Getting the Camel Out of the Tent: Behind the Federal Energy Regulatory Commission's Rise to Power and the Importance of States' Continued Regulatory Oversight

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GETTING THE CAMEL OUT OF THE TENT: BEHIND THE FEDERAL ENERGY REGULATORY COMMISSION’S RISE TO POWER AND THE IMPORTANCE OF STATES’ CONTINUED REGULATORY OVERSIGHT

SAMUEL R. BRUMBERG*

The federal camel has a tendency to occupy permanently any state tent. That may be a wise course; but if so, Congress should make the decision.1

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1 Fed. Power Comm’n v. Fla. Power & Light Co., 404 U.S. 453, 476 (1972) (Douglas, J., dissenting). This quote begins Cassandra Burke Robertson’s 2001 Article on state and federal power over electricity transmission. The quote also begins this Note, for the issues that Ms. Robertson raised in 2001 have not yet been resolved and have grown ever more cloudy and troublesome in the past four years. The federal camel has now fully invaded the state tent, and does not seem content to leave anytime soon. See generally Cassandra Burke Robertson, Note, Bringing the Camel Into the Tent: State and Federal Power Over Electricity Transmission, 49 CLEV. ST. L. REV. 71 (2001) (covering in detail the jurisdictional problems facing FERC and the states).
INTRODUCTION

State public utility commissions should control electric transmission regulation. In recent years, states have embraced a precarious federalization: new policy involving Independent System Operators and Regional Transmission Organizations ("RTOs"). The Energy Policy Act of 1992 and Federal Energy Regulation Commission ("FERC") orders implementing that Act have left states with jurisdictional quandaries. For the moment, FERC is filling in the holes, and the states are left with fundamental problems such as whether to try to remain active in light of a

2 Independent System Operators, or ISOs, are the "referees" of electricity transmission. One definition states, "the ISO is the FERC regulated control area operator of the ISO transmission grid. Its responsibilities include providing non-discriminatory access to the grid, managing congestion, maintaining the reliability and security of the grid, and providing billing and trading settlement services. The ISO has no affiliation with any market participant." CalISO, Glossary of Terms—The California ISO, http://www.caiso.com/aboutus/glossary (last visited Apr. 14, 2006) [hereinafter "CalISO Glossary of Terms"]. The ISOs are not to be confused with, but often operate hand-in-hand with, the RTOs (also known as "RTGs"). The RTOs, as opposed to being independent "referees" or "bus drivers" of sorts, operate as consortia or "teams" of utilities that pool their resources and operational control of their transmission networks. Id. They are "voluntary organization[s] of transmission owners and users who act as a forum to report to the FERC on the implementation of open access to transmission systems." Id. ISOs may come together to form RTOs, which are generally thought of as larger, regional groups. See FERC, Regional Transmission Organization Region Map, http://www.ferc.gov/industries/electric/indus-act/rto/rto-map.asp (last visited Apr. 13, 2006). However, many areas have only ISOs covering a state or a portion of a state, as opposed to RTOs covering multi-state regions. Id. Some RTOs and ISOs also form even larger organizations to integrate and coordinate policies across an entire interconnection, such as SSG-WI, a "discussion forum for facilitating the creation of a Seamless Western Market and for proposing resolutions for issues associated with differences in RTO practices and procedures." Seams Steering Group—Western Interconnection, Home Page, http://www.ssg-wi.com (last visited Apr. 13, 2006). The SSI-WI group is made up of the California ISO, the West Connect RTO, covering Arizona, New Mexico, and other states, and the GridWest RTO, covering Washington, Oregon, and up into Canada. See id.

3 See infra Parts I.G., II, & III.
federal regulatory behemoth or to watch their power and influence over transmission policy diminish. Some argue that a regime of almost total federal regulation would end the problems associated with limitations on transmission access. In large part, the federal government has already taken major steps to federalize the nation's transmission policy through the use of RTOs. However, the nation deserves a chance to determine whether the states can handle electric transmission policymaking and regulation, as Congress originally intended when it first proposed federal control over the electricity industry. Recently, constitutional concerns have arisen after state governments gave permission to incumbent franchised utilities to turn over operational control of the transmission systems to RTOs, while at the same time trying to protect retail in-state buyers of electricity.

This Note will argue that, whatever the condition of transmission policy at the regional or national level, the state governments and specifically the state public utilities commissions are the most qualified bodies to decide transmission policy such as siting and access issues. These bodies are best equipped to maintain equity in the face of concerns over "native load" protection. This proposal is especially true given the increasing push to

4 See id.
5 See infra Part III.
7 In the Act creating the FERC, the Federal Power Act of 1935, Congress anticipated that the FERC's power (the predecessor to FERC was the FPC, the Federal Power Commission) would be small and used to fill gaps in regulation that extended beyond state lines. Federal jurisdiction was to extend "only to those matters which are not subject to regulation by the States." 16 U.S.C. 824(a) (2001); see also Robertson, supra note 1 at 73. A discussion of Congress's intent appears infra Part II.B.
9 Transmission line "siting" refers to the land use procedure of deciding where electric transmission lines should be located and how and under what circumstances they should be placed. It may involve the use of eminent domain powers. See infra note 177 and accompanying text.
10 "Native load" refers to an end-user customer or device using electricity.
move the nation’s power grid to a regionally-based system of RTOs. In her article, *New Power, Few New Lines: A Need for a Federal Solution*, Hoang Dang argues that a federal solution is needed because “FERC believes that transmission congestion is largely due to persistent discrimination by public utility monopolies reluctant to share their transmission lines with wholesale competitors.” FERC, however, exaggerates the role of discrimination; the process of discrimination itself may even be fair. This Note concludes that the States, rather than FERC, should solve the current problems involving electric transmission.

CalISO Glossary of Terms, *supra* note 2. These are often retail use customers—residents and businesses. *Id.* “Native load” is “load” that is using electricity that is “native” or geographically close to the generating plant. CalISO defines load as “an end-use device or an end-use customer that receives power from the electric system. Load should not be confused with [d]emand, which is the measure of power that a load receives or requires.” *Id.* A load, then, is an individual consumer, while demand is the amount of electricity required by that consumer. Native load refers to that group of consumers or end-users close in proximity (usually in the same state) to the generating plant. One of the many concerns of state governments is native load protection, that is, a priority of service given to customers within that state (the “natives”), ostensibly the very customers for which the generation capacity (i.e., power plants) in that state was intended. Native load protection has been one of the key issues in regards to the constitutionality of state statutes and regulations governing that topic. A discussion of native load appears in Part II. *See also* note 195 and accompanying text.


13 Dang, *supra* note 12, at 328 (discussing FERC’s encouraging RTO development as a solution to this problem in its Order 2000). The fear of discrimination against non-incumbent transmission line owners is the driver behind much of FERC’s regulatory expansion over the years. Beginning with the Energy Policy Act of 1992, FERC’s jurisdiction has gradually expanded through various court opinions and now stands near its apogee, and, should the outcome of constitutional and preemption challenges to state native load protection measures come to fruition, FERC’s power over transmission will be almost total.

14 *See infra* Part V.B.
I. BACKGROUND ON ELECTRIC TRANSMISSION

A. The Basics

The U.S. electrical system can be divided into three parts: generation, transmission, and distribution. Generation is the production of power at a power plant, and is beyond the scope of this Note. Transmission, the next step, will be the focus of this Note. "Transmission refers to the movement of large currents over grid systems that can span continents. From the generator, electrons travel a short distance to a nearby transmission station where voltage is increased to high levels... The power is then sent... [onto] thick cables supported by high towers." These "interstates for electrons" range from 115kv to 765kv. The final step, distribution, is when electricity moves from substations, which receive power from the transmission lines, over distribution lines and into the homes and businesses which need the electricity.

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16 For more information regarding electric generation, the types of generating plants, different fuels that can be used in the process, and other elements of generation, see Smithsonian Inst., Throw The Switch, The Technology of Electric Power http://americanhistory.si.edu/powering (last visited Apr. 13, 2006).


18 Id. See generally Smithsonian Inst., What Are Volts?, available at http://americanhistory.si.edu/powering/basics/volt.htm (last visited Apr. 13, 2006). "Kv" is an abbreviation for "kilovolt(s)," or a measure of power equal to 1,000 volts. A volt is "a measure of the pressure forcing the current to flow." The larger the volt measure, the more pressure available to move electric particles. Id.

