

February 2018

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Repository Citation

Scott Jacobson, *Dual Sovereignty Is Out, Time for Concurrent Jurisdiction to Shine*, 42 Wm. & Mary Env'tl. L. & Pol'y Rev. 627 (2018), <https://scholarship.law.wm.edu/wmelpr/vol42/iss2/8>

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DUAL SOVEREIGNTY IS OUT, TIME FOR CONCURRENT JURISDICTION TO SHINE

SCOTT JACOBSON*

INTRODUCTION

In 2016, the United States Supreme Court abandoned an almost eighty-year-old federalism doctrine of dual sovereignty that governed federal-state energy regulation jurisdiction.¹ In *FERC v. Electric Power Supply Ass'n*, the Supreme Court upheld regulations by the Federal Energy Regulatory Commission (“FERC”) and in doing so, rejected dual sovereignty.² Prior to this decision, the Supreme Court interpreted the New Deal Era Federal Power Act (“FPA”) and the Natural Gas Act (“NGA”), as establishing a bright-line jurisdictional rule.³ FERC was allocated authority to regulate wholesale transmission while retail energy sale was left to the states.⁴ Justice Kagan, writing for the majority, reasoned that when FERC acts regarding wholesale energy transactions, it effects the retail prices.⁵ Kagan dismissed this overlap as legally insignificant and thus abandoned the bright-line rule of dual sovereignty.⁶

Shortly after deciding *EPSA*, the Supreme Court in *Hughes v. Talen Energy Mktg.* found that regulation enacted by Maryland was beyond the scope of state jurisdiction.⁷ While the Court answered some questions about how the concurrent jurisdiction doctrine would be applied, there is still uncertainty about what state legislation would be preempted by FERC.

While the doctrine is not yet complete, the Court’s decision to abandon dual sovereignty in favor of concurrent jurisdiction is appropriate for modern energy needs. Presently, however, the role of federalism is blurred and will need to become more defined. As the courts apply concurrent

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¹ *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 766 (2016).

² *Id.*

³ Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399, 415 (2016).

⁴ See *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594 (2015); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

⁵ *FERC v. EPSA*, 136 S. Ct. at 784.

⁶ *Id.*

⁷ *Hughes v. Talen Energy Mktg.*, 136 S. Ct. 1288, 1292 (2016).

jurisdiction and define roles for the states and FERC, special care will be required to ensure that the states will maintain their ability to innovate as well as continue the nation's progress towards cleaner affordable energy. The Supreme Court must remain conservative and reach narrow holdings as they create precedent in this dynamic and rapidly changing industry.

Part I begins by discussing the history of the FPA and the NGA and the Supreme Court's application of dual sovereignty in energy regulation. The history will provide context and demonstrate that concurrent jurisdiction is consistent with the intention of the FPA and NGA given the modern energy market. In Part II, I will explain that while the doctrinal shift in federalism is beneficial, there are valid concerns about the jurisdictional change. Part III will address the concerns raised in Part II and will provide suggestions on how the courts should develop the jurisdictional roles to ensure that the energy market can progress.

While there is existing scholarship on the newly created concurrent jurisdiction in energy regulation, this Note will demonstrate that the late Justice Scalia's concern about a "jurisdictional snarl"⁸ is legitimate. I will address other concerns that will be raised as the doctrine matures. However, this Note will explain that with care by the courts, concurrent jurisdiction can be "unsnarled" resulting in a more effective energy regulatory scheme.

These changes in the regulatory system come at a time where the energy market is facing a great deal of change. For much of the 20th century, utilities were monopolies that produced power in central facilities and delivered it to customers via their own transmission lines.⁹ State public utility commissions countered the monopolies by ensuring that the rates and services were equitable.¹⁰ Presently, new technologies and environmental concerns have shaped how power is generated, transmitted, and stored.¹¹

Instead of exclusive centralized power generation, an increasing amount of power is generated by solar panels on residential rooftops and in small wind farms.¹² These new energy sources require updated transmission and advanced power management systems.¹³ Utilities are facing

⁸ *ONEOK*, 135 S. Ct. at 1606.

⁹ Joel B. Eisen, *Dual Electricity Federalism Is Dead, But How Dead, and What Replaces It?*, 8 GEO. WASH. J. ENERGY & ENVTL. L. 3, 3 (2017).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 3–4.

competition from startups with innovative business models such as solar leasing farms.¹⁴

The energy grid is changing to keep up with new power demands. The power grid is becoming a smart grid.¹⁵ Consumers are becoming increasingly able to generate power and sell it back to the grid.¹⁶ New technologies like battery storage and demand response are pushing the grid to transform.¹⁷ The regional wholesale markets that comprise two thirds of the energy market have only been in operation since the 1990s.¹⁸ Also in that time, consumers in several states now have gained the ability to choose to receive power from suppliers rather than traditional utilities.¹⁹

I. HISTORY OF FERC JURISDICTION

A. *History of The Federal Power Act and the National Gas Act*

In 1927, the Supreme Court in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.* held that the states were powerless to regulate interstate commerce of electric utilities.²⁰ However, at the time of *Attleboro*, there was no federal agency to regulate interstate energy regulation.²¹ The lapse in regulation of the interstate market became known as the “*Attleboro Gap*.”²² In response to the *Attleboro Gap*, Congress passed The Federal Power Act (“FPA”) in 1935²³ and the National Gas Act (“NGA”) in 1938 to regulate the interstate energy markets.²⁴ In the FPA, Congress granted authority to FERC (then the Federal Power Agency) to regulate wholesale energy in the interstate market.²⁵ In the NGA, the same authority was given with regards to the interstate market of natural gas for resale.²⁶

¹⁴ See generally Innovative Solar Systems, <http://innovativesolarfarms.com> [<https://perma.cc/C9CK-TM6B>] (last visited Jan. 21, 2018) (leasing land from farmers to build “solar farms.”).

