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Legal Sidebar

Federalism and the Electricity Markets: Balancing National and Local Interests

April 30, 2025

The Infrastructure Investment and Jobs Act (IIJA) sought to enable and encourage infrastructure projects throughout the United States. Section 40105 of the IIJA addressed a particular type of infrastructure: the nation's electricity grid. Section 40105 sought to amend and clarify a "backstop" authority allowing the federal government to permit certain electricity transmission facilities if the relevant state or states decline to do so.

Some may be surprised to learn that the federal government has a limited role with respect to electricity transmission infrastructure, but the jurisdictional lines between federal and state agencies in regulating electricity generation, transmission, and distribution have been closely guarded for more than a century. Over time, however, the landscape for generating and delivering electricity has changed. Electricity is now generated by a larger number of sources, and electricity is transmitted across longer distances throughout interconnected grids, rather than within smaller, intrastate markets. The slow expansion of the federal role in regulating the electricity industry reflects the increasing interdependency of the grid and both retail and wholesale electricity markets, as well as greater attention to environmental issues that raise national and global concerns. This Legal Sidebar reviews the history of that expansion and clarifies current federal and state roles in permitting and regulating the electric power industry.

The "Attleboro Gap" and the Federal Power Act

In the first few decades after Thomas Edison harnessed the power of electricity, the federal government left it to the states to regulate this new commodity. The traditional understanding of the Commerce Clause of the U.S. Constitution limited federal oversight to foreign and interstate transactions, and the burgeoning electricity markets and infrastructure were largely local in nature. However, as the electricity grid expanded and aspects of the chain of commerce became more interdependent, broader concerns emerged that the states lacked the authority to regulate. In the 1927 case *Rhode Island Public Utility Commission v. Attleboro Steam and Electric Co.*, the Supreme Court heard a challenge to the jurisdiction of the Rhode Island Public Utility Commission (PUC), which had amended a contract between a Rhode Island power generator and a Massachusetts wholesale power purchaser to impose "reasonable" rates as determined by the PUC. Citing the impact on those rates for Massachusetts-based customers of the purchases, the Court found that the Rhode Island PUC's rate change placed "a direct burden on interstate

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LSB11296

commerce" in violation of the Commerce Clause. In so doing, the Court created a jurisdictional "gap" whereby no regulatory agency had oversight over these interstate transactions. The Court expressed that "the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character," and thus concluded that the rate "is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress."

Congress would soon comply, enacting Title II to what was then known as the Federal Water and Power Act in 1935 to give the recently created Federal Power Commission (FPC) authority to regulate interstate wholesale sales and transmission of electricity. Wholesale electricity refers to the purchase and sale of energy by generators, resellers, or energy retailers. Section 205 of the revised Act, now known as the Federal Power Act (FPA), mandates that all rates and charges for these jurisdictional sales and services be "just and reasonable" and requires all public utilities engaged in these jurisdictional sales and services to file rate schedules for review and approval. Section 206 of the FPA empowered the FPC to conclude, on its own motion or in response to a complaint, that existing rates are "unjust, unreasonable, unduly discriminatory or preferential" and authorizes the Commission to "determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and . . . fix the same by order."

This broad authority to regulate and adjust rates and services continued to apply only to wholesale interstate sales and interstate transmission services, however. State PUCs retained the sole authority to set rates and otherwise regulate intrastate electricity transactions, including sales to commercial and residential consumers. State PUCs also retained sole regulatory authority over intrastate transmission services, including exclusive authority to permit the construction and operation of transmission facilities themselves.

Public Utility Regulatory Policies Act of 1978

As the nation's electricity generation capacity and the scope and interconnected nature of the electricity grid expanded, the state and federal regulatory roles remained largely unchanged until the 1970s. The first significant change was an internal one: the Department of Energy Organization Act of 1977 created the Department of Energy (DOE) as well as the Federal Energy Regulatory Commission (FERC), an independent agency. The Act transferred many of the jurisdictional responsibilities of the now-defunct FPC, including many of those assigned by Title II of the FPA, to the newly created FERC.

One year later, Congress enacted the Public Utility Regulatory Policies Act (PURPA). PURPA focused primarily on policies promoting energy conservation and efficiency, including some measures intended to advance those goals at the intrastate and consumer levels where the federal government previously had not participated based on the traditional understanding of federalism as applied to the electric power industry. For example, PURPA directed FERC to establish preferential pricing treatment for "qualifying facilities" that satisfy certain criteria.

Section 111 of PURPA represents perhaps the federal government's most substantial effort to regulate retail sales and intrastate transmission of electric power to date. Section 111 requires state PUCs to consider a list of federal "standards" set forth in Section 111(d) for retail electricity operations. These include rates that vary based on time of day or the seasons, net metering, conservation and demand management measures, and others. However, Section 111(a) clarifies that the state PUCs are not obligated to adopt these federal standards but instead are simply required to "consider" and to "make a determination concerning whether or not it is appropriate to implement" the standards. State PUCs are thus free to conclude that a particular federal standard or standards should not be implemented in their jurisdiction.

Order 888: Regional Transmission Organizations

As noted above, Title II of the FPA granted the FPC/FERC authority to set and adjust rates for jurisdictional sales and services to ensure the rates are "just and reasonable." A significant test of the scope of that authority came in Order No. 888, wherein FERC sought to broaden access to transmission by directing vertically integrated utilities to "unbundle," or parse out their generation, jurisdictional transmission, and retail power sales, and to allow other power generators, sellers, and buyers "open access" to their transmission facilities and thus the electricity grid. The order, issued in 1996, represented an overhaul of the electric power industry and was subjected to a number of administrative and legal challenges.