19 Moving & Using Electrons, supra note 15; see also Smithsonian Inst., What Happens After Electricity is Made?, http://americanhistory.si.edu/powering/basics/system.htm (last visited Apr. 13, 2006).
B. Interconnection

Another important element of the nation's transmission system is known as the interconnection. The interconnection "permit[s] a utility to spread its generating plants over a wide area, and provide regional backup in case of problems at a given plant."\(^{20}\) Today, virtually all utilities "are tied into an interconnection, allowing each to rely on the others."\(^{21}\) This interconnection is both practical and economical. "Instead of individual utilities having to build extra generators to cover routine or emergency shut-downs, they can readily buy power from each other as needed via the interconnection."\(^{22}\) This process of buying and selling of power has been a great impetus for the RTO,\(^{23}\) while a decline in regulatory oversight by the States has hindered the development of RTOs.\(^{24}\)

There are also several practical implications of the RTO and the making of interconnections. The nation's transmission system is surprisingly fragile.\(^{25}\) Falling victim to sagging,\(^{26}\) wind and weather,\(^{27}\) a low tolerance for instability,\(^{28}\) and the wear of time,\(^{29}\) transmission systems must be rigorously maintained, and the consequences of the RTO system include the possibility that the

\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) Id.

\(^{23}\) See Dang, supra note 12, at 338-39.

\(^{24}\) Id.

\(^{25}\) See Moving & Using Electrons, supra note 15.

\(^{26}\) Sagging occurs when more power is forced through a line and its temperature rises. As the temperature rises, the line expands, and "sags" between the towers. Id.

\(^{27}\) Wind and weather take their toll on the transmission lines. "Even the sun can play havoc with transmission systems, as solar flares induce large currents in grids." Id.

\(^{28}\) "Generators connected to a common grid must be kept in synchronous operation to maintain the 60hz frequency." Id. "[G]rid[s] must remain constantly energized to meet consumer demand." Id. "Instabilities in the system, if not corrected, can cause it to collapse and result in a blackout." Id.

\(^{29}\) "Over time, expansion and contraction can cause lines to wear out." Moving & Using Electrons, supra note 15.
weakness of one system could potentially threaten transmission grids well beyond its immediate geographic area. Proper safeguards must be put in place to keep the weaknesses in one company’s transmission system from flooding over into others. This is where state governments might have a competitive regulatory edge. Professor Koch describes transmission as follows:

> [E]nvision a person in Spain buying a cup of water from someone in the United States. The seller in the United States must deliver the water by dropping it in the Atlantic Ocean. To receive the delivery, the purchaser in Spain then dips into the Atlantic Ocean to withdraw the cup of water. The seller delivered a cup of water into the system and the purchaser withdrew a cup of water, but in no sense can either party identify the particular molecules of water that were the subject of their market transaction. The transportation of the seller’s cup never literally occurs, and the cup withdrawn actually comes from an unidentifiable source, which in all probability is not the seller.

Similarly, a generator plant adds unidentifiable units of electricity to the flow from which a consumer extracts electricity for personal use. The generator plant’s agreement to supply the consumer with electricity can be honored only in the most artificial sense. Adding to this artificiality is the fiction that a particular unit of electricity is transported and

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30 Id.

31 The northeast blackout of August 2003 is a good example of how the interconnection can be detrimental. Individual companies were not able to isolate themselves from the effects of FirstEnergy’s problems, and thus, many states were affected by a problem with a single company’s transmission system. See, e.g., Wis. Power Systems Eng. Research Ctr., Excerpts from “A Timeline of the 2003 Blackout,” available at http://www.pserc.wisc.edu/Timeline.pdf (case sensitive) (last visited Apr. 13, 2006).
transmitted directly to the user. In actuality, the consumed unit may have traveled any number of routes from any number of sources to the consumer.\(^\text{32}\)

C. Understanding Deregulation & PURPA

To understand the federal-state dynamic of the current transmission regime, one must have a rudimentary understanding of electric deregulation in the United States. Federal regulation of energy had always been around to some degree, but the Public Utility Regulatory Policies Act ("PURPA") of 1978\(^\text{33}\) was the first comprehensive federal regime governing the way that the nation produced and used electricity.\(^\text{34}\)

PURPA had four main components with several major consequences. First, promotional rate structures, which encouraged higher levels of consumer consumption,\(^\text{35}\) were eliminated except when they could be financially justified by electric utilities.\(^\text{36}\) Second, PURPA put in place incentives for companies to "co-generate."\(^\text{37}\) Co-generation "required utility companies to purchase power from industrial companies that produced electricity as a by-product of other activities. In other words, a paper company that needed steam would ... produce some electricity for use in the factory."\(^\text{38}\) PURPA required excess electricity, above what the paper company could use for its internal process, to be


\(^{35}\) For example, promotional rate structures would charge a high initial fee for, hypothetically, the first 50kWh of electricity used, but a lower fee for subsequent usage, thereby encouraging high use by consumers. *Id.*

\(^{36}\) *Id.*

\(^{37}\) *Id.*

\(^{38}\) *Id.*
purchased by utilities and used instead of wasted. The third major component of PURPA was the encouragement of the development of gas turbine technology. Natural gas, cleaner to burn than coal, also provided a greater thermal efficiency. Natural gas produced power directly from a gas turbine, likened to an aircraft engine that produces electricity, and also by using excess heat from the process burning to heat steam to generate electricity on a traditional steam turbine. "By the early 1990s, gas turbine cogeneration units could be installed quickly and obtain thermal efficiencies in the 50% range—well above that achieved by central station utility plants." Finally, PURPA put in place great incentives for the use of alternative energy. Alternative energy, such as energy from wind, hydroelectric, and solar power, and from other non-fossil-fuel resources, was developed as a result of the PURPA legislation. Prices fell and efficiencies rose. As a result of PURPA, California "had become the home of 85% of the world’s capacity of electricity powered by the wind and 95% of the world’s solar-powered electricity."

"Overall, PURPA provided a tremendous and unanticipated spur to technological innovation for numerous non-traditional technologies for producing electricity." Important consequences of PURPA laid the groundwork for the deregulated environment that we see in the electric utility industry today. Utilities that were already fairly monopolistic became entrenched as natural monopolies and became vertically integrated.

"Even before utility companies won designation as natural monopolies, they had established themselves as vertically integrated firms. [T]hey undertook all the functions of generating, transmitting, and distributing electricity to the ultimate cus-

39 Id.
40 See PURPA, supra note 34.
41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 See PURPA, supra note 34.
47 Id.
As utility regulation took hold, the monopolies of utility companies reflected a fixed entrenchment. The alternative, under PURPA, was that non-utility companies, so-called Non-Utility Generators ("NUGs"), were able to compete in the generation market with traditional utility companies. This was one of the first footholds of modern deregulation.

After PURPA's consequences were fully known, many in the energy community began to question the traditional natural monopoly structure in which most utilities operated.

Congressmen and members of the Federal Energy Regulatory Commission, the body that has authority over interstate transactions of electricity, believed that electric generation was no longer a natural monopoly. In short, the existence and success of PURPA [including the proliferation of NUGs] appeared to destroy one important justification for regulation of utilities.

D. Modern Economics and Deregulation

The push to deregulate traditional utility monopolies began in the 1980s with the deregulation of the banking, trucking, natural gas, and telecommunications industries. PURPA laid the groundwork for deregulation, and amendments in the 1980s completed the process in earnest.

In classical economic theory, competition among many participants yielded lower prices to customers.