¹⁵ Eisen, *supra* note 9, at 4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See generally *Pub. Utils. Comm’n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

²¹ Rossi, *supra* note 3, at 409.

²² *Id.*

²³ Federal Power Act, 16 U.S.C. § 824 (2012).

²⁴ Natural Gas Act, 15 U.S.C. § 717 (2012).

²⁵ 16 U.S.C. § 824 (2012).

²⁶ 17 U.S.C. § 717 (2012).

B. The History of Dual Sovereignty

For much of the next eighty years, the jurisdictional roles as defined by dual sovereignty was sufficient to ensure that no gaps in regulation existed.²⁷ The Supreme Court settled on a bright-line test for determining state and federal authority.²⁸ The test as defined in *Federal Power Comm'n v. S. Cal. Edison Co.* relegated the wholesale of energy to the Federal Energy Regulatory Commission and left retail sale to the states.²⁹ This bright-line test “cut sharply and cleanly between sales for resale and direct sales for consumptive uses.”³⁰ The energy market was not as convoluted as it is today.³¹ FERC and the states were able to legislate with relative ease within their own domain.³²

By the early 2000s dual sovereignty began to appear less effective in energy regulation.³³ This can be seen in the 2002 case of *New York v. FERC*.³⁴ While the Supreme Court did not go so far as to invalidate dual sovereignty, it marked the beginning of the end for the doctrine.³⁵ The Supreme Court heard a challenge of FERC’s overhaul of power market structuring rules known as Order 888.³⁶ In response to energy monopolies, FERC restructured the energy market by allowing equal access to transmission lines through tariffs.³⁷ This provided new entrants to the industry a chance to compete in the market.³⁸ After finding that the utilities were impacting bulk power markets, FERC asserted authority under sections 205 and 206 of the Federal Power Act.³⁹

The Court rejected New York’s argument that Order 888 should be invalidated for impermissibly encroaching into the state purview of retail sales.⁴⁰ However, the Court noted that wholesale and retail sale of energy was not as neatly separated as it was when the FPA was enacted.⁴¹

²⁷ Rossi, *supra* note 3, at 414.

²⁸ *Federal Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 206–07 (1964).

²⁹ *Id.* at 215–16.

³⁰ *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 517 (1947).

³¹ Robert R. Nordhaus, *The Hazy “Bright Line”: Defining Federal and State Regulation of Today’s Electric Grid*, 36 ENERGY L.J. 203, 207 (2015).

³² *Id.*

³³ *See generally* *New York v. FERC*, 535 U.S. 1 (2002).

³⁴ *Id.*

³⁵ *See* Rossi, *supra* note 3, at 409.

³⁶ *New York v. FERC*, 535 U.S. at 5.

³⁷ *Id.* at 10–11.

³⁸ *Id.* at 11.

³⁹ *Id.*

⁴⁰ *Id.* at 20.

⁴¹ *New York v. FERC*, 535 U.S. at 21.

This was interpreted as indicating that the Supreme Court was beginning to move away from dual sovereignty.⁴²

II. THE BEGINNING OF DUAL SOVEREIGNTY'S END

The Supreme Court took another step away from dual sovereignty in *ONEOK v. Learjet*.⁴³ Decided in 2014, the case was the culmination of several state antitrust lawsuits brought by retail natural gas buyers.⁴⁴ FERC found that natural gas traders had been reporting false price and trading information.⁴⁵ Gas purchasers then filed state antitrust suits alleging they overpaid for natural gas because of the price manipulation.⁴⁶ This issue was complicated because the allegations involved both wholesale retail sales as well as state antitrust law.⁴⁷

The central issue decided by the Court in *ONEOK* was whether the Natural Gas Act intended for natural gas pricing antitrust remedies to be under federal purview.⁴⁸ The NGA did not explicitly bar state antitrust remedies in the natural gas market.⁴⁹ The pipelines and the federal government behind them argued that implied preemption prohibits the action in state court.⁵⁰ The parties focused on field preemption, a subset of implied preemption.⁵¹ Field preemption exists when Congress has enacted comprehensive law that occupies the field and does not leave any room for state law.⁵²

The Court ruled in favor a narrow interpretation of federal jurisdiction.⁵³ The Court found that the NGA did not preempt the state power to regulate.⁵⁴ Additionally, the Court began to question whether a line between federal and state jurisdiction existed at all.⁵⁵ Scalia, in his dissent claimed that the majority was creating a “snarl” by blurring the lines between state and federal jurisdiction.⁵⁶

⁴² See Rossi, *supra* note 3, at 430.

⁴³ *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594 (2015).

