Jurisdictional Forum Shopping: Ripples in the Stream Broader Implications of Legislative Actions

Laura Chappelle, J.D., Chappelle Consulting, LLC
The Institute for Regulatory Policy Studies
Department of Economics, Illinois State University
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History:
"The More Things Change, The More They Stay The Same"

"I don't know much about history, and I wouldn't give a nickel for all the history in the world. History is more or less bunk. It is a tradition. We want to live in the present, and the only history that is worth a tinker's damn is the history we make today." ~ Henry Ford

States vs. Federal Authority over Energy Regulation

- **States**
  - **10th Amendment**
    - part of the Bill of Rights
    - explicitly states the Constitution's principle of federalism
    - powers not granted to the fed gov't nor prohibited to the states by the Constitution are reserved to the states or the people.

- **Feds**
  - **Commerce Clause**
    - Article I, Section 8, cl 3
    - One of the most frequently-used sources of Congress's power to regulate
    - Congress shall have power to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes
    - Imposes limitations on the States in the absence of congressional action

Dormant Commerce Clause

- Justice Kennedy has stated that:

> "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."

  - *C&A Carbone, Inc v Clarkstown, New York*, 511 US 383 (1994), citing The Federalist No. 22, pp. 143–145 (C. Rossiter ed. 1961) (A. Hamilton); Madison, Vices of the Political System of the United States, in 2 Writings of James Madison 362–363 (G. Hunt ed. 1901).

Early State regulatory powers – Railroad Commissions

- Six states set up commissions before the Civil War: Rhode Island (1839); New Hampshire (1844); Connecticut (1853); New York and Vermont (1855) and Maine (1858)

- **Illinois Railroad and Warehouse Commission: 1871-1913**
  - Grew out of Granger movement of late 1860s – farmers in Illinois frustrated by RR monopoly power
    - Elections of 1870/1871 – hotly contested: farmers vs. cite/corporate vote (farmers won)
    - new legislature/state constitution in 1870
      - Made it mandatory upon the General Assembly to enact certain laws for the control of RRs
      - RRs became public highways – free to all persons for the transportation of their persons or property – required regulation
      - Illinois GA – duty of the legislature to fix schedules of maximum rates
      - Creates IRW Commission in 1871 to carry out those duties.
      - ***Munn v Illinois, 94 US 113 (1876)***
        - US Supreme Court upholds Illinois Commission - maximum rates for grain storage
  - Illinois Public Utilities Commission: 1913-1921
  - Illinois Commerce Commission: 1921- Present

- 1920: more than two-thirds of the states had regulatory commissions
- Today: all fifty states, District of Columbia.

1887 – Interstate Commerce Commission

- Early (State) regulations not solving public discontent over RR rates
- ICC – first significant federal regulatory body created by the Interstate Commerce Act of 1887
  - First independent gov't agency
  - 7 members, appointed by the President/consent by Senate
  - Original purpose was to regulate railroads to ensure fair rates and eliminate rate discrimination
- Enabling law failed to give it enforcement powers
- **Shreveport Rate Case: *Houston & Texas Railway v U.S.*, 234 US 342 (1914)**
  - U.S. Supreme Court affirms that the ICC had *preemption* authority whenever an intrastate rate would frustrate federal statutory goal.
  - Makes clear that Congress regulates interstate commerce (broadly!)
    - "It is the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government."

Early 1900s – States begin to collide

- States now regulating new telecommunications, natural gas and electric emerging industries
- Individual state interests begin to collide with other states
- *Public Utilities Commission of Rhode Island v Attleboro Steam and Electric Co., 273 US 83 (1927)*
  - Basic federalism principles underlying modern regulation of electricity
  - Rhode Island/Massachusetts
  - Court finds RI Comm's rate increase to a Mass utility placed a direct burden on interstate commerce, and was therefore invalid
  - Similar to *Missouri v Kansas Gas Co., 265 US 298 (1924)*
  - "Attleboro Gap"