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48 Id.
49 Id.
50 Id.
51 PURPA, supra note 34.
52 Id.
54 Id.
and a flurry of innovation among sellers to provide new services and goods. Overall, society benefited from a free competitive market as resources were used and allocated efficiently. In the energy realm, advocates of the free market expected economic efficiency to yield energy efficiency as well.55

"Wheeling," or the opening of an incumbent utility's transmission lines to competitors,56 allowed NUGs and smaller utilities to sell power across the country.57 This, in many ways, indicated a need for further federal regulation. "Under the new approach, independents could contract to sell power to distant purchasers and use the transmission lines of several utilities (for a reasonable fee) to get the power to them."58

E. The Energy Policy Act of 199259

The original purpose of the Energy Policy Act of 1992 was to introduce wholesale competition into the electric industry.60 This

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55 Id.
56 This could be equated to "unbundling" in the telecommunications industry, wherein an incumbent carrier is forced by operation of law to lease to its competitor at wholesale rates that portion of the line needed for the competitive carrier's network. See Robert W. Crandall, Symposium: Antitrust: The Remedy for the "Bottleneck Monopoly" in Telecom: Isolate It, Share It, or Ignore It, 72 U. CHI. L. REV. 3, 17, nn.37-38 (2005).
57 See Market Economics, supra note 53.
58 Id. See infra note 62 and accompanying text for discussion of this reasonable fee.
59 Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992) [hereinafter EPAct]. The Energy Policy Act of 1992 was a massive piece of legislation, addressing energy efficiency (everything from utility energy generation to energy efficient lighting and buildings, appliances, and equipment), federal agency energy management, alternative fuels, electric motor vehicles, wholesale generation, and amendments to the Federal Power Act. Those amendments are chiefly at issue here, as they were an attempt to introduce wholesale competition into the electric utility industry. See Robertson, supra note 1 at 75.
60 Robertson, supra note 1 at 75. The EPAct also addressed radioactive waste, uranium enrichment and associated environmental, health and safety issues, renewable energy, clean coal technology, the strategic petroleum reserve, octane
was done through the wheeling process,\textsuperscript{61} for which the issue of non-discrimination was pivotal. The legislation called for FERC to require utilities to ensure open access through "reasonable, nondiscriminatory, cost-based rates."\textsuperscript{62} The open access provisions of the bill were achieved through the use of Open Access Transmission Tariffs, or OATTs, ordered by FERC in Order 888.\textsuperscript{63}

F. Order 888

Order 888 was issued by the FERC on April 24, 1996.\textsuperscript{64} The wheeling provisions of Order 888 allowed NUGs to wheel electricity over incumbent transmission owners' lines at a uniform wholesale rate.\textsuperscript{65} Gone were the discriminatory pricing practices in place before the Order's issuance.\textsuperscript{66} The pricing scheme imagined by FERC was one where transmission lines would be open "to competing electricity generators at the same price as the utility would charge its own affiliate."\textsuperscript{67} This resulted in a "functional display and disclosure (for example, on commercial retail gasoline pumps), oil and gas pipeline policy, hydro-electric power, and nuclear plant licensing. See EPAct, 106 Stat. at 2276-82.\textsuperscript{61} See supra note 56 and accompanying text (discussing wheeling).\textsuperscript{62} Koch, supra note 32, at 577 n.40. The EPAct "required the FERC to force utilities to deliver power from generators to other utilities and electricity wholesalers at reasonable, nondiscriminatory, cost-based rates. This legislative mandate led the FERC to issue its open access rule, Order 888." Id. (citations omitted).\textsuperscript{63} See id.\textsuperscript{64} Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996); F.E.R.C. Statutes & Regulations ¶ 31,036 (1996); see also Order on Reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997); F.E.R.C. Statutes & Regulations ¶¶ 31,048, 31,780-83 (1997).\textsuperscript{65} See id.; see also Robertson, supra note 1, at 75-76.\textsuperscript{66} Id.\textsuperscript{67} Robertson, supra note 1, at 75. This would not eliminate the requirement for a 'reasonable fee,' but rather would make the fee equal to that which an incumbent utility would charge an affiliate or subsidiary company.
unbundling,” of the transmission system from the incumbent utility. Order 888 requires that utilities:

File open-access, nondiscriminatory tariffs that contain minimum terms and conditions of nondiscriminatory services prescribed by FERC through its pro forma tariff; take transmission service for their own, new wholesale sales and purchases of electric energy under the same terms and conditions as they offer that service to others; develop and maintain a same-time information system that will give potential and existing transmission users the same access to transmission information that the utility enjoys . . . ; and State separate rates for wholesale generation, transmission and ancillary services.  

Cassandra Robertson indicates that Order 888 assumes that FERC has jurisdiction over unbundled retail transmission. This assumption has profound effects on the powers that FERC has to reach into the electricity market and affect not only the utility and non-utility generators, but also retail consumers. This jurisdictional territory had previously been untouched by the federal government. FERC’s power as determined by court interpretation reaches far beyond Congress’s original intent.

68 “[F]unctional unbundling” is a term Robertson uses to describe “the separation of a utility’s transmission function from its ‘wholesale electricity merchant function.’” Robertson, supra note 1, at 75-76. Functional unbundling results in separate price quotations for generation service versus transmission service, wholesale transmission service under an open access transmission tariff (or OATT), and a market equalization due to an imposed equality of information, through a same-time information system for transmission data called OASIS, the Open Access Same-Time Information System. See id at 76 n.27.

69 Id. at 76 (citing State Commissions Ask Supreme Court to Review FERC Order 888, UTIL. INDUS. LITIG. REP., Dec. 2000, available at LEXIS News Library, ALLNEWS file).

70 Robertson, supra note 1, at 75-76.

71 Under the Federal Power Act, Congress intended for the States to be the primary regulators of the electricity industry. See supra note 7 and accompanying text.

72 Id.
G. The Regional Transmission Organizations & FERC Order 2000

The wave of the future, along with burgeoning federal control, is the RTO. The RTO not only provides a single source of control over a previously monopolistic electric utility's transmission lines, but also a marketplace for the exchange of energy for sale. The RTO was established as a "voluntary" participatory organization under FERC's Order 2000. The benefits of RTOs were to include a consolidation of control leading to a more ordered transmission system, increased efficiency, management of congested traffic, reduced costs, and benefits accruing to the States and to the environment. "All of these improvements," states FERC, "will help improve power market performance, which will ultimately result in lower prices to the Nation's electricity consumers." 

FERC's system shifts operational control from existing utilities to the RTO. The RTO, now centrally headquartered potentially hundreds of miles from the native generating and transmitting capacity of the state-regulated incumbent utilities, will control the transmission grid which, for many utilities, often spans a large number of states. Order 2000 mandates that "all public utilities . . . that own, operate or control interstate transmission facilities' file with the Commission . . . a proposal for an RTO . . . or, alternatively, a description of efforts to participate in an RTO, any existing obstacles to RTO participation, and any plans to work towards RTO participation." In Order 2000, the FERC orders

74 See Robertson, supra note 1, at 77.
75 Id. (quoting 89 F.E.R.C. ¶ 61,285; 1999 FERC LEXIS 2692, *114 (1999)).
76 See supra note 2.
77 Robertson, supra note 1, at 77 (quoting Order 2000).
78 Order 2000 states that "each public utility that owns, operates, or controls facilities for the transmission of electric energy in interstate commerce is required to form and participate in an RTO." See Regional Transmission
direct participation in RTO planning. FERC effectively was ordering at least some measure of participation but calling this a voluntary process. Contrary to the claims of FERC, this process is not voluntary. Present evidence bears this out. This author is not now aware of any large incumbent utility not actively participating in, or seeking to participate in, an RTO scheme.

The nation now has several RTOs and ISOs designed to serve most of the populated areas of the United States, many of which also interconnect with Canadian electric systems. The push to adopt RTOs permeates almost every state, with many state legislatures now mandating membership for their existing electric utilities.

II. THE CAMEL IS IN THE TENT, AND WE KNEW IT ALL ALONG

A. Introduction


In fact, “[o]n July 12, 2001, [FERC] issued four orders directing three [ISOs] in the Northeast to participate in a mediation proceeding concerning the formation of a single regional transmission organization (citation omitted). The Commission announced in this decision that the Northeast was a single, natural market, with significant and growing interregional trading” (citation omitted). Charles Pratt, Re-Inventing New York’s Power Plant Siting Law, 6 ALB. L. ENVTL. OUTLOOK 1, 3 n.37 (2001); see also Stephen P. Sherwin, Comment, Deregulation of Electricity in New York: A Continuing Odyssey 1996-2001, 12 ALB. L.J. SCI. & TECH. 263, 305-06, nn.295-96 (discussing the New York ISO’s entry into talks to develop a northeastern RTO).


