab": On Whose Foot is the Shoe?

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States often accuse FERC of "power grabs." But in jurisdictional battles under the Federal Power Act, most judges have held that the boundary violator was the state. As will the U.S. Supreme Court this spring, when it holds that a Maryland order is preempted. In these FPA cases against FERC, why do the states keep losing? What lessons can we learn?

The legal principles

The FERC-state struggle involves legal violations of two types, one for each side.

A **FERC violation** occurs when the agency exceeds its FPA authority. Regulators regulate the actions of actors. So a regulator's jurisdiction is defined by the actions it is authorized to regulate. FPA Section 201(b)(1) authorizes FERC to regulate transmission in interstate commerce and wholesale sales in interstate commerce. FERC also may regulate any "practice ... affecting" transmission or wholesale sales. (FPA section 206(a)). If FERC regulates some other action, it exceeds its authority.

A **state violation** occurs when the state (a) enters a "field" that the FPA has assigned to FERC exclusively, or (b) conflicts with decisions FERC has lawfully made. Known as "field preemption" and "conflict preemption" respectively, these concepts flow from the interaction between the Constitution's Supremacy Clause and the intent of Congress. When Congress declares an area exclusively FERC's to regulate, the states must stay out.[1]

The states' track record

In each of four Supreme Court cases on FPA jurisdiction, and in at least as many court of appeals cases, the state either acted in conflict with FERC's authority or argued erroneously that FERC has exceeded its authority. Here are the cases and the vote tallies:[2]

1. The North Carolina Commission was conflict-preempted when it treated a retail utility as having access to more low-cost, wholesale hydropower than the limited amount allocated to the utility by FERC.[3] (7-0)

2. The Mississippi Commission was conflict-preempted when the state Attorney General demanded that it investigate the prudence of a utility's subsidiary's purchase of high-cost nuclear capacity allocated to it by a FERC-approved wholesale contract.[4] (6-3)

3. FERC did not exceed its FPA authority in exercising jurisdiction over the unbundled transmission of retail electricity.[5] (9-0 on that issue)

4. Louisiana was conflict-preempted from disallowing from a utility's retail rates costs charged to that utility under a FERC-authorized cost allocation agreement.[6] (8-0).

5. FERC did not exceed its jurisdiction in approving (with modifications) an allocation of wholesale generating capacity among affiliated retail utilities of a centrally planned holding company, even though the allocation would affect retail rates.[7] (3-0)

6. FERC did not exceed its jurisdiction in requiring that if a utility had state law eminent domain powers, it could not use those powers for its own interconnection facilities unless it offered to use the same powers for its competitors. The rule did not "commandeer[] states' eminent domain authority"; it merely forbade utilities from exercising that authority discriminatorily.[8] (2-1)

7. FERC did not exceed its jurisdiction in allocating among a region's retail utilities specific responsibilities for having sufficient capacity relative to load.[9] (3-0)

8. FERC did not violate the Tenth Amendment when it allocated costs of a regional transmission network among the retail utilities that use the network. (The states said FERC "coerced" them to host these facilities, because the costs would be spread among all states while the benefits would be retained by the hosting states.) The court of appeals (Posner, J.) called the Tenth Amendment argument "frivolous": A tariff is not "coercive" merely because it "provides a carrot that states won't be able to resist eating...."[10] (3-0)

FERC did have two howlers. It claimed authority over the unbundled physical distribution of retail power.[11] And it ordered the California Independent System Operator to choose a new Board of Directors using a FERC-prescribed method.[12] Both times, FERC exceeded its jurisdiction. (In the second case the court said: "We are not biting.")[13]

The Maryland case

The Maryland Commission ordered a retail utility to sign a long-term wholesale purchase agreement with a generating company selected through competitive bidding. The agreement fixed the seller's compensation. To receive that compensation, the generating company would have to bid into the PJM capacity auction and be selected. A separate "contract for differences" would cover any difference between (a) the price specified in the agreement and (b) the price set by the PJM auction. So if the PJM price fell below the agreement price, the retail utility (using dollars charged to its ratepayers) would make the generator whole. The Maryland Commission order thus guaranteed to the wholesale generator a level of compensation different from the prices set by the FERC-jurisdictional, PJM-administered auction.

In the Maryland case (and the similar New Jersey case), eight out of eight federal judges (two U.S. district courts, and three-judge appellate panels in the Third and Fourth Circuits) all found the state action preempted. Some of these decisions found both field preemption and conflict preemption; others found only one type. Common to all four decisions was this conclusion: The states' actions had the effect of setting a FERC-jurisdictional wholesale price.[14] Maryland has appealed to the U.S. Supreme Court. For the state, oral argument did not go well.

Why do states bring losing cases?

