

Threshold Jurisdictional/Legal Issues – Future Grid Proposals



Presentation Overview

- Overview of FERC Jurisdiction
 - FERC jurisdiction granted and limited by statute
 - Jurisdiction as interpreted by courts
- Overview of state authority
- Analysis of regulatory action that may fall within FERC jurisdiction
- Post-Jurisdictional Issues
 - Determination of whether rates are “just and reasonable”
 - Undue discrimination or preference

Overview of FERC jurisdiction: FPA

- FERC only has the jurisdiction given to it by Federal statute: the Federal Power Act (FPA)
- **FPA Section 201** gives FERC jurisdiction over:
 - “that part of such business which consists of the **transmission** of electric energy in **interstate** commerce”
 - The “sale of such energy at **wholesale in interstate** commerce”
- **FPA Section 205** requires that public utilities must file “rates and charges...and the classifications, practices, and regulations affecting such rates and charges” with FERC

Overview of FERC jurisdiction: FPA

- FERC has the authority and responsibility under FPA **Sections 205 and 206** to ensure that wholesale power rates and charges which are on file with it, including the practices affecting such rates and charges, are **just and reasonable and not unduly discriminatory or preferential**
- FERC can exercise jurisdiction over transactions that are “in connection with” or **directly** “affect” jurisdictional rates and charges, even if the transactions themselves do not directly involve the transmission or sale of energy in interstate commerce. 16 U.S.C. § 824d; *City of Cleveland, Ohio v. FERC*, 773 F.2d 1368 (D.C. Cir. 1985); *FERC v. EPSA*, 136 S.Ct. 760 (2016).

State Authority

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

- FPA Section 201 specifically does *not* give FERC jurisdiction over:
 - “Facilities
 - used for the generation of electric energy
 - used in local distribution or
 - used for the transmission of energy in *intra*-state commerce, or for the transmission of energy consumed wholly by the consumer;” OR
 - Any sale of electricity that is not a sale at wholesale (i.e., for resale)

Interpreting FERC's Jurisdiction: Relevant Court Cases

- ***NAACP v. FPC*, 452 U.S. 662 (1976)**: FERC's authority to consider public interest is not broad authority to promote public welfare, but rather to further the purpose of the FPA
- ***FPC v. Florida Power & Light*, 404 U.S. 453 (1972)**: Even a purely intra-state utility may transmit power at wholesale that "intermixes" with power that will be travelling across state lines and thereby trigger FERC jurisdiction
- ***FPC v. Conway*, 426 U.S. 271 (1976)**: FERC can consider retail effects when setting wholesale rates as long as the wholesale rate remains within the zone of reasonableness

Interpreting FERC's Jurisdiction: Relevant Court Cases

- ***Oneok v. Learjet*, 575 U.S. 373 (2015)**: FPA's grant of authority to FERC over interstate electric and natural gas companies does not preempt state anti-trust laws that apply to those companies
- ***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
- ***NARUC v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020)**: FERC's jurisdiction over wholesale markets includes the ability to prohibit RTOs/ISOs from providing states with the option of blocking distribution-level storage wholesale market participation.

Testing the Limits of FERC Jurisdiction

- Following the Supreme Court precedent in *FERC v. EPSA*, to determine whether FERC has exceeded its jurisdiction, Courts will ask:
- Whether the practice at issue “directly affects wholesale rates” → if it does, FERC can likely assert jurisdiction
 - Whether FERC has attempted to regulate a practice that is left to the states → if it has, FERC may have over-stepped its jurisdictional limitations
 - Whether the Court’s determination on jurisdiction would conflict with FPA’s core purposes of **“curb[ing] prices and enhanc[ing] reliability in the wholesale power market.”** *NARUC v. FERC*, 964 F.3d 1177, 1186 (D.C. Cir. 2020).
 - *As applied in NARUC v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020) (*citing FERC v. EPSA*, 136 S.Ct. 760 (2016)).

FERC's Exercise of Jurisdiction

Courts have upheld FERC's jurisdiction over:

- Practices that directly affect wholesale markets
 - Sales of electricity and the rates, terms and conditions that go along with such sales. (*Hughes*)
- Compensation for demand response in wholesale markets (*EPSA*)
- Promulgating rules prohibiting RTOs/ISOs from banning batteries in wholesale markets (*NARUC*)
- Determining what is just and reasonable in RTO and ISO market auctions (*Hughes*)

FERC *may* have jurisdiction over:

- Regulation of carbon pricing in wholesale markets

FERC's Exercise of Jurisdiction

FERC does *not* have jurisdiction to:

- Regulate employment practices not related to the wholesale energy market (*NAACP*)
- Suggest rate design entirely different from that proposed by utility or from prior rate scheme (*NRG Power Marketing LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017))
- Replace the governing board of an Independent System Operator with a new board chosen through a method dictated by the Commission (*CAISO v. FERC*, 372 F.3d 395 (D.C. Cir. 2004))
- Regulate any retail sale of electricity or electricity “inputs” (*Detroit Edison Co. v. FERC*, 334 F.3d 38 (D.C. Cir. 2003))
- Regulate in-state facilities (*Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm’n*, 461 U.S. 190, 205 (1983) (quoted in *Hughes*.)
- Require utilities to cede any rights granted to them under the FPA (*Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002); *Pub. Serv. Comm’n of New York v. FERC*, 866 F.2d 487 (D.C. Cir. 1989))
- Preempt state anti-trust laws (*Oneok*)


Additional Threshold Legal Issues

■ Preemption

- The Federal Constitution and Federal statutes (such as the FPA) are supreme law of the land
- Field Preemption
 - When Congress has legislated comprehensively and left no room for states to supplement with their own legislation → federal law is supreme. *Northwest Central Pipeline Corp v. State Corporation Comm'n of Kan.*, 489 U.S. 493 (1989).
 - FPA “occupies the field” of wholesale power regulation. *Hughes*, 136 S.Ct 1288; *EPISA*, 136 S.Ct at 780.
- Conflict Preemption
 - If state law presents an obstacle to compliance with the federal law such that it is impossible to comply with both → federal law is supreme. *Arizona v. United States*, 567 U.S. 387 (2012).