See, e.g., VA. CODE ANN. § 56-577 (2004); see infra note 195.

Interconnection, L.L.C., one RTO covering Kentucky. The most recent problem with states trying to maintain some measure of control over electric transmission regulation is one of constitutionality. However, the ballooning power of FERC dates back to earlier days. As with many issues of governing at the federal level, the problem appears to be the definition of “interstate commerce.”

B. The Birth and Rise of FERC

FERC derives its power from the Federal Power Act, which states in pertinent part that

[it is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation . . . and of 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.]

It would seem, then, that Congress intended FERC’s jurisdiction to begin only where the States’ jurisdiction ends. However, this is not actually the case. Through a broad definition of interstate commerce, FERC’s jurisdiction now extends significantly into the spheres of the States. The Supreme Court’s

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84 Id.
85 See infra Part IV.
86 See infra Part II.B.—C.
87 See infra Part II.B.
89 See infra this section.
jurisprudence on the Commerce Clause\textsuperscript{90} tells practitioners that the federal government may regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and "those activities that substantially affect interstate commerce."\textsuperscript{91} The interconnected electric transmission grid can properly be seen as an instrumentality of interstate commerce, according to most modern commentators\textsuperscript{92} but, often the analysis ends there.\textsuperscript{93}

To date, no party has made a Commerce Clause challenge to FERC’s jurisdiction.\textsuperscript{94} In fact, a Dormant Commerce Clause case has been used to bolster FERC’s jurisdiction.\textsuperscript{95} One commentator goes on to say that despite FERC’s (now) broad powers, “[c]learly Congress intended to permit the states to continue to play a role in transmission regulation.”\textsuperscript{96} In the late 1990s and the early twenty-first century, there has been a fair amount of disagreement about FERC’s role.\textsuperscript{97} “Some utilities take the position that FERC has usurped too much power in its regulation of transmission . . . . Others believe that the FERC has not gone far enough in asserting jurisdiction over bundled transmission. Several lawsuits have attempted to clarify the scope of FERC’s authority.”\textsuperscript{98} The question for today, especially in light of Kentucky Power Co., is whether there will be any state-based regulation of transmission at all. The significant environmental consequences of transmission line siting,

\begin{footnotesize}
\begin{enumerate}
\item U.S. CONST. art. I, § 8, cl. 3.
\item See Robertson, supra note 1, at 78. Robertson discusses the case of Wabash, St. Louis & Pacific Railway Co. v. Illinois as being a good example of a parallel between railroad regulation and electricity regulation. She explains that if states use insular policies to protect proprietary interests in the shipment of goods, as was the case in Wabash, that the same type of behavior vis-à-vis the transmission grid could cause similar damage. See Robertson, supra note 1, at 78 (quoting Wabash, St. Louis & Pacific Ry. Co. v. Ill., 118 U.S. 557 (1886)).
\item Id.
\item See id.
\item See Robertson, supra note 1, at 78-79.
\item Id. at 79.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
access issues, and deregulation policy in general reveal a need for state involvement, as well as a significant state interest in making policies related to transmission access.  

C. How Far Could FERC Go?

Judicial challenges to FERC's authority are few, but remain notable. Jurisprudence on FERC's involvement in transmission began in Federal Power Commission v. Florida Power & Light Co. In that case, the Supreme Court held that the decisions of the FPC were subject to the standard of review accorded to independent administrative agencies—that of substantial deference if not arbitrary and capricious. This seemed reasonable, but the case also began the jurisprudential chain in the interstate commerce line of cases. The question was whether the FPC exceeded its authority when asserting jurisdiction over Florida Power & Light ("FP&L"). The Commission claimed that FP&L was transmitting energy in interstate commerce; however, "[a]ll of FP&L's equipment, including transmission lines, is confined to Florida and none of its lines directly connect with . . . out-of-state companies." One wonders how FP&L might be subject to the FPC's interstate commerce jurisdiction. The Court goes on to say

[FERC] does not have strong eminent domain authority in siting transmission lines. As a result, projects for new transmission can be quite complex, involving a multitude of federal, state, and local agencies, and may take years to construct. Not surprisingly, local communities are often reluctant to agree to interstate construction designed to benefit customers and investors in states other than their own.

Id. (citations omitted); see also id. at 362 nn.188-89.


Id. at 456.
that "FP&L does, however, indirectly connect with out-of-state companies. As a member of the Florida Pool, it is interconnected with the Florida Power Corp., the Tampa Electric Co., the Orlando Utilities Commission, and the City of Jacksonville." The relationships between power companies were the focal point of the case for the majority.

The dissent in the *Florida Power & Light Co.* case represents the reasoning that best conforms to the congressionally-drafted statute. In FP&L’s reasoning, and that of Justice Douglas, the facts did not demonstrate that any of FP&L’s power flowed in interstate commerce, but rather merely affected it. Congress could have, but did not, give the FPC any power over transmission merely affecting or simply touching interstate commerce. Although the majority predicted that, "as interconnections proliferate and energy pools grow larger . . . the greater the need for [federal] regulation [would be]," the dissent rightly notes that this is purely a matter of statutory construction. "While federal regulation was to be pervasive, once fastened onto a company, Congress expressed an unambiguous policy to preserve and to rely upon effective and adequate state regulation." Justice Douglas quoted the committee report from the drafting of the applicable federal legislation:

> [t]he revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission’s jurisdiction in this regard

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104 *Id.* (citations omitted).
105 *Id.*
106 *Id.* at 462.
107 *Id.* at 462. Note that Justice Douglas did not use the term “substantially affected” interstate commerce.
108 *Id.*; see also *id.* at n.12 (noting Congress’s “discriminating use of language” in passing the Federal Power Act).
110 *Id.*
111 *Id.* at 474.
has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters.\textsuperscript{112}

In modern times, the line of cases holding that FERC could extend its jurisdiction to those cases whose facts touched interstate commerce only peripherally or tangentially has developed from \textit{Florida Power \& Light Co.} and bloomed into an almost totally federal regulatory regime.\textsuperscript{113}

\textbf{D. Native Load Protection \& Curtailment}

In the case of \textit{Northern States Power Co. v. FERC}, 176 F.3d 1090 (8th Cir 1999), the court held that FERC could not regulate native load curtailment\textsuperscript{114} because FERC "ha[d] transgressed its Congressional authority which limits its authority to interstate transactions... [I]ts attempt to regulate the curtailment of electrical transmission on native/retail consumers is unlawful..."\textsuperscript{115} Robertson then observed that "the case raised questions about the scope of FERC's authority: to what extent can FERC actions over \textit{wholesale} transmission affect \textit{retail} sales of electricity?"\textsuperscript{116} The effects to which Robertson refers are those that FERC is having today—those that indirectly affect retail service, but which are just related enough to interstate commerce as to come within FERC jurisdiction.\textsuperscript{117} Some commentators believe that the Eighth Circuit incorrectly decided \textit{Northern States Power}, and that the Court should have ruled in favor

\textsuperscript{112} \textit{Id.} (quoting S. REp. No. 621, 74th Cong., 1st Sess., at 18) (emphasis in original quotation omitted; quotation marks omitted).

\textsuperscript{113} \textit{See generally infra} Part III.

\textsuperscript{114} Native load curtailment refers to the lowering or cutting off of power to the native load of that geographic area. \textit{See supra} note 10.


\textsuperscript{116} Robertson, \textit{supra} note 1, at 79 (emphasis added).

