Federal–State Jurisdiction II:
Jurisdictional Wrestling vs. Coordinated Regulation

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No man is an island entire of itself; every man is a piece of the continent, a part of the main.

— John Donne

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"Federal–State Jurisdictional Relations: Pick Your Metaphor," noted that for interstate industries, federal–state simultaneity is unavoidable—and good for consumers. Why, then, does this interdependency produce so much irritability? One illustration of irritability is when the "federal versus state" dispute is actually a state-versus-state dispute. This month's essay explores this example in real time: namely, some states' discomfort with FERC jurisdiction over "resource adequacy."

When car drivers pick their pace, they pursue their private interests—dentist appointments, warm dinners, court appearances, soccer games. So do airlines—on-time departures, lower labor costs, avoiding turbulence. Because these self-interests often diverge from the public interest, we regulate: with speed limits and traffic lights for car drivers, safety rules and air traffic controls for airlines.

Buyers and sellers of electricity also pursue their self-interest. Consumers want lighting at reasonable cost, retail utilities want stable revenues, generation owners want maximum output at maximum price, no one wants blackouts. In an interconnected, interstate transmission system, individual, unregulated, self-interested decisions would produce electrical instability. So we regulate: FERC certifies reliability entities, approves regional transmission tariffs, and allocates multistate transmission costs.

And now we have FERC mandating capacity adequacy requirements. FERC has approved some regional transmission tariffs that require "load-serving entities" (retail entities legally obligated to serve loads that depend on the regional transmission system) to have available a specified quantity of generation capacity exceeding their customers' load requirements. This on-hand reserve reduces the probability of blackouts in the event of unanticipated consumer demand or equipment breakdown.

Some states oppose not only the magnitude of these mandates but also FERC's authority to impose them. They raise a question of statutory interpretation: Does FERC's exclusive statutory jurisdiction over wholesale sales in interstate commerce, and transmission service in interstate commerce, include authority to require these retail entities to comply with generation adequacy requirements?

Statutory interpretation aside, the policy question is clear: When unregulated, self-interested uses of an interconnected system would cause reliability problems for others, is there a need to regulate? The question compels a "yes" answer. Regulating behaviors that affect interstate adequacy is unavoidable.

Who, then, should do the regulating? It cannot be the state commission. Regulation is necessary when private behavior diverges from public interest. In an interconnected transmission system, divergence occurs because some transmission users, pursuing their private interest, can cause problems for others. Just as airlines can't be air traffic controllers, transmission users can't be adequacy regulators.

A state commission is not a transmission user, so why can't it be the regulator? For the same reason that a single state cannot decide air traffic priorities for multistate air space. A state commission, it is true, is a regulator. But it regulates to induce its in-state utility to serve its in-state customers at the lowest feasible cost. To impose adequacy requirements in-state is to increase costs in-state. In an interconnected system, the benefits of that in-state cost inevitably flow in part to other states. This is the classic "positive externality" in which each individual state will underinvest because it does not receive the full benefits of its investment. The sum of each state's self-interest actions, therefore, will not yield regional adequacy. And no consumer would want to live in a region whose reliability depended on the sum of each state's voluntary actions. Someone above the fray needs to take charge and assign obligations.

That leaves only the federal level as regulator of generation adequacy. Some states accept this reality. These states still might object to FERC's techniques and procedures, but not to its jurisdiction. Other states, bothered by their FERC-assigned reliability share, blame FERC and Congress for their "impairment of the state prerogative." How do we get out of this box?

The choice is between (a) allowing "local control" to supersede the national interest, and (b) pursuing the national interest with sensitivity to local facts. The legitimate concern is not with a national regulatory entity prescribing results within the state, for with reliability some super-state prescription is unavoidable. The legitimate concern is that in prescribing results, the prescriber will ignore local concerns. There cannot be "local control" of decisions that affect non-local interests; but the federal forum must take into account local facts and local values. "Take into account" does not mean "be bound by" or "honor at all costs." It means "weigh along with other facts and values."

Is that not what happens now? Can anyone persuasively assert that states lack opportunities to be "heard" by FERC? There are official proceedings, mutual visits to each other's national and regional conferences and workshops, joint studies, countless informal meetings. States are heard. A federal regulator is not "ignoring state concerns" just because it weights them less heavily than one might wish, or decides that some states seek the unfair result of benefitting from reliability paid for by others.

From Jurisdictional Irritability to Bi-Jurisdictional Policymaking: Three Thoughts

Improve each other's hearing. In any conversation, what improves hearing is speaking to each other's concerns. (See any book by the Georgetown linguistics professor Deborah Tannen.) A state speaks to the federal agency's concerns if it speaks as a co-regulator seeking solutions to multistate problems, rather than as a market participant seeking the protection only of its own residents. The federal agency speaks to the state's concerns if it describes its purpose as seeking to serve the sum of legitimate in-state values.

Recognize interdependencies and mutual benefits. By approving terms and conditions for intra-regional transmission, FERC creates opportunities for state-regulated utilities to shop the regional market. Each state's approval of terms and conditions for retail service allows utility-as-shoppers to create demands that stimulate wholesale competitors to sell. Each jurisdiction can shape the market positively. With mutual recognition, each jurisdiction can help the other to do its job—a better result than seeking the other's removal through appellate attacks on jurisdiction.

Focus less on "national interests" and "state interests," and more on what matters: industry performance. We measure industry performance in terms of economic efficiency, reliability, product innovation, customer satisfaction. The relevant economic actors—the manufacturer choosing a plant location, the generation investor selecting technology and site, the load-serving utility designing its supply portfolio—do not think about federal versus state; they think about results. So should our regulators.

Conclusion: There are not two interests, national and state. There is a single goal: high-quality industry performance. To produce that performance, there may be a national role and a state role, but there is not a national interest and a state interest.