

Integrating Markets and Public Policy (IMAPP): Overview of Legal & Jurisdictional Issues

October 21, 2016



Presented by:
NEPOOL Counsel

 DAY PITNEY LLP

© 2016 Day Pitney LLP

Presentation Overview

- FERC's Jurisdictional Authority
- States' Authority & Responsibility
- Recent Supreme Court Cases
- IMAPP: Threshold Legal/Jurisdictional Issues
 - FERC's jurisdictional authority
 - Undue discrimination or preference
 - Cost allocation issues
 - Preemption issues
 - Other issues?

FERC's Jurisdiction -- Overview



- FERC only has the jurisdiction given to it by Federal statute
- The applicable statute here is the Federal Power Act (“FPA”)
 - FPA gives FERC jurisdiction over “that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.” **FPA Section 201**
 - “Public Utilities” must file with FERC “rates and charges ... and the classifications, practices, and regulations affecting such rates and charges.” **FPA Section 205**
 - FERC must ensure that wholesale power rates and charges on file with it, including the practices affecting such rates and charges, are just and reasonable and not unduly discriminatory or preferential. **FPA Sections 205 & 206**

State Authority & Responsibilities

In general, States have exclusive jurisdiction over retail electric power sales, distribution, and generation siting

- The FPA has specific limitations of FERC's jurisdiction in Section 201
 - “[E]xcept as specifically provided” in the FPA, FERC jurisdiction does not extend, to “facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce.”
 - FERC jurisdiction is over “the sale of electric energy *at wholesale* [i.e., for resale] in interstate commerce,” but not over “any other sale,” which is the domain of the states.

Some Relevant Landmark U.S. Supreme Court Rulings

- ***Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951)** – just and reasonable is a range—there is “a substantial spread between what is unreasonable because too low and what is unreasonable because too high.”
- ***Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)** – within zone of reasonableness, FERC can employ price to achieve “relevant regulatory purposes.”
- ***NAACP v. FPC*, 425 U.S. 662 (1976)** – [FERC’s] authority to consider “public interest” is not broad authority to promote public welfare, but rather to further the purposes of the FPA.

Recent U.S. Supreme Court Rulings

- ***Oneok v. Learjet, Inc.*, 135 S. Ct. 1591 (2015)** – FERC’s exclusive jurisdiction over wholesale rates does not pre-empt States’ authority to enforce their antitrust laws, even if they affect the wholesale rates
- ***FERC v. EPSA*, 136 S. Ct. 760 (2016)** – FERC has broad jurisdiction over practices directly affecting wholesale rates, even where those practices relate to demand response regulated by States
- ***Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016)** – States do not have the authority to set wholesale power rates, directly or indirectly

IMAPP: Threshold Legal & Jurisdictional Issues

Issue #1

Does FERC's jurisdiction extend to approval and regulation of environmental attributes in wholesale power arrangements?

- The FPA gives FERC broad and exclusive jurisdiction over wholesale power markets
- FERC must ensure that rates, terms and conditions of service, including practices, are just and reasonable and not unduly discriminatory
- FERC can use wholesale power arrangements to advance public interest purposes that are consistent with the FPA (*NAACP* and *Permian*)

FERC Jurisdictional Authority?

Acceptable

RECs that are part of a wholesale energy transaction

WSPP Inc., 139 FERC ¶ 61,061 (2012).

Compensation for Demand Response

FERC v. EPSA

“IT DEPENDS”
on whether the attributes directly affect or are closely related to wholesale rates, terms and conditions

Unacceptable

RECs that are not part of wholesale energy transactions

Regulation of employment practices to eradicate discrimination

NAACP v. FPC

IMAPP: Threshold Legal & Jurisdictional Issues

Issue #2

Would rates, terms, and conditions of service (including practices) that differ based on environmental attributes be unduly discriminatory or preferential?

- The FPA prohibits **undue** discrimination or preference in rates, terms and conditions (including practices) of jurisdictional services

Undue Discrimination or Preference

- Different treatment in rates, terms and conditions is OK if differences are shown to be based on distinctions that FERC can properly consider under the FPA.
 - A rate is not unduly or unreasonably discriminatory or preferential if the disparate effect is justified based on factual, policy or other legitimate reasons.
 - The focus of undue discrimination or preference analysis will be whether there are legitimate reasons for the disparate treatment, including whether the recipients of the treatment are similarly situated.

Undue Discrimination or Preference?

Acceptable

2015-2018
Winter
Reliability
Program

“IT DEPENDS”
on whether case has
been made

Unacceptable

Exclusion of non-
generation
resources, such
as demand
response, in
wholesale
capacity market

IMAPP: Threshold Legal & Jurisdictional Issues

Issue #3

Can additional costs from IMAPP be assigned to entities that are not subject to the public policies driving those costs?

- Costs should be allocated in a way that is roughly commensurate with costs caused or benefits received.
- Costs should not be allocated to those who do not cause the costs or do not benefit from the service.

IMAPP: Threshold Legal & Jurisdictional Issues

Issue #4

What level of involvement can States have in defining wholesale power market criteria or requirements?

- Any terms and prices set by a state and not sanctioned by FERC “[strike] at the heart of [FERC’s] statutory power” under the FPA (*Hughes v. Talen*)
- “The FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result” (*FERC v. EPSA*)

Preemption of State Involvement?

Acceptable

FERC requires that State input be considered by ISO and seeks to avoid conflicts if possible (e.g., development of ICR)

“IT DEPENDS”
on the degree
of state control over
setting wholesale
power rates, terms
and conditions

Unacceptable

States cannot set wholesale rates, terms and conditions
(Hughes v. Talen)

Any other legal/jurisdictional issue(s) to consider?