\textsuperscript{117} \textit{See id.} \& Part II.B.–C.
of FERC and held that the indirect effect on native load would have been proper.\footnote{See, e.g., Robertson, supra note 1, at 80.}

A string of cases affirming FERC's ability to regulate the nation's transmission grid came closer in time to the \textit{Kentucky Power Co.} case. The courts have held that everything on the grid is in interstate commerce. First came \textit{Transmission Access Policy Study Group v. FERC}.\footnote{225 F.3d 667 (D.C. Cir. 2000).} In this case, the D.C. Circuit Court of Appeals held that because commingling of electricity from various states could be considered a transaction in interstate commerce, FERC had authority to regulate it.\footnote{Id. at 694 (citing Fla. Power & Light Co.).} This decision applied regardless of whether the transactions were at retail or at wholesale.\footnote{Id.}

More important than the \textit{Transmission Access Policy Study Group} case is its appeal, \textit{New York v. FERC},\footnote{535 U.S. 1 (2002).} where the Supreme Court finally gave stakeholders a handhold, however loose, on the definition of interstate transmission.\footnote{See Robertson, supra note 1, at 81.} In \textit{New York v. FERC}, the State of New York argued that FERC "has no power to regulate unbundled retail sales because they are intrastate transmission and therefore outside of FERC's realm. FERC argues that these transactions are part of interstate—not intrastate—transmission, which it has the power to regulate."\footnote{Id.} As Robertson states, "[t]he main question, then, is whether such transmission is better characterized as intrastate or interstate."\footnote{Id. (quotations omitted).}

The Supreme Court affirmed the D.C. Circuit in \textit{Transmission Access Policy Study Group}, and allowed FERC's Order 888 to stand.\footnote{See New York v. FERC, 535 U.S. 1, 2 (2002).}

\footnotesize

\begin{thebibliography}{99}
\bibitem{118} See, e.g., Robertson, supra note 1, at 80.
\bibitem{119} 225 F.3d 667 (D.C. Cir. 2000).
\bibitem{120} Id. at 694 (citing Fla. Power & Light Co.).
\bibitem{121} Id.
\bibitem{122} 535 U.S. 1 (2002).
\bibitem{123} See Robertson, supra note 1, at 81.
\bibitem{124} Id.
\bibitem{125} Id. (quotations omitted).
\bibitem{126} See New York v. FERC, 535 U.S. 1, 2 (2002).
\end{thebibliography}
guidelines. The petitioners, including New York and an electric utility, brought an action challenging FERC's Order 888, which ended discriminatory treatment of non-incumbent affiliated utilities. The Supreme Court affirmed the opinion of the Court of Appeals for the District of Columbia Circuit, which explained that the plain language of the FPA readily supported FERC's jurisdiction. Further, "the landscape of the electric industry has changed since the enactment of the FPA, when the electricity universe was 'neatly divided into spheres of retail versus wholesale sales.'" The Supreme Court continued, explaining that "Section 201(b) of the FPA states that FERC's jurisdiction includes 'the transmission of electric energy in interstate commerce' and 'the sale of electric energy at wholesale in interstate commerce.'" From this follows an odd twist of logic: "[t]he unbundled retail transmission targeted by FERC are indeed transmissions of 'electric energy in interstate commerce' because of the nature of the national grid." Practitioners had heard this before, and the Court makes a brief comparison of the electric transmission jurisdiction of the FERC with its natural gas jurisdiction. The Court continues with the chief rationale for its holding: "There is no language in the statute limiting FERC's transmission jurisdiction to the wholesale market, although the statute does limit FERC's sale jurisdiction to that at wholesale." The Supreme Court had extended FERC's power to new depths. Now, not only does FERC have judicially-mandated power over transmission policymaking, but the effect of its rulemaking can extend into the retail market as well.

127 See Robertson, supra note 1, at 84-85.
129 See Robertson, supra note 1, at 84.
130 New York v. FERC, 535 U.S. at 16 (citations omitted). This author returns to his previous point made in the introduction—should not Congress make these sorts of policy pronouncements? See supra text accompanying note 1, regarding Fla. Power & Light Co.
131 Robertson, supra note 1, at 16-17 (citing 16 U.S.C. § 824(b) (2000)) (citations omitted).
132 Id. at 17 (citing 16 U.S.C. § 824(b) (2000)) (citations omitted).
133 Id. at 17.
134 Id. (citations omitted).
The Court also discusses issues regarding preemption, taking time to point out that in a situation where states have traditionally regulated, there is a presumption against federal preemption, and noting that “[i]n such a situation, the Court starts with the assumption that the historic police powers of the States were not to be superceded . . . unless that was the clear and manifest purpose of Congress.” After paying mere lip service to Congress's intent, the Supreme Court refers to its previous statutory analysis as “straightforward.” The Court’s discussion of the presumption ultimately carried no weight.

E. Does the Decision in New York v. FERC Render Northern States Power Co. Bad Law?

These recent developments call into question whether the decision in New York v. FERC now makes the Eighth Circuit’s decision in Northern States Power bad law. The stated goal of FERC in Order 888 was “to bring more efficient, lower cost power to the Nation’s electricity consumers.” Northern States Power, in its written submissions to the court, asserted that “the direct effect of FERC's curtailment orders will cause a nonjurisdictional disruption of service affecting [Northern States Power Co.’s] native/retail customers.”

The fundamental issue to be decided on this appeal is whether FERC may, through its tariff orders, require [Northern States Power Co.], a public utility, to curtail electrical transmission to wholesale (point-to-point)
customers on a comparable basis with its native/retail customers when it experiences power constraints. FERC acknowledges that it cannot permissibly affect state regulation of retail rates and practices. FERC argues that it has simply required that, as to transmission curtailment, [Northern States Power Co.] may not discriminate against a third party in favor of its own native/retail customers.\textsuperscript{140}

In \textit{Northern States Power}, then, the effect of FERC's Order 888 was to reach down into Northern States Power Co.'s vertical monopoly and indirectly affect the company's relationship with consumers, who require an uninterrupted power supply at a retail rate.\textsuperscript{141} FERC responded by arguing that it does "not operate in a vacuum"\textsuperscript{142} and that it was "not exercising its regulatory powers directly,"\textsuperscript{143} but rather was enforcing a federal tariff.\textsuperscript{144} The court held that "it is fundamental that this court must first satisfy itself that FERC has Congressional approval to regulate [Northern States Power Co.] . . . Congress has drawn a bright line between state and federal regulation."\textsuperscript{145} Finally, the court "[thought] it obvious that the indirect effect of Order No. 888 . . . is an attempt to regulate curtailment of electric power to [Northern State Power Co.'s] native/retail consumers."\textsuperscript{146} The Eighth Circuit remanded the case back to the Commission "so as to not encroach upon the authority of the regulatory commissions of the states."\textsuperscript{147}

Despite the holding in \textit{Northern States Power}, the Supreme Court effectively invalidated the Eighth Circuit's "reaching down" reasoning that limited FERC in accordance with its congressional

\textsuperscript{140} Id. at 1093.
\textsuperscript{141} See id. at 1094-96.
\textsuperscript{142} Id. at 1095.
\textsuperscript{143} Id.
\textsuperscript{144} Id. The federal tariff which FERC was enforcing was derived directly from and subject to its ability to promulgate and enforce Order 888. See id.
\textsuperscript{145} Id. at 1096.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
mandate. In *New York v. FERC*, the Supreme Court allowed FERC to target retail transmission. Notably, the court relied on *New York v. FERC* in the most recent *Kentucky Power* case, using it as the basis for upholding and applying FERC's Order 888 to the states. The court in *Kentucky Power* indicated that *New York v. FERC* was an unparalleled authority that transmission and curtailment anywhere on the interstate grid constituted an action in interstate commerce that FERC could regulate. In light of these decisions, any regulation of transmission, regardless of whether it significantly and substantially affects native or retail load, now appears subject to regulation by FERC. The reasoning of the Eighth Circuit does not necessarily track with the reasoning of the Supreme Court in each of the cases, that is, *New York v. FERC* did not directly overrule *Northern States Power Co.* whatever modicum of protection previously appeared to be available to states and their public utility commissions under *Northern States Power Co.* and similar lines of reasoning is now unavailable. Any regulation of curtailment that might "encroach upon the authority of the regulatory commissions of the States" now seems to be allowed.