The Federal Power Act – 1935

- "Federal Power Commission"
  - Authorized in 1920 (Federal Water Power Act); commissioned in 1930
  - Part of "New Deal" legislation
  - Electric power industry
    - Electric power sales for resale in interstate commerce (wholesale)
    - Electric power transmission in interstate commerce
    - Hydroelectric (FERC) and nuclear (NRC) plant licensing
    - Limited "backstop" siting and certificate of transmission

Federal Power Act of 1935

- Sec. 201(b)(1)
  - FERC has exclusive jurisdiction over all rates or changes related to the transmission and wholesale sale of electric energy in Interstate Commerce
    1. **the "transmission of electric energy in interstate commerce," and**
    2. **the "sale of electric energy power at wholesale in interstate commerce."**
- Sec. 205:
  - "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . Shall be *just and reasonable*, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." (No "undue preference or advantage")
- Sec. 206:
  - If FERC finds that any rate or charge demanded "by any public utility for any transmission or sale subject to the jurisdiction of the Commission . . . Is *unjust, unreasonable, unduly discriminatory or preferential,* the Commission shall determine the *just and reasonable rate* . . ."

FERC Orders re: Regional Transmission Organizations

- FERC Order 888 (1996)
  - Main goal is "open access" at the wholesale level
  - Rule: FERC urged – but did not require – formation of ISOs
  - US Supreme Court upholds Order 888 in *New York v FERC, 535 US 1 (2002)*
- FERC Order 2000/2000-A (1999)
  - RTO Rule: FERC urged – but did not require – formation of larger ISOs (RTOs)
  - Recognized "pancaked" transmission rates create obstacles to the competitive markets overseen by FERC
  - Eliminating pancaked rates a "central attribute of RTO formation
  - Various rate structures now approved ("license plate," "postage stamp" etc.)
- FERC Order 890
  - Cost Allocation Principles
  - Regional flexibility in cost allocation
    - Fairly assigns cost among participants, including those who cause them and those whom experience the benefits
    - Ensures adequate incentives to construct new transmission facilities
    - Needs to be generally supported by state authorities and participants across the region.

Energy Policy Act of 2005 (EPAct)

- The first major energy law enacted in more than a decade
- Makes the most significant changes in Commission authority since the New Deal's Federal Power Act of 1935 and the Natural Gas Act of 1938.
- Congress signaled a strong vote of confidence in the Commission.
- Per FERC: EPAct had three principal policy goals

(1) it reaffirmed a commitment to competition in wholesale power markets as national policy, the third major federal law in the last 30 years to do so,

(2) it strengthened the Commission's regulatory tools, recognizing that effective regulation is necessary to protect the consumer from exploitation and assure fair and

(3) it provided for development of a stronger energy infrastructure.

FERC - committed to ensuring the fairness and efficiency of competitive markets

- FERC Order 719 (2008)
  - final rule to improve organized power markets
    - This rule applies only to RTOs and ISOs and their organized markets
    - Four Requirements:
      - DR Resources
        - May provide ancillary services
        - May not be penalized in an emergency
        - May be aggregated into threshold bids
        - May respond based on emergency prices
      - Long-Term Contracting
      - Market Monitoring Units
      - RTO/ISO Responsiveness to Customers
    - RTOs and ISOs required to make compliance filings with FERC

State issues with various wholesale market design/decisions

- Two Recent PJM instances of State discontent with Regional (Federal) Orders/Rules
  - Cost Allocation and Capacity Market Rules

- Both invoke FPA 205 – 206: FERC's Authority in setting/approving wholesale market rates/design

Illinois Commerce Commission v FERC, 576 F3d 470 (7th Cir 2009)

- In part, Illinois/Ohio challenge FERC's approval (in Order 494) of PJM's "postage stamp" pricing of new transmission facilities over 500 kV.

  PJM fails to do any type of cost/benefit analysis, in part, due to the fact that:

  - PJM wants to follow 40-year "precedent" of PJM's members entering into pro rata sharing agreements,
  - "everyone benefits from high-capacity transmission facilities because they increase the reliability of the entire network" and
  - "figuring out who benefits from a new transmission facility and by how much is very difficult and so generates litigation"

- 7th Circuit finds that FERC has not shown that postage stamp for over 500 kV pricing produces a "just and reasonable" price (citing Sec. 205)

  "FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members. All approved rates must reflect to some degree the costs actually caused by the customer who must pay them."