⁴⁴ *Id.* at 1598.

⁴⁵ *Id.* at 1597.

⁴⁶ *Id.* at 1598.

⁴⁷ *Id.* at 1594.

⁴⁸ *ONEOK*, 135 S. Ct. at 1595.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *ONEOK*, 135 S. Ct. at 1600.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1601.

⁵⁶ *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1606 (2015) (Scalia, J., dissenting).

The majority disagreed with the dissent and petitioner's argument that there should be a clear line between federal and state authority in the natural gas market because the idea of a bright-line rule is not realistic in the energy market.⁵⁷ The pipelines and the federal government argued that the Court find preemption whenever a state law governs anywhere the NGA regulates Justice Breyer for the majority provided a test to determine if a state law has usurped federal regulation.⁵⁸

Courts must consider "the target" of the state law in deterring preemption. Breyer applied the targeting test, and found that the target of the law is antitrust regulation, which does not fall under the federal purview of energy regulation.⁵⁹ The Court distinguished the antitrust laws directed at all businesses, not solely natural gas companies.⁶⁰ The Court indicated that there would be a different result if the state law was targeting wholesale and interstate natural gas providers.⁶¹

III. THE BEGINNING OF CONCURRENT JURISDICTION

In 2016, the Supreme Court would take the final steps in abandoning dual sovereignty in *FERC v. EPSA*.⁶² The Electric Power Supply Association challenged FERC Order 745, which established the cost benefits test that system operators use to determine when it is cost effective to use demand response resources.⁶³ Demand response is defined by FERC as "a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy."⁶⁴ The test determined when the cost benefit favored use of the demand response.⁶⁵ The order further specified

⁵⁷ *ONEOK*, 135 S. Ct. at 1601.

⁵⁸ *Id.* at 1599.

⁵⁹ *Id.* at 1600.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *FERC v. EPSA*, 136 S. Ct. at 784.

⁶³ *Id.* at 767.

⁶⁴ U.S. DEP'T OF ENERGY, BENEFITS OF DEMAND RESPONSE IN ELECTRICITY MARKETS AND RECOMMENDATIONS FOR ACHIEVING THEM: A REPORT TO THE UNITED STATES CONGRESS PURSUANT TO SECTION 1252 OF THE ENERGY POLICY ACT OF 2005, at IX (2006), https://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/DOE_Benefits_of_Demand_Response_in_Electricity_Markets_and_Recommendations_for_Achieving_Them_Report_to_Congress.pdf [<https://perma.cc/6FBD-3376>].

⁶⁵ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC P 61,187 (Mar. 15, 2011).

that demand response must be compensated at the market rate for wholesale generators.⁶⁶

In Order 745, FERC conceded that demand response was close to the line between state and federal authority.⁶⁷ FERC did not attempt to justify the order solely on its jurisdiction over the wholesale market but on its duty under the FPA to ensure “just and reasonable” rates.⁶⁸ The D.C. Circuit was not convinced however and invalidated the order.⁶⁹ Under pressure by state public utility commissions, various interest groups, and demand response providers the Supreme Court granted certiorari.⁷⁰

The Supreme Court issued a two-part holding that focused on pragmatism rather than the text of the FPA. In the first part of the holding, the Court found that FERC jurisdiction extends to rules that directly affect wholesale rates.⁷¹ By reducing demand in wholesale markets, FERC is directly affecting wholesale prices.⁷² The second component of the holding decided whether Order 745 overstepped the jurisdictional line.⁷³ The Court, focusing on practicality examined the division between state and federal authority and rejected the notion that the two could be separated.⁷⁴ The Supreme Court reversed the D.C. Circuit and noted that FERC offered veto power over wholesale demand response to each jurisdiction.⁷⁵

In Scalia’s dissent, the last dissent he authored, he indicated that he believed the FERC acted outside its authority.⁷⁶ Not only did he reach a different result, Scalia’s approach was the inverse of the majority.⁷⁷ While Stevens and the majority begin with a presumption in favor of the

⁶⁶ *Id.*

⁶⁷ *Id.* at 16,676.

⁶⁸ *Elec. Power Supply Ass’n v. Fed. Energy Regulatory Comm’n*, 753 F.3d 216, 221 (D.C. Cir. 2014), rev’d, 136 S. Ct. 760 (2016).

⁶⁹ *See Elec. Power Supply Ass’n*, at 216 (D.C. Cir. 2014).

⁷⁰ *See* Adam Liptak, *Supreme Court Accepts Case on Electricity Regulation*, NY TIMES (May 4, 2015), <https://www.nytimes.com/2015/05/05/business/energy-environment/supreme-court-accepts-case-on-electricity-regulation.html> [<https://perma.cc/CY5T-ZN6P>]. *See also* Joint State Brief in Support of Petitions for Writ of Certiorari, *Fed. Energy Regulatory Comm’n v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2015) (No. 14-840). *But see* Opposition to Petitions for Writ of Certiorari at 2, *Fed. Energy Regulatory Comm’n v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2015) (No. 14-840).

⁷¹ *FERC v. EPSA*, 136 S. Ct. at 774.

⁷² *Id.*

⁷³ *Id.* at 776.

⁷⁴ *Id.*

⁷⁵ *Id.* at 779.