F. Economic Arguments for Federalization

Wresting transmission policy away from the state governments was not just a matter of modern Commerce Clause jurisprudence, such as that from *United States v. Lopez*, superimposed over the Federal Power Act. It was also based upon an economic

148 See infra notes 150-53 and accompanying text.
152 *Northern States Power Co.*, 176 F.3d at 1096.
153 514 U.S. 549 (1995) (the *Lopez* case is generally considered to be the starting point of modern Commerce Clause jurisprudence by the Rehnquist Court).
154 There is a primary issue of statutory interpretation in light of the Commerce
argument that efficiency could be achieved by the pooling of resources and centralization of control. This policy argument began during the deregulation of the airline industry, interstate trucking industry, and telecommunications industry.\textsuperscript{155} The application of efficiency through market forces and competition can not easily be done in the electric industry.\textsuperscript{156}

In addition to taking a closer look at "government regulation and bureaucracy,"\textsuperscript{157} economic theories have "also exposed other warts, such as regulation's tendencies to cross-subsidize high cost consumers by imposing higher rates to low-cost consumers."\textsuperscript{158} These notions are not economic flights of theoretical fancy; there is some truth to arguments that economic theories akin to \textit{laissez-}

Clause. There are also secondary issues. It is a fundamental principle of statutory interpretation that statutes be accorded their plain meaning. "In determining the meaning of a statute, a court generally looks to its words and gives them their usual and ordinary meaning. Or as sometimes stated, in construing a statute, words must be taken in their usual, normal, or customary meaning." 73 AM. JUR. 2d, Statutes, § 124 (2004) (citations omitted). See, e.g., Birbrower, Montalbano, Condon & Frank v. Superior Court, 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998), \textit{as modified} (Feb. 25, 1998) and Yonkings v. Wilkinson, 86 Ohio St. 3d 225, 714 N.E.2d 394 (1999); \textit{see also} Rice v. CertainTeed Corp., 84 Ohio St. 3d 417, 704 N.E.2d 1217 (1999), \textit{cited in} 73 AM. JUR. 2d, Statutes, § 124 n.2 (standing for the principle that in assessing the language employed by the legislature, a court must take words at their usual, normal, or customary meaning). Some have argued that the Supreme Court's broad interpretation of the Federal Power Act has created a federal behemoth at the expense of the States and Congress's intention that the states remain primarily in control of transmission policy. Furthermore, the FERC's assertion of jurisdiction comes from the very interconnection that it seeks to regulate. See 16 U.S.C. § 824(a) and Fed. Power Comm'n v. Fla. Power & Light Co., 404 U.S. 453, 92 S. Ct. 633, 30 L. Ed. 2d 617 (1972); \textit{see also} id. (Douglas, J., dissenting).

\textsuperscript{158} \textit{See supra} Part I, notes 54-55 and accompanying text.

\textsuperscript{156} \textit{See} Koch, \textit{supra} note 32, at 572. "Three discrete bodies of law shape the electric utility industry: physics, economics, and society. The laws of physics that govern electricity are inflexible, leaving economics and society to adapt. Therein lies the complexity of restructuring the electric utility industry." \textit{Id.} (citations omitted).


\textsuperscript{158} \textit{Id.} (footnotes omitted).
faire can be successfully applied to traditionally heavily-regulated industries.\(^\text{159}\) However, the economic theories of regulation that now dominate the thinking of both industry and units of government are directly opposed to a public interest theory of regulation.\(^\text{160}\) The public interest theory of regulation “starts from the uncontroversial normative proposition that regulation should occur when necessary to address ‘market failures’ such as natural monopoly . . . ”\(^\text{161}\)

According to the public interest theory, if a market is a natural monopoly, the public will demand industry regulation because the best solution is not achievable in the absence of regulation. Unfettered competition will result in excessive pricing and/or too many firms producing, thus exceeding a socially optimal level. Net welfare gains result by industry regulation, and this potential for welfare gains generates the public’s demand for regulation.\(^\text{162}\)

It is this potential for “welfare gains” that has girded the idea of public utility regulation for many prior decades.\(^\text{163}\) Since the transmitting and selling of electricity is affected with a public interest,\(^\text{164}\) it seems reasonable that a public interest theory be used to regulate the industry.

III. BUT WHY CAN’T THE STATES DO IT?

Judge Issac Benkin, in his article on the virtues of federal jurisdiction over transmission access, describes the traditional
arguments that states have asserted in support of their efforts to control transmission policy. He also addresses the issue raised by Section 201 of the Federal Power Act:

Some proponents of state regulatory jurisdiction over transmission access have noted that section 201 of the FPA specifically restricts the scope of federal regulation “to extend only to those matters which are not subject to regulation by the States,” and have focussed on the Act’s declaration that “electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof . . .” Based upon this language, they argue that state commissions may regulate “intra-state” transmission which is said to consist of transmission of electricity produced by a generating facility within the state to loads located in the same state. Precedent, as well as physics, demonstrates that this argument is unlikely to be successful.

Benkin goes on to defend the holding in Florida Power & Light that all electricity with even the potential of crossing state lines is in interstate commerce. This now appears to be a foregone conclusion with the decision in New York v. FERC. “It seems to follow,” argues Benkin, “that the FERC has regulatory jurisdiction over transmission service performed by a utility connected to the interstate network. This description fits virtually all utilities . . .” Precedent certainly supports Benkin’s argument. Physics also supports Benkin to the extent that he claims that electricity moving over transmission lines does not do so in a direct path, from point A to B, but rather by means of a pool-like effect

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167 Benkin, supra note 165, at 50; see also id. n.23.
168 Id.
169 Id.
with deposits and withdrawals to and from a general source.\footnote{See Koch, supra note 32, at 572-73.} However, Benkin, a former FERC Administrative Law Judge, speaks from a position of bias in relation to the federal system.\footnote{The FERC has suffered from this sort of bias in the past. See Northern States Power Co., 176 F.3d at 1096.} The FERC’s jurisdiction over the interstate network only exists because the Supreme Court says that it does.\footnote{See New York v. FERC, 535 U.S. 1 (2002).} In the first of the major jurisdictional cases, \textit{Florida Power & Light Co.}, the Federal Power Commission asserted jurisdiction over a utility whose interstate commercial activity was two steps removed from the state line between Florida and Georgia.\footnote{See Fed. Power Comm’n v. Fla. Power & Light Co., 404 U.S. at 456-57 (explaining that as a member of the “Florida Pool,” FP&L connects to Florida Power Corp. (among other utilities) which then interconnected to Georgia Power Co. and “regularly exchanges power with it. Georgia’s lines transmit the power out of or into Florida”).} Benkin asserts that one argument for the States to regulate transmission policy is that “because the FERC lacks jurisdiction to direct utilities to perform transmission service, so the argument runs, there is a regulatory ‘gap’ that the states are free to fill.”\footnote{Benkin, supra note 165, at 51 (citations omitted).} As true as it might be that there remains a gap in the regulation, this argument ultimately misses the point. The FERC is designed to fill in regulation only \textit{after} the States have regulated. The gap-filling argument should work in the opposite direction if we were to look at the original legislation and its intent.\footnote{See 16 U.S.C. § 824(a) (2000); see also Fla. Power & Light Co., 404 U.S. 453 (1972) (Douglas, J., dissenting).}

Additional arguments asserted by proponents of State regulation include: (i) that the state has primary jurisdiction over the planning and operation of the transmission system,\footnote{This argument, among the three mentioned as alternatives to the strict statutory construction issue, supra, is probably the most meritorious of the three. States have, historically, retained primary jurisdiction over transmission line siting issues, and as sovereigns of the land on which the transmission lines sit, have played a vital role in the siting process through their public utility commissions; see also Borders, supra note 99, at 360.} (ii) that...
state action will enhance competition; and (iii) that state action to regulate will carry out the purposes of federal legislation, from a policy standpoint, at least as well as FERC could. These arguments are all meritorious, though Judge Benkin disputes each one with vigor. In the end, Judge Benkin advocates a policy from the federal level because the FERC is better suited to "make the rules" for everyone, even if it did not jump at the chance when deregulation was just beginning. Benkin posits that solutions promulgated by early state entrepreneurs, such as California, in attempts to lead deregulatory efforts were extra-jurisdictional, and that FERC should have stepped into efforts to deregulate the industry much earlier. He agrees with Justice Marshall noting that Marshall's notion that "the regulation of matters vital to the national economy cannot be left to the parochial supervision of the several states," remains valid today.

Benkin's argument concludes: "[t]he FERC is the administrative agency vested with the responsibility for exercising that national perspective. It, not the state commissions, should be the institution making the rules for transmission access. The time has come for FERC to get on with that task." But now that FERC has gotten on with the task in Orders 888 and 2000, to what end? The federal camel now has both of its humps and its posterior in the state tent.