In *New York v. FERC*, the Supreme Court heard a consolidated challenge to Order No. 888. The petitioners argued, among other things, that Order No. 888 was beyond the scope of FERC's authority under the FPA, particularly in exercising jurisdiction over retail transmission services. FERC countered that Section 206 of the FPA required FERC to rectify "undue discrimination" in the provision of electricity transmission services. The Court agreed, finding that "[t]he unbundled retail transmissions targeted by FERC are indeed transmissions of 'electric energy in interstate commerce,' because of the nature of the national grid" and thus properly within FERC's FPA jurisdiction.

FERC would later supplement this authority in 1999 with Order No. 2000, which provides the framework for not-for-profit "Regional Transmission Organizations" (RTOs) to provide open access transmission services to all power generators and electricity customers. Participation in the RTOs remains voluntary, however, as FERC continues efforts to shape national energy and electric power policy while respecting the continuing exercise of state PUC jurisdiction over retail rates and transmission siting and services.

Transmission Siting: A National Approach to Congestion

As noted above, Title II of the FPA generally limits FERC's authority to wholesale sales and interstate transmission pricing and allocation. In contrast, the siting of transmission facilities has traditionally been left entirely to the states except in cases where the facilities are located on federal land.

However, as the electricity grid expanded and became more interconnected and interdependent, and the insufficiency of available transmission capacity to accommodate a growing number of generation sources started to interfere with reliable service, Congress sought to carve out a backstop role for the federal government in siting transmission facilities on private lands. Section 1221 of the Energy Policy Act of 2005 (EPAct) enacted a new Section 216 of the FPA, establishing what is commonly called a "backstop" siting authority for FERC. It authorized FERC to issue permits for the construction or modification of transmission facilities in certain circumstances in areas designated by the Secretary of Energy as "national interest electric transmission corridors" (NIETCs). EPAct directed the Secretary of Energy to "conduct a study of electric transmission congestion" and subsequently "issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor."

After enactment, both FERC and DOE undertook rulemaking proceedings as directed by Section 1221 of EPAct. However, these administrative actions were undone by legal challenges. In *Piedmont Environmental Council v. FERC*, the U.S. Court of Appeals for the Fourth Circuit interpreted the scope and meaning of Section 1221 and held that FERC had exceeded its statutory authority in its 2006 regulations implementing Section 1221. Section 1221 provided that FERC could exercise its backstop electricity transmission siting authority if "a State commission or other entity that has authority to approve the siting of the facilities has . . . withheld approval for more than 1 year." In its rulemaking, FERC interpreted this authority to be applicable not only in cases in which the state agency had failed to act but also in cases in which the state agency had denied or rejected a request for the required approval.

The court disagreed, finding that the plain meaning of the statute indicated that Congress intended to make backstop federal siting authority available only where the state had not made any decision on proposed facilities, and not where the state had decided to deny the requested authorization. As a result of this decision in 2009, as well as a 2011 decision by the U.S. Court of Appeals for the Ninth Circuit vacating two NIETC designations, federal transmission siting authority was largely abandoned by the relevant agencies and the process left to the states for the next decade.

More recent legislative efforts appear to allow for a more extensive federal role. In 2021, Congress amended FERC's backstop siting authority in Section 40105 of the IIJA. The IIJA amended Section 216(b)(1) of the FPA to explicitly authorize FERC to exercise its backstop transmission siting authority not only when a state authority has not made a determination regarding a proposed project but also when the state has denied the proposal. This provision effectively authorized the federal government to regulate a matter previously left to the states by codifying the expanded backstop electricity siting authority that FERC asserted in its final rule in 2006, which had been vacated by the Fourth Circuit in *Piedmont*.

Following enactment of the IIJA, FERC amended its regulations implementing Section 216 of the FPA, detailing the process by which parties could petition FERC to exercise its expanded backstop authority. Additionally, in December 2024, DOE announced that it was moving forward with establishing three NIETCs, its first effort to do so since the 2011 decision vacating its previous determinations, and published a *Federal Register* notice seeking public input on the potential NIETCs. DOE has not yet published any NIETC designations.

Considerations for Congress

As FERC and DOE move forward with the administrative processes for establishing NIETCs and for federal review and permitting of proposed electricity transmission projects, legislators have options to expand or contract this shift. If Congress seeks to preserve the states as the sole arbiters of transmission facility siting, it can amend the language in Section 40105 of the IIJA that creates the expanded FERC backstop authority. If Congress seeks to provide for further federal transmission siting authority, it has a number of options, including but not limited to removing the requirement that a proposed transmission facility be located within a NIETC or giving FERC primary or sole siting authority for certain transmission facilities. While a FERC or state permit to build and operate a transmission project is a key step toward completion and operation of the project, it is not the only regulatory requirement. Projects may need other federal or state permits and must otherwise comply with applicable federal statutes, including those that protect the environment and public health and safety.

Congress could also return any of the ratemaking or other administrative authorities to the states, or give the federal government new authority to regulate retail and intrastate facilities. Legislation was introduced in the 118th Congress to expand or limit federal authority. As the Supreme Court explained in *New York v. FERC* and *FERC v. Electric Power Supply Association*, the commercial electricity grid is now national and interconnected, so regulation of this grid would almost certainly come within the scope of Congress's Article I authority.

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