⁷⁶ *FERC v. Elec. Power Supply Ass’n.*, 136 S. Ct. 760, 789 (2016) (Scalia, J., dissenting).

⁷⁷ *Id.* at 785.

FERC, Scalia would favor the states.⁷⁸ Scalia advocated for a bright-line rule between the FERC and state governments.⁷⁹

Despite Scalia's concerns, the text of the acts, the legislative history and surrounding circumstances, and the Supreme Court's interpretation of the FPA and NGA all indicate that the purpose of the legislation was to close the *Attleboro* Gap. Congress intended to create a federal agency that could act where states did not have authority.⁸⁰

Concurrent jurisdiction is not out of line with the text of the FPA and NGA. The text of the NGA and the FPA do not explicitly give exclusive power or preemptive authority to the federal regulators.⁸¹ Essentially the text of the acts does not require any jurisdictional doctrine.⁸² The legislative intent of the two acts are more telling that Congress intended for the FPA and NGA to work in unison with the states.⁸³ The Senate Committee on Interstate Commerce report on the FPA stated that the intent of the bill was to assist the states and regulate where the states cannot.⁸⁴ The House Committee Report on the FPA expressed a similar intent to aid the states.⁸⁵

Concurrent jurisdiction is consistent with the purpose of the FPA and the NGA when considering the changing energy markets. Modern energy markets create different challenges that can be effectively resolved with concurrent jurisdiction. Closing regulatory gaps and providing effective energy regulation is more vital to the reasoning behind the FPA and the NGA than what jurisdictional test is used. Additionally, providing FERC with broad authority to regulate the market is especially beneficial because every state has a different regulatory scheme and requires a different level of intervention. FERC needs the ability to close regulatory gaps in all fifty states.

IV. CHALLENGES FACING CONCURRENT JURISDICTION

Not only is the new jurisdictional doctrine established by the Supreme Court unclear, there is risk that courts will hinder state energy regulation. The Supreme Court in *EPSA* left the states the authority to set the retail prices.⁸⁶ However, *EPSA* allows for FERC to set wholesale

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Rossi, *supra* note 3, at 408.

⁸¹ Federal Power Act, 16 U.S.C. § 824; Natural Gas Act, 15 U.S.C. § 717; *see also id.*

⁸² *See* § 842, § 717.

⁸³ *See* Rossi, *supra* note 3, at 441–42.

⁸⁴ S. Rep. No. 74-621, at 48 (1935).

⁸⁵ H.R. Rep. No. 74-1318, at 8 (1935).

⁸⁶ *FERC v. EPSA*, 136 S. Ct. at 784.

prices and concedes that FERC does not “run afoul” when “it affects—even substantially—the quantity or terms of retail sales.”⁸⁷ The Court does not appear to be willing to extend this deference to the states.⁸⁸

In *Hughes*, the only case after *EPISA* applying concurrent jurisdiction, the Supreme Court struck down state legislation for interfering with FERC regulation of wholesale markets.⁸⁹ The case arose out of legislation Maryland enacted in an attempt to provide incentives for a new power plant.⁹⁰ The Maryland legislation offered incentives based on the PJM Interconnection,⁹¹ the regional transmission organization (“RTO”) established by FERC that manages the transmission of wholesale electricity in Maryland and other states.⁹² PJM establishes wholesale contract prices three years in advance.⁹³ Under the Maryland plan, if the contract price with PJM exceeded the market price, the utilities would pay the difference to the power plants.⁹⁴ In other words, the greater the number of power plants, then the lower the market rate would be, and the power plants would receive increasingly large payments from the utilities.

The Supreme Court invalidated the legislation.⁹⁵ The Court found that it interfered with the system of wholesale rates set by PJM.⁹⁶ By providing the power plants with the ability to circumvent the wholesale rate set by PJM, Maryland impermissibly interfered with the wholesale market.⁹⁷

Ginsburg, in her *Hughes* majority opinion, stated that the Court “need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state owned generation facilities, or re-regulation of the energy sector.”⁹⁸ The majority also explicitly stated that this was a narrow holding applicable only to the Maryland legislation.⁹⁹

⁸⁷ *Id.* at 776.

⁸⁸ *See generally* *Hughes v. Talen Energy Mktg.*, 136 S. Ct. 1288 (2016).

⁸⁹ *Id.* at 1299.

⁹⁰ *Id.* at 1290.

⁹¹ *Id.*

⁹² *Who We Are*, PJM (2017), <http://www.pjm.com/about-pjm/who-we-are.aspx> [<https://perma.cc/SR9H-G33F>].

⁹³ *Hughes*, 136 S. Ct. at 1290.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1299.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Hughes*, 136 S. Ct. at 1299.

⁹⁹ *Id.*

The language that Ginsburg uses suggests that the court wishes to leave the states room to effectuate regulation in the energy marketplace. However, it is still unclear what the states are permitted to enact. For example, a state-owned generation facility could easily influence wholesale prices. Ginsburg's opinion stops short of explicitly allowing the methods of regulating energy markets that she listed.¹⁰⁰ Additionally, Ginsburg follows up the examples by asserting that state actions "untethered to . . . wholesale market participation" are not foreclosed by the jurisdictional restrictions.¹⁰¹ However, the Court has recognized that the line between state and federal jurisdiction is intertwined.¹⁰² A broad interpretation of "untethered" would seemingly conflict with the examples listed if retail and wholesale rates are tangled.