IV. STATE DEFENSES TO THE FEDERAL CAMEL—A KENTUCKY STATUTE LEADS TO CONSTITUTIONAL CONCERNS ABOUT NATIVE LOAD PROTECTION

A new challenge has arisen to states trying to protect their stake in transmission policy—the Dormant Commerce Clause.

177 Benkin, supra note 165, at 52.
178 See Benkin, supra note 165, at 59-60.
179 Id.
180 Id. at 60 (noting this opinion was that of Chief Justice John Marshall when contemplating the federal role in "our great constitutional scheme"). One can only wonder whose side the Great Chief Justice would have taken in Florida Power & Light.
181 Benkin, supra note 165, at 60.
With the rush into RTOs and "deregulation" progressing rapidly at the state and federal levels, Kentucky passed a statute designed to give the state native load protection, which assures priority for its own customers in cases of overloads on the regional system elsewhere.\textsuperscript{182} The Kentucky statute, entitled "Curtailment of service by utility or generation and transmission cooperative," states as follows:

When a utility or generation and transmission cooperative engaged in the transmission of electricity experiences on its transmission facilities an emergency or other event that necessitates a curtailment or interruption of service, the utility or generation and transmission cooperative shall not curtail or interrupt retail electric service within its certified territory, or curtail or interrupt wholesale electric energy furnished to a member distribution cooperative for retail electric service within the cooperative's certified territory, except for customers who have agreed to receive interruptable [sic] service, until after service has been interrupted to all other customers whose interruption may relieve the emergency or other event.\textsuperscript{183}

The states have a right to do this. The constitutional question comes full circle to the issues of interstate commerce: should the door that the Supreme Court opened in \textit{Florida Power & Light Co.} now be the basis for a constitutional challenge to the statutory authority of the States? The court in \textit{Kentucky Power Co.} ruled that it can.\textsuperscript{184}

Based on the Commerce Clause, the district court in \textit{Kentucky Power Co.} held that the Kentucky statute was unconstitutional because it provided a curtailment preference only to

\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{See Ky. Power Co.}, 352 F. Supp. 2d at 784-87 (2005).
Kentucky customers and disadvantaged all similarly situated customers outside of Kentucky.\textsuperscript{185} The statute gave Kentucky residents a preferred right of access to transmission service so that Kentucky service would not be diverted because of problems elsewhere on the regional network.\textsuperscript{186} The foregoing circumstances create a fundamental problem that combines erroneous federal jurisdictional jurisprudence and the market approaches to electric transmission validated in \textit{New York v. FERC}. On one end of the spectrum, there is the line of cases beginning with \textit{Florida Power & Light Co.} and ending in \textit{New York v. FERC} that extend FERC's jurisdiction to the maximum possible extent, and on the other end, there is a deregulatory approach emphasizing market economics that the Supreme Court has validated. These two factors operate to deprive the states of both the statutory jurisdiction envisioned by Congress, and the efforts to create market protection at the retail level.

"The [Dormant Commerce Clause is the principle that state and local laws are unconstitutional if they discriminate against or unduly burden interstate commerce."\textsuperscript{187} The district court had to decide whether the state law affected interstate commerce, and, relying on \textit{New York v. FERC}, the court ruled that it did.\textsuperscript{188} Under the current jurisprudential regime, all activity that touches the “interconnected national grids constitute a transmission in interstate commerce.”\textsuperscript{189} In its Dormant Commerce Clause analysis, the court then went on to ask whether the state law prohibiting curtailment of Kentucky's native load customers, until other non-native customers had suffered curtailment, discriminated against out-of-staters.\textsuperscript{190} The court concluded that it did, noting that “[a] regulation that burdens interstate commerce is presumed to be invalid if it is found to be discriminatory.”\textsuperscript{191} In

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{See id.}

\textsuperscript{187} \textit{Id.} at 785 (citing GMC v. Tracy, 519 U.S. 278 (1997)).

\textsuperscript{188} \textit{Ky. Power Co.}, 352 F. Supp. 2d at 785 (2005).

\textsuperscript{189} \textit{Id.}

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.} (citing Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 344 n.6 (1992)).
concluding its Commerce Clause analysis, the court held that "KRS 278.214 violates the [D]ormant Commerce Clause because it provides curtailment preference only to Kentucky customers and disadvantages all similarly situated customers located outside Kentucky borders."\(^{192}\)

The operative question appears to be whether all state actions that try to protect native load are unconstitutional in light of the current jurisprudential regime of *New York v. FERC* and its predecessors, especially with *Kentucky Power Company* operating as a guide? Though yet unchallenged, settlement agreements through which the RTO voluntarily agrees to native load protection and curtailment preferences may not suffer from this same constitutional ailment. At least *some* state actions attempting to protect native load *may* be unconstitutional.\(^ {193} \)

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\(^{193}\) See the Stipulation Entered Into as Part of the Order Granting Approval for Appalachian Power Company d/b/a American Electric Power to join PJM Interconnection, L.L.C., an RTO. Order Granting Approval in Case No. PUE-2000-00550 (Aug. 30, 2004), available at http://www.scc.virginia.gov/news/2000_550.pdf. Paragraph 6(c) of the Stipulation was ordered to be entered as follows:

> The foregoing curtailment protocols [providing protection to Virginia's native load customers] shall apply except in extraordinary circumstances such as where load shedding [cutting off power or turning it down by reducing demand on the generating facility] would be beneficial to prevent separation from the Eastern Interconnection, prevent voltage collapse or in order to restore frequency following a system collapse.

*Id.* at 4 of Stipulation. It is noteworthy that several participants in the Virginia proceedings for this particular company, Appalachian Power, were worried that even the Stipulation, with at least some provision for native load protection, would not provide enough native load protection. One witness testified that he was concerned that the Stipulation "gives PJM carte blanche authority to cut-off [sic] power to Virginia at any time." *Id.* at 17 of Order Granting Approval. Further, this same witness "believes that there is great risk to the general public, and that Virginia consumers have the best protection, as to adequacy of service and as to rates, with continued maximum regulation by the [Virginia State Corporation] Commission." *Id.* The Commission stated, almost lamentably, that its hands were tied by the nature of the Virginia statute, which mandated RTO membership and did not allow for a public interest inquiry to be made. *Id.* at 19. For further debate and opinion surrounding the case of Virginia, see generally Samuel R. Brumberg,
V. THE FUTURE STATE OF FEDERAL INVOLVEMENT IN TRANSMISSION POLICY

In recent years, federal preemption under newer legislation has elevated the role of FERC beyond simply a wholesale power regulator to that of a key agency with the development of Regional Transmission Organizations ("RTOs"), the super entities that are now responsible for the interoperability of the nation's power grid.\textsuperscript{194} Federal policymakers contend that this move will increase reliability, lower costs, and increase competition in a nationalized power market.\textsuperscript{195}

Those hopeful wishes notwithstanding, many issues remain in converting the natural regulated monopolies of electric utilities to the rigors of a market-based system. While some view the moves to a market-based system with great optimism, some are justifiably skeptical.\textsuperscript{196}

[A]pplying the same market approach to the transmission segment is problematic because electricity is an undifferentiated product that cannot be efficiently stored and cannot be directed from a source of production to any specific end-user. Thus, the overarching task is to structure the transmission segment of the electric utility industry in a way that does not endanger the market solutions at work in the generation and distribution segments.\textsuperscript{197}

The problem with RTOs, and with the New York v. FERC precedent, is that they allow the federal government to impose upon the States a regulatory regime that they, the States, may find

\textsuperscript{194} See supra note 2 and accompanying text.
\textsuperscript{195} See generally Benkin, supra note 165.
\textsuperscript{196} See Koch, supra note 32, at 570.
\textsuperscript{197} Koch, supra note 32, at 570-71.
unsuitable.\textsuperscript{198} Electricity before deregulation was a vertically-integrated industry: one company, a natural monopoly, was responsible for the generation, transmission, and distribution functions.\textsuperscript{199} The vertically-integrated monopoly was predisposed to abuses, so it was heavily regulated.\textsuperscript{200} The modern problem with a deregulated market, full of both utility generators and NUGs, is that the laws of physics do not allow the RTO framework to actually transmit electricity from point A to point B.\textsuperscript{201} We have simply grafted an energy trading market onto the existing pooled system.