- PJM's "precedent" (i.e., history) carries no weight at all:

  "The fact that some of the same members of PJM who agreed to share the costs of such facilities with each other many years ago would like contributions from Midwestern utilities carries no weight. The eastern utilities that created PJM refer to themselves revealingly as the 'classic' PJM utilities, and the fact that these utilities thought it appropriate to share costs in 1967 says nothing about the advantages and disadvantages of such an arrangement in the larger, modern PJM network."

PJM's Minimum Offer Pricing Rules (MOPR)

- Capacity procurement minimum offer rule (contained within the Reliability Pricing Model (RPM)) – capacity commitments three years ahead of when needed
- Intended to provide sufficient revenue assurances to support new entry
- PJM and the PJM Power Providers Group (P3) filed (sec. 205 and 206, respectively) complaints with FERC - asserting, in part, that the MOPR was ineffective in deterring buyer market power
  - Recent state initiatives in NJ (law: S. 2381, 214th Leg. (N.J. 2011) and Maryland (Commission: Order No. 9214)
    - Supports new generation entry through out-of-market payments to generators
    - By all accounts, would depress wholesale capacity market prices
    - MOPR's "net-short" requirement's narrow focus could have enabled a net buyer, or an entity acting on its behalf, to evade mitigation by structuring a new entry in such a way that depresses prices without triggering the MOPR.
- FERC's Order agrees: orders various, immediate changes to the rule.

FERC's Order Approving PJM MOPR Revisions

- Issued April 12, 2011: 135 FERC ¶ 61,022

- FERC reasons that changes will ensure that capacity prices are just and reasonable:

  - "A capacity market will not be able to produce the needed investment to serve load and reliability if a subset of suppliers is allowed to bid noncompetitively to suppress market clearing prices . . . The lower prices that would result under . . . (the) proposal (to eliminate the MOPR) would undermine the market's ability to attract needed investment over time. Although capacity prices might be lower in the short run, in the long run, such a strategy will not attract sufficient private investment to maintain reliability . . The MOPR does not punish load, but maintains a role for private investment so that investment risk will not be shifted to captive customers over time."

FERC's elimination of State Mandated Exemption to the MOPR

- Prior MOPR had exempting from its operation any planned resource being developed in response to a state regulatory or legislative mandate to resolve a projected capacity shortfall.

- "As the Pennsylvania Commission notes, there is no valid state interest in ensuring that uneconomic offers can submit below-cost offers into the RPM auction."

- Preserves state options:

  "…The MOPR does not interfere with states or localities that for policy reasons seek to provide assistance for new generation entry if they believe such expenditures are appropriate for their state. The MOPR ensures only that the wholesale capacity market prices remain at just and reasonable levels. The commission has previously found, and we reiterate here, that uneconomic entry can produce unjust and unreasonable wholesale rates by artificially depressing capacity prices, and therefore the deterrence of uneconomic entry falls within our jurisdiction. It is the potential for these unjust and unreasonable outcomes in a Commission-jurisdictional market that is the focus of our actions here."

FERC rejects proposed burden (IMM or other party) to prove state intent to suppress wholesale capacity prices

- "While the Commission acknowledges the rights of states to pursue legitimate policy interests, and while, as we have said, any state is free to seek an exemption from the MOPR under section 206, it is our duty under the FPA to assure just and reasonable rates in wholesale markets.

- As the Pennsylvania Commission notes, without effective mitigation of state-sponsored uneconomic entry, the actions of a single state could have the effect of preventing other states from participating in wholesale markets. Because below-cost entry suppresses capacity prices and because the Commission has exclusive jurisdiction over wholesale rates, the deterrence of uneconomic entry falls within the Commission's jurisdiction, and we are statutorily mandated to protect the RPM against the effects of such entry."

State vs. Federal Authority over various energy issues . . .

Will surely continue!

- Questions . . .