A. *Difficulties in Applying Concurrent Jurisdiction*

Proponents of *EPSA* argue that Scalia is overreacting in his dissent and that the jurisdictional line is not a snarl but will become more defined.¹⁰³ While more definition and clarity will help, states are still unclear as to what they can enact. Difficulty interpreting *Hughes* will at a minimum slow down legislation, but has potential to prevent states from enacting energy laws or unnecessarily abandoning portions of bills. A recent example of a state struggling to interpret and apply *Hughes* and concurrent jurisdiction can be found in a New York Public Service Commission order where the Commission adopted regulation called the Clean Energy Standard.¹⁰⁴

Proponents and opponents of the Clean Energy Standard each advocated for a different interpretation of where the state jurisdiction ended.¹⁰⁵ The Commission agreed that there was uncertainty and a potential risk of federal preemption.¹⁰⁶ The Commission was concerned that

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *FERC v. EPSA*, 136 S. Ct. at 784.

¹⁰³ *See Rossi*, *supra* note 3, at 438.

¹⁰⁴ New York Public Service Commission, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard; Petition of Constellation Energy Nuclear Group LLC; R.E. Ginna Nuclear Power Plant, LLC; and Nine Mile Point Nuclear Station, LLC to Initiate a Proceeding to Establish the Facility Costs for the R.E. Ginna and Nine Mile Point Nuclear Power Plants, 2016 N.Y. PUC LEXIS 425, 425 (Aug. 1, 2016).

¹⁰⁵ *Id.* at 435.

¹⁰⁶ *Id.* at 152.

this uncertainty would slow the implementation of the standard.¹⁰⁷ In order to implement the resolution, the state needed the authority to enter into contracts with utilities.¹⁰⁸ If the contracts may be unenforceable, the private actors may be less willing to participate or may require additional incentives.¹⁰⁹

A second example of a state public utilities commissioner applying *Hughes* can be found in Maine's *Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act*.¹¹⁰ Part of the act included expanding an existing pipeline.¹¹¹ The Conservation Law Foundation ("CLF") alleged that the act was foreclosed by *Hughes*.¹¹²

In 2013, three years before *EPSA* and *Hughes*, Maine passed the act,¹¹³ but in 2016 the Public Utilities Commission determined whether *Hughes* had any effect on the act.¹¹⁴ CLF argued that *Hughes* precluded Maine's legislation.¹¹⁵ The Commission disagreed and ruled in favor of the natural gas companies.¹¹⁶ The Commission distinguished *Hughes* claiming that the pipeline would not affect wholesale prices set by FERC.¹¹⁷ However, an argument could be made that the plan is not "untethered" from the whole sale market. Additionally, The Commission in Maine does not have authority to find federal preemption unless it is apparent.¹¹⁸ The explicitly narrow holding in *Hughes* may not interfere with the Maine Energy Cost Reduction Act, but how the Supreme Court will rule on other state programs remains to be seen.

State officials are not alone in interpreting *Hughes*. In the limited time since the opinion was issued, there is at least one case of a federal judge misinterpreting the holding. In *North Dakota v. Heydinger*, an Eighth

¹⁰⁷ *Id.* at 153.

¹⁰⁸ *Id.*

¹⁰⁹ New York Public Service Commission, *supra* note 104.

¹¹⁰ See generally Maine Public Utilities Commission, *Investigation of Parameters for Exercising Authority Pursuant to the Maine Energy Cost Reduction Act*, 2016 Me. PUC LEXIS 128 (2016).

¹¹¹ *Id.* at 2.

¹¹² *Id.* at 33.

¹¹³ The Maine Energy Cost Reduction Act, Me. Stat. tit. 35 § 1901 (2017); For an in-depth analysis of federalism challenges facing this act before *Hughes*, see Benjamin T. McCall, *The Road Less Travelled: The Maine Energy Cost Reduction Act, Economic Federalism, and a Modern Approach of Preemption Analysis Under The Natural Gas Act of 1938*, 67 ME. L. REV. 311 (2015).

¹¹⁴ Maine Public Utilities Commission, Me. PUC LEXIS 128 at 33.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 36.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 37.

Circuit judge cited the case as supporting dual sovereignty.¹¹⁹ Fortunately, the misinterpretation was in a concurrence¹²⁰ and is unlikely to have a harmful precedential effect.

B. Potential Areas of Conflict

Two areas in which the states are possibly usurping federal jurisdiction are building more power generation stations and updating the power grid. States are increasingly promoting diverse energy production¹²¹ and often are collaborating with the federal government to establish new energy generation facilities.¹²² While on first appearance this seems like a like a matter solely within the federal purview, state government is necessary to establish new power plants due to their authority to make retail rates.¹²³

A recent example of state and federal collaboration can be seen in the construction of nuclear power reactors in Georgia and South Carolina.¹²⁴ The V.C. Summer nuclear project in South Carolina and the Vogtle Electric Generating Plant in Georgia received federal assistance but were only made possible by state legislation that allowed “construction work in progress” (“CWIP”) costs to be immediately added to the rate charged to consumers.¹²⁵ CWIP allowed the utility companies to pay financing costs without taking more of a loss.¹²⁶ Allowing upfront financing is a departure from the standard practice of not adding to the rates until the power source is servicing customers.¹²⁷

The state legislation to allow the addition to power rates was not without critics.¹²⁸ Opponents have alleged that legislators are giving too

¹¹⁹ *North Dakota v. Heydinger*, 825 F.3d 912, 927 (8th Cir. 2016) (Murphy, J., concurring in part).