A. \textit{Benefits to Regional Coordination}

There are benefits to coordination among various utilities. In emergencies, we want to be able to have utilities contribute electricity to one another to protect consumers from the dangers and inconveniences of power outages. Does such activity, however, have a substantial effect on interstate commerce?\textsuperscript{202} "The dominant

\textsuperscript{198} \textit{See} Order 2000, \textit{supra} note 73. \textit{See supra} note 193, describing how the Virginia State Corporation Commission felt its hands were tied in approving a Stipulation regarding an RTO.

\textsuperscript{199} \textit{See} Koch, \textit{supra} note 32, at 572-73.

\textsuperscript{200} \textit{See} Koch, \textit{supra} note 32, at 573; \textit{see also} Brasfield, \textit{supra} note 164.

\textsuperscript{201} \textit{See supra} Part II; \textit{see also} Koch, \textit{supra} note 32, at 573 nn.13-14.

\textsuperscript{202} The problem may be one of degree.

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

approach to restructuring the transmission segment of the . . . industry” is to “place management, if not ownership and operation, in the hands of an independent entity.” 203

An ISO has two complimentary roles: (1) ‘daily operation’ of a specified transmission grid, the scope of which can be controversial, and (2) implementation of a ‘bidding system that would determine which generators provide power to the grid’ at any given price and ‘point in time’ . . . . [T]he ISO would optimize transmission capacity so that the least costly electricity flows to the consumers who value it the most. 204

The ability of an entire region to coordinate operation of its transmission grid, and possibly provide power to other utilities in cases of dire need or emergency, is a positive element of regional coordination. However, this does not mean that the benefits of regional coordination cannot be regulated by states, via joint or regional boards or perhaps even by interstate compacts.

B. What’s Wrong with a Little Discrimination?

The issue of RTOs goes beyond the Supreme Court’s decisions in Florida Power & Light Co. and New York v. FERC. The overarching policy is one of non-discriminatory transmission access that, in turn, enables the energy market to operate. The idea of non-discriminatory transmission via the federal OATTs as ordered in Order 888, in addition to the system of RTOs envisioned in Order 2000 and currently coming into existence, is alive and

145 (holding that state statutes requiring business operations to be performed in the home state, which could more efficiently be performed elsewhere, are viewed with particular suspicion. This decision also holds that even when a state is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be almost per se illegal).

203 Koch, supra note 32, at 579-80.

204 Id. at 580 (quotations omitted).
GETTING THE CAMEL OUT OF THE TENT

well. Only time will tell whether the policies of FERC, handed down and arguably forced upon the states, will prove to be beneficial to the consumers of electricity who, through the system of regulated natural monopolies, subsidized much of the construction used to serve them. Because electric service is "affected with a public interest," the benefit to the public—that is, to electricity consumers—should be the measure by which success is judged.

Intricately and inextricably connected to the public interest is the idea of native load protection. States are still seeking to find their way and determine their role in light of the current state of the law and the economics affecting the public utility industry. Whether by statute or by contractual agreement, states must find ways to become more than entities to which utilities must submit reports, or from which FERC receives reports, comments, and recommendations, or to which FERC gives notices. The state public utility commissioners are regulators, nothing more and nothing less. Discrimination, while perhaps economically unfashionable, need not be viewed as being unfair. The ratepayers—a particular state's utility consumers—ultimately subsidized the building of the equipment that serves them, and the state governments should tolerate discrimination not only for equitable purposes, but also in the interests of public safety.

CONCLUSION

"In this area, as in so many others, the choice of regulatory forum often seems to determine the outcome of the controversy.

205 It should be noted that the Federal Power Act prohibits only "undue" discrimination, not all discrimination. See 16 U.S.C. §§ 824d(a)-(b) & 824e(a) (2000).
207 See supra note 10 and accompanying text.
208 See supra this section & infra Conclusion.
210 For example, state regulators should be able to exercise an oversight function related to outages, blackouts, and emergencies on the transmission lines covering their states. See also Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) and Brasfield, supra note 164.
That may explain why Americans have traditionally shed so much metaphorical and genuine blood deciding what are essentially jurisdictional disputes between governmental institutions." Judge Benkin expresses, succinctly, that jurisdictional problems are important problems, and his article notes that they must be examined. Both the federal and state governments have "found themselves caught up in changing fashions of economic theory." This problem of law and society, has developed into the current deregulatory regime that we see both in the state legislatures and public utility commissions.

However, doing what is fashionable has also led to problems. The Supreme Court has often fallen prey to this desire. The rules have changed since Judge Benkin penned that

[t]his situation places utilities in a dilemma. They must continue to do business under the regulatory aegis of the state commissions. These agencies have vast discretion over retail rates and utility decisions to construct generation, transmission, and distribution facilities. Faced with the uncertainty of vindicating their possible legal defenses and the certainty of an important and powerful agency hell-bent on implementing a transmission access scheme, utilities may be excused if they decline the honor of inscribing their names in the lawbooks in the titles of test cases. The result is that state regulatory agencies exercise real influence over transmission access matters, an influence that far exceeds the theoretical scope of their limited jurisdictional reach. Utilities rightly believe that it is perilous to ignore the state commis-

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211 Benkin, supra note 165, at 46.
212 Id.
213 Id. See generally Moot, supra note 157 (explaining varying hypotheses regarding the economic theories upon which deregulation is based and positing, interestingly, that deregulation might have as one of its impetuses the withdrawal of support for traditional regulation by power producers).
214 See Koch, supra note 32.
sions' desires with respect to interstate transmission matters.\textsuperscript{215}

The situation has become such that the state commissions are now afterthoughts, rubber stamping policies that have taken root at the whimsy of state legislatures and FERC. A move towards deregulation has come at the expense of placing authority for transmission policy in the hands of state governments, where it belongs. Thanks to the jurisprudence begun in \textit{Florida Power \& Light Co.} and ended in \textit{New York v. FERC}, we have a federal administrative agency acting questionably in the face of its own enabling statute and we are seemingly content to let this happen. Further, states that try to undertake protective measures in the form of a statutory mandate in the public interest find themselves up against a high constitutional burden.\textsuperscript{216}

One now-retired state public utility commissioner characterized the problem facing the states: \textsuperscript{217} "[FERC's vision] must be recognized for what it is: a public policy initiative that fundamentally re-orders and restructures an industry that is the lifeblood of our economy."\textsuperscript{218} Commissioner Moore argues that one basis of "sound public policy is to increase net social welfare," and that because electricity is a necessity for our modern lives, we should aspire to a public service model of regulation.\textsuperscript{219}

Our goal should be an industry that provides reliable service at reasonable rates with the electricity produced and delivered in an environmentally responsible manner. Once the goal is established, the goal becomes the polar star. Each action we take, or

\textsuperscript{215} Benkin, \textit{supra} note 165, at 48-49.
\textsuperscript{218} Id. at 741.
\textsuperscript{219} Id.
fail to take, can, and should, be fairly judged by whether it moves us toward, or away from, that goal. This approach is critical to the current public policy debate in the electric industry. Once the goal is established, our discussion is then about the means to achieve the goal. The means do not become the goal. Thus, competition cannot become the goal, but rather the means to achieve our goal for the electric industry. In like manner, regulation cannot become the goal.\textsuperscript{220}

FERC's current exuberance about a market-driven system has unforeseen costs and risks that have not been fully investigated.\textsuperscript{221} Costs of RTO administration may be "hundreds of millions of dollars."\textsuperscript{222} "As FERC and others have moved forward with competition, they have lost sight of the goal. Instead of reliable service at reasonable rates and environmental responsibility, FERC has made mere competition its goal."\textsuperscript{223}

The federal camel now appears to be permanently inside the state tent. No one seems to know when it will leave. To what end? "[S]laying 'there will be winners and losers' is not enough. You must look out not just for corporate America, not just for the ISOs, RTOs, and utilities, but for the people as well."\textsuperscript{224}

\textsuperscript{220} Id.
\textsuperscript{221} Id. at 741-46.
\textsuperscript{222} Id. at 747.
\textsuperscript{223} Moore, supra note 217, at 749.
\textsuperscript{224} Id. at 751 (quotations omitted).