Additional Threshold Legal Issues

- **The Commerce Clause/Dormant Commerce Clause**
 - States cannot: (1) discriminate against out-of-state economic interests, (2) unduly burden interstate commerce or (3) regulate commerce that takes place outside their borders.
 - Potential Exception: The Market Participant Exception. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (if the state is participating in the market, rather than regulating the market, the state can favor its own citizens and the regulation cannot be struck down for violating the Dormant Commerce Clause).



**Across the Threshold:
Assuming FERC has jurisdiction, what are
the next legal issues to consider?**

Is the rate, term or condition of service “just and reasonable”?

- FPA Sections 205 and 206 authorize FERC to regulate the rates, terms, and conditions of jurisdictional service and ensure they are just and reasonable, and not unduly discriminatory or preferential.
- Courts have found that this standard is “incapable of precise judicial definition”—Courts are largely deferential to FERC. *Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017) (citing *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County, Wash.*, 554 U.S. 527 (2008)).
- FERC seeks to ensure just and reasonable rates by “enhancing competition” in order to bring efficient, lower cost power to consumers
 - Ensuring a level playing field for similarly-situated actors
 - Enhancing competition
 - Breaking down regulatory and economic barriers that hinder free market economy
 - Promoting cooperative federalism

Cases - “Just and Reasonable” Standard

- ***FPC v. Conway Corp.*, 426 U.S. 271 (1976)**: Statutory “reasonableness” is an abstract quantity that allows for a substantial spread between what is unreasonable because too low and unreasonable because too high.
- ***Montana-Dakota Util. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246 (1951)**: FERC’s responsibility is to reduce the abstract concept of reasonableness to a concrete expression in dollars and cents.
- ***Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)**: FERC is not required to find a rate, term, or condition to be just and reasonable at any particular level. It has “discretion regarding the methodology by which it determines whether a rate is just and reasonable.” *See also Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017); *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944).

Is there any “undue discrimination or preference”?

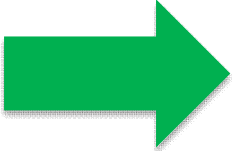
- Different treatment in rates, terms and conditions is acceptable if the differences are shown to be based on distinctions that FERC can properly consider under the FPA
 - A rate is not unduly discriminatory or unreasonably preferential if the disparate effect is justified based on factual, policy or 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

Cases - Undue Discrimination

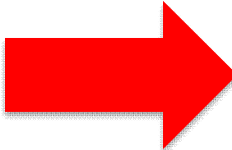
- ***New York v. FERC, 535 U.S. 1 (2002)***: when the Commission finds that there is undue discrimination within its jurisdictional markets, it has the power to remedy such undue discrimination.
- ***Black Oak Energy LLC v. FERC, 725 F.3d 230 (D.C. Cir. 2013)***: Disparate treatment between ratepayers can be acceptable if FERC offers a valid reason for the disparity.
- ***Transmission Agency of N. Cal v. FERC, 628 F.3d 538 (D.C. Cir. 2010)***: The Court will not find a Commission determination to be unduly discriminatory if the entity claiming discrimination is not similarly situated to others.

Recent Nuance of Undue Discrimination at FERC

Discrimination that is not undue = acceptable:

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- Discriminating in favor of renewables by allowing an exemption to the MOPR in ISO-NE and PJM. (ISO-NE) *Aff'd in NextEra Energy Resources, LLC v. FERC*, 898 F.3d 14 (D.C. Circuit 2018); (PJM) *Aff'd in New Jersey Bd. of Public Utilities v. FERC*, 744 F.3d 74 (3rd Cir. 2014).
 - CASPR: allowing for different treatment of Sponsored Policy Resources as not similarly situated. *ISO New England, Inc*, 162 FERC ¶ 61,205 (2018)
 - Allowing aggregation for non-year-round resources making capacity bids and not allowing aggregation of year-round resources. *Advanced Energy Management Alliance v. FERC*, 860 F.3d 656 (D.C. Cir. 2017)

Discrimination that is undue = unacceptable:

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- NYISO prioritizing Public Policy Resources in the capacity market. *NYISO*, 172 FERC ¶ 61,206 (2020); *NYISO*, 153 FERC ¶ 61,022 (2015)
 - PJM's Capacity Repricing proposal was unduly preferential towards resources that received out-of-market support such as RECs and ZECs. *Calpine Corp. et al.*, 163 FERC ¶ 61,236 (2018)

Appendix: References

Statutes

16 U.S.C. § 824d

Supreme Court Cases

FERC v. EPSA, 136 S.Ct. 760 (2016)

NAACP v. FPC, 452 U.S. 662 (1976)

FPC v. Florida Power & Light, 404 U.S. 453 (1972)

FPC v. Conway, 426 U.S. 271 (1976)

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Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County, Wash., 554 U.S. 527 (2008)

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Permian Basin Area Rate Cases, 390 U.S. 747 (1968)

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NRG Power Marketing LLC v. FERC, 862 F.3d 108 (D.C. Cir. 2017)

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FERC Decisions

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Calpine Corp. et al., 163 FERC ¶ 61,236 (2018)