¹²⁰ *Id.*

¹²¹ For example, see *An Act to Promote Energy Diversity*, Mass. Gen. Laws Ch. 23m § 2; Governor Baker Signs Comprehensive Energy Diversity Legislation, MASS.GOV (Aug. 8, 2016), <http://www.mass.gov/governor/press-office/press-releases/fy2017/governor-baker-signs-comprehensive-energy-diversity-law.html> [<https://perma.cc/5FQF-DPZ5>].

¹²² William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 842 (2016).

¹²³ *Id.*

¹²⁴ *Id.* at 847.

¹²⁵ *Id.* at 848.

¹²⁶ *Id.*

¹²⁷ Boyd & Carlson, *supra* note 122.

¹²⁸ *Id.*, at 849; see also Adam Russell, *Another Vogtle Debacle? Cost Overruns, Delays and Construction Woes Bedevil V.C. Summer Reactor Project in S.C.*, FRIENDS OF THE EARTH

much to utility providers and that passing the costs to the customers is not an acceptable means of reducing costs.¹²⁹ Much of the criticism may be warranted as the V.C. Summer nuclear project in South Carolina was abandoned.¹³⁰ However, it is not necessary to evaluate the wisdom of this legislation to recognize that it was within state jurisdiction and successfully raised revenue to begin construction on a new reactor. The utilities were facing a great deal of risk in building a nuclear reactor, even with federal assistance, and the state action ensured that the plants were initially financed.¹³¹ Georgia and South Carolina decided that nuclear power was beneficial to their state energy markets and acted to secure new nuclear facilities.¹³² While there are other considerations, both states are below the national average in energy costs.¹³³

There is a risk that Georgia and South Carolina are impermissibly affecting the wholesale of energy. However, this situation is where concurrent jurisdiction should be beneficial. Applying a bright-line test could invalidate the concerted federal and state efforts. The Supreme Court recognized that retail and wholesale of energy are inextricably related.¹³⁴ If challenged, the collaborative approach to energy generation should be upheld. Overturning a scheme like in Georgia or South Carolina would be detrimental to the energy market. Collaboration by federal and state authorities to provide diverse and affordable energy is in the best interest of consumers. Even if the projects in Georgia and South Carolina are not successful, the method of raising money through CWIP may prove effective.

The second area where state legislation may be invalidated is state efforts to update the power grid. This challenge is an example of state experimentation that other states can learn from and emulate or avoid. As more of the energy grid becomes outdated, upgrading the energy grid is a costly endeavor.¹³⁵ The cost of a nationwide “smart grid” is over \$255 billion.¹³⁶ Modernizing the distribution network will require enabling

(Jan. 16, 2014), <http://www.foe.org/news/news-releases/2014-01-another-vogtle-debacle-cost-overruns-delays-and-construction-woes-at-reactor> [<https://perma.cc/AKW4-AQAK>].

¹²⁹ Boyd & Carlson, *supra* note 122, at 849.

¹³⁰ Brad Plumer, *U.S. Nuclear Comeback Stalls as Two Reactors Are Abandoned*, NY TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/climate/nuclear-power-project-canceled-in-south-carolina.html?mcubz=3> [<https://perma.cc/ST4H-7T9H>].

¹³¹ *Id.*

¹³² *Id.*

¹³³ See State Electricity Profiles, U.S. ENERGY INFO. ADMIN. (Jan. 17, 2017), <http://www.eia.gov/electricity/state/> [<https://perma.cc/K8QC-CPYW>].

¹³⁴ *FERC v. EPSA*, 136 S. Ct. at 784.

¹³⁵ Boyd & Carlson, *supra* note 122, at 856.

¹³⁶ *Id.*

two-way systems.¹³⁷ This allows for time-variant pricing and customer-side generation.¹³⁸ Similar to the construction of nuclear plants in Georgia and South Carolina, utilities are apprehensive to undertake this kind of a massive investment without assurances that they will recover their costs.¹³⁹ States have approached the task of upgrading distribution systems in different ways.¹⁴⁰

Illinois, for example, has elected to use a performance-based rate system to encourage utilities to upgrade their distribution systems.¹⁴¹ The 2011 Energy Infrastructure Modernization Act established rate formulas based on performance objectives.¹⁴² The two main energy distributors in the state can recover costs of upgrading as well as a return for continued compliance.¹⁴³ The act also protects consumers from shouldering the costs and suffering dramatic rate increases if the distributor does not meet a performance objective.¹⁴⁴

By contrast, Massachusetts' plan for upgrading the energy distribution grid is the same as the Georgia and South Carolina methods to recover costs in constructing the nuclear power plants.¹⁴⁵ The state requires that utility distributors submit five- and ten-year plans for grid modernization.¹⁴⁶ The state then identifies performance benchmarks to track progress.¹⁴⁷ Massachusetts then allows for "targeted cost recovery" to allow for upfront cost recovery instead of absorbing the costs until they can recover.¹⁴⁸

Other states are following these methods or using different techniques to update the grid.¹⁴⁹ For example, Maryland and Pennsylvania are allowing for cost recovery through smart meters.¹⁵⁰ Texas has used advanced metering infrastructure to increase data availability to encourage competition and provide more services to energy users in the state.¹⁵¹

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Boyd & Carlson, *supra* note 122, at 857.