The jurisdictional boundaries Congress established in 1935 do not work well in 2016. But statutory mismatch does not equal statutory ambiguity. If the Federal Power Act's boundaries were ambiguous, one would expect more judges to side with states more often. They don't.

So why we keep trying, and why we keep losing, is worth some soul-searching. (I say "we" because having worked for state commissions or state consumer advocates in 26 states, I consider myself part of "state" community.) Do we conflate disagreements over policy with disputes over jurisdiction? Do we view "states" as stakeholders in a FERC-regulated industry (the wrong view) rather than as co-regulators with FERC in a changing industry (the right view)? Do we view federal vs. state as a zero-sum struggle rather than federal *and* state as a bi-jurisdictional partnership? Whatever the reasons, the approach is not working.[15]

What are the consequences?

The consequences of continuing this way are adverse to the states' interest and to the public interest. Here are four reasons:

1. By mis-casting differences over policy as attacks on jurisdiction, we create a culture of us vs. them. The resulting divisiveness makes cooperation politically difficult, because those displaying some appreciation for the "other" risk being viewed as betrayers of their allies. These differences harden over time, as each new crop of commissioners reflects the leanings of their predecessors.

2. Losing so often reduces the respect states deserve from the very fora whose deference they seek and need—FERC and the courts.

3. Unnecessary appeals create investment uncertainty, for both sellers and buyers, because during the multi-year appellate period no one knows the rules.

4. We divert the immense talent of our state-level lawyers from other work, because for each state that "signs on" to someone else's appellate briefs some lawyer is spending hours reviewing someone else's drafts.

Can we reframe?

While these cases are framed as state against FERC, they always involve some deeper conflict. It could be state against state (as in cost allocations), with FERC acting as the arbitrator. It could be short-term interests against long-term interests (as in low prices today vs. sufficient supply tomorrow), with FERC obligated by law to balance and decide. It could be Supplier A against Supplier B (with different states backing different suppliers).

These are legitimate, difficult differences. One finds them not only in electricity policy but also in taxation, economic development and environmental protection. Casting them as "state vs. FERC" creates a "tragedy of commons"[16] The "commons" is the public interest (promoted by regulatory collaboration), while the "tragedy" is the public loss (caused by regulatory friction). Effective federal-state regulation is joint regulation—essential in an industry whose physical network, commercial markets and environmental effects are interstate but whose ultimate effects are local.

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[1] The broader federal-state conflict involves three other situations: Congress acting outside its Commerce Clause authority, Congress violating the Tenth Amendment by entering areas reserved by the Constitution to the states, and states violating the Dormant Commerce Clause by discriminating against or unduly burdening interstate commerce. For a detailed discussion of all five areas as applied to utility regulation, see Chapter 12 of my *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (American Bar Association 2013).

[2] These summaries address only the question of jurisdictional conflicts. Some of the cases involved additional issues.

[3] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

[4] *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). Full disclosure: On behalf of Consumer Federation of America and Environmental Action Foundation, I wrote an amicus brief supporting the state. I was wrong.

[5] *New York v. FERC*, 535 U.S. 1 (2002).

[6] *Entergy Louisiana v. Louisiana Public Service Commission*, 539 U.S. 39 (2003).

[7] *Mississippi Industries v. FERC*, 808 F.2d 1525, vacated in part on other grounds, 822 F.2d 1104 (D.C. Cir. 1987).

[8] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

[9] *Connecticut Dep't of Public Utility Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009).

[10] *Illinois Commerce Comm'n v. FERC*, 721 F.3d 764 (7th Cir. 2013).

[11] *Detroit Edison v. FERC*, 334 F.3d 48 (D.C. Cir. 2003).

[12] *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 401 (D.C. Cir. 2004).

[13] In other cases the state has beaten FERC. But unless I have missed one, in those cases FERC was reversed not because it exceeded its jurisdiction but because it violated some principle of administrative law (*e.g.*, lack of substantial evidence, arbitrary or capricious reasoning, failure to take evidence into account).

[14] This paragraph is necessarily simplified to fit into my monthly essay format. A more complete discussion is in my article "Pricing in Organized Wholesale Electricity Markets: Can We Make the Bright Line any Brighter?", *Infrastructure* (American Bar Association, Spring 2015).

[15] For more thoughts on this question, see these essays: "Federal-State Jurisdictional Relations: Pick Your Metaphor" ; "Coordinated Regulation or Jurisdictional Wrestling: Which Will Produce Better Industry Performance?"; "Federal-State, Continued: Jurisdictional Peace Requires Joint Purpose"; "Intra-Regional Relations: Can States Commonalities Outweigh Their Differences?"; and "Federal-State Relations: A Plea for Constitutional Literacy".

[16] See Garret Hardin, "The Tragedy of the Commons," *Science* (Dec. 13, 1968), See also my essay, "Interconnection Animus: Do Regulatory Procedures Create a Tragedy of the Commons?".