¹⁴¹ *See generally* Energy Infrastructure Modernization Act, 220 ILCS 5/16-108.5 (2012).

¹⁴² Boyd & Carlson, *supra* note 122, at 858.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See generally* Mass. DEP'T OF PUB. UTILS., *Investigation By The Department Of Public Utilities On Its Own Motion Into Modernization Of The Electric Grid* 19 (2014).

¹⁴⁶ Boyd & Carlson, *supra* note 122, at 859.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 860.

¹⁵⁰ *Id.*

¹⁵¹ Boyd & Carlson, *supra* note 122, at 860.

Support for state involvement can be seen in Sotomayor's concurrence in *Hughes*.¹⁵² Sotomayor posited that "courts must be careful not to confuse the 'congressionally designed interplay between state and federal regulation' . . . for impermissible tension that requires preemption under the Supremacy Clause."¹⁵³ She went on to recognize the states' important role in furthering the Federal Power Act's goal of promoting sustainable and affordable energy.¹⁵⁴

Which state method is the most effective will not be known for some time, and there may not even be a universally effective method. What is beneficial, however, is the state experimentation in utilizing new technologies and methods to encourage financial recovery and make the power grid more cost effective and energy efficient.¹⁵⁵ As the Supreme Court draws the jurisdictional roles, state experimentation must still be permitted. Fortunately, the above examples show fund upgrades to the energy grid through retail rates. The methods employed by the several states should fall within their purview despite influencing the wholesale transmission of energy because of the narrow holding in *Hughes*.¹⁵⁶

V. UNCERTAINTY FOR UTILITIES

While energy utility companies rarely receive much sympathy from the public, regulatory uncertainty is harmful to the industry and their stakeholders.¹⁵⁷ This is an already uncertain time for utilities and some are advocating for regulatory changes.¹⁵⁸ Government programs that offer incentives for certain technologies, potential new technologies, and the falling costs of natural gas combine to create uncertainty for energy utilities.¹⁵⁹ However, one of the main sources of concern for utilities is the increasing use and falling costs of distributed energy resources ("DER").¹⁶⁰ DERs are defined as small scale power sources that can

¹⁵² *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Boyd & Carlson, *supra* note 122, at 861.

¹⁵⁶ *See Hughes*, 136 S. Ct. at 1299.

¹⁵⁷ *See generally* Peter Kind, *Disruptive Challenges: Financial Implications and Strategic Responses to a Changing Retail Electric Business*, OUR ENERGY POLICY 1 (Jan. 2013), <http://www.ourenergypolicy.org/wp-content/uploads/2013/09/disruptivechallenges-1.pdf> [<https://perma.cc/55ZG-32XA>].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

supplement or replace traditional power production to meet demand.¹⁶¹ These small-scale operations are taking an increasing market share from the large utilities.¹⁶²

Peter Kind for the Energy Infrastructure Advocates highlighted this uncertainty and proposed responses to what he calls “disruptive challenges.”¹⁶³ As DERs become more common, states and FERC will be forced to consider additional regulation.¹⁶⁴ Kind has offered several suggestions in both the short and long term.¹⁶⁵ For example, revising the tariff structures so that subsidizing one group of customers at the expense of another, or cross subsidizing, no longer occurs.¹⁶⁶ Specifically, regulators could develop a tariff that reflects the increased service to the customers that benefit from DERs.¹⁶⁷

How regulators decide to address DER is beyond the scope of this Note, however it offers an example of an area of uncertainty that is then compounded by regulatory uncertainty. Applying a charge to customers at a retail level is certainly within the state purview but establishing more DERs and applying tariffs to access the grid will fall within the wholesale of energy. As more utilities seek to acquire DER production, cost recovery methods will need to be established. Kind’s article demonstrates the apprehensions investors have about the energy market, and a failure to establish a cost recovery system will make investors and utilities hesitant to expand and adapt to the changing energy landscape.¹⁶⁸

VI. SOLUTIONS AND NEXT STEPS FOR THE COURT

A. *Applying Concurrent Jurisdiction to Establish Federally Mandated Minimums*

Concurrent jurisdiction presents an opportunity for FERC and the courts to establish a minimum for standards and regulations and allow the states to enact additional regulation. The Supreme Court has declined

¹⁶¹ Barney L. Capehart, *Distributed Energy Resources (DER)*, WHOLE BUILDING DESIGN GUIDE (Oct. 10, 2016), <https://www.wbdg.org/resources/distributed-energy-resources-der> [<https://perma.cc/8W7G-MRBU>].

¹⁶² Kind, *supra* note 157, at 5.

¹⁶³ *Id.* at 1.

¹⁶⁴ *Id.* at 4.

¹⁶⁵ *Id.* at 17–18.

¹⁶⁶ *Id.* at 18.

¹⁶⁷ Kind, *supra* note 157.

¹⁶⁸ *See generally id.*

to establish “floor preemption” as they have for environmental law in the past, but with concurrent jurisdiction,¹⁶⁹ there may be more leeway for FERC and the states to adopt more ambitious energy policies.

Concurrent jurisdiction and a congressionally enacted minimum are consistent with other acts of Congress.¹⁷⁰ An example of a congressionally created floor for states to expound upon is the Clean Water Act.¹⁷¹ Congress mandated that state standards lower than the federal levels would be superseded.¹⁷² States are free to adopt more stringent water quality standards while the EPA enforces a consistent minimum.¹⁷³

A potential area for collaboration can be seen in the case that created concurrent jurisdiction, *FERC v. EPSA*. FERC’s “demand response” efforts to reduce energy use by providing incentives to customers to purchase less was upheld by the Supreme Court.¹⁷⁴ The Court allowed a foray into what was previously state jurisdiction.¹⁷⁵ There is no reason to believe that states cannot adopt demand response measures on the retail end of the market.

Demand response is vital to certain regions and if it is eliminated, energy consumers would see large increases in rates.¹⁷⁶ Business models have been designed around demand response and in 2013, demand response saved PJM \$11 billion.¹⁷⁷ However, it would be more stable if FERC could enact a minimum floor level of regulation that states are free to supplement. States could offer additional subsidies or incentives to consumers that are able to curtail their energy use.

It remains to be seen if the courts will apply a floor in the inverse situation. In *Hughes*, the Supreme Court invalidated a Maryland program that established twenty-year contracts with a wholesale rate not set by FERC.¹⁷⁸ The Maryland program cannot be viewed as adding to what FERC had established as it is counter to FERC action.¹⁷⁹ If Maryland

¹⁶⁹ See generally Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors*, 91 N.C. L. REV. 1283 (2013) (advocating for energy preemption “floors”).

¹⁷⁰ See 33 U.S.C. § 1370 (2006).

¹⁷¹ *Id.*; see also Rossi & Hutton, *supra* note 169, at 1294.

¹⁷² Rossi & Hutton, *supra* note 169, at 1294.

¹⁷³ *Id.*

¹⁷⁴ See *FERC v. EPSA*, 136 S. Ct. at 766.

¹⁷⁵ See generally *FERC v. EPSA*, 136 S. Ct. 760.

¹⁷⁶ Robert Walton, *Demand Response in PJM Markets: “A World of Great Uncertainty”*, UTILITY DIVE (Oct. 29, 2014), <http://www.utilitydive.com/news/demand-response-in-pjm-markets-a-world-of-great-uncertainty/326803/> [<https://perma.cc/4M8D-AF6N>].

¹⁷⁷ *Id.*

¹⁷⁸ *Hughes*, 136 S. Ct. at 1299.

¹⁷⁹ *Id.*

offered additional incentives, in concert with the rates and contracts established by FERC, there may have been a different result. Ginsburg, for the majority, offered a narrow holding: "We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC."¹⁸⁰ Perhaps by collaborating instead of usurping, the program could have survived.

The issue will be where states do not want to collaborate with FERC in decreasing demand. States like South Carolina and Georgia have taken steps to increase generation rather than to decrease use.¹⁸¹ States taking different approaches is beneficial to the laboratory of democracy but there could be environmental harm in the meantime.

The Supreme Court recognizes that wholesale and retail rates are intertwined.¹⁸² Allowing FERC to establish minimums that the states can expound upon is in the best interest of consistency as well as promoting greener energy use. Limiting what a state is permitted to enact in an effort to reduce energy consumption and establish clean sources of energy is counterproductive and would lead to the continued degradation of the environment.

B. Continuing to Make Narrow Holdings

Ginsburg's approach in *Hughes* of making a narrow holding is the appropriate method at this time. While utilities and other interested parties would prefer a clear line as quickly as possible, that is not pragmatic. As mentioned above, there is uncertainty in the energy market.¹⁸³ Resolving this uncertainty would alleviate some of the concern, but at the expense of losing flexibility in a dynamic period in the energy market. The Court cannot lose the ability to respond to the changes in the energy marketplace.

Acting conservatively and making narrow holdings will allow FERC and state legislators to respond to changes in the marketplace. An overbroad ruling could handicap either the states or FERC in promoting clean and affordable energy. A broad ruling that limits state power would stifle innovation at the state level while granting the states too much authority could create environmental concerns.

¹⁸⁰ *Id.*

¹⁸¹ *See infra* Part II.

¹⁸² *FERC v. EPSA*, 136 S. Ct. at 784.

¹⁸³ *See generally* Walton, *supra* note 176.

CONCLUSION

How the Supreme Court proceeds to define concurrent jurisdiction is important; however, by continuing to make pragmatic, narrow holdings this new federalism doctrine will be beneficial to the energy market. Carefully carving out a role for the states to experiment with innovative regulation while allowing FERC to establish a baseline will continue the country's progress to clean affordable energy. Unfortunately, while the Court establishes roles for FERC and the states, some confusion, or jurisdictional "snarl," will exist. This confusion will subside and the Supreme Court should resist efforts to make a sweeping or overbroad decision on jurisdictional roles.

