PENTAGON PREEMPTION: THE 5-SIDED LOSS OF

STATE ENERGY AND POWER

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      plus ~383 footnotes (all complete and in place)

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I. FIVE APPLICATIONS OF POWER PREEMPTION

Orders from the federal courts now are striking state regulation of energy and climate change technologies as constituting a violation of the U.S. Constitution. Courts are declaring state regulation preempted under the Supremacy Clause of the Constitution in five dimensions, constructing a pentagon of preemption blocking some of the most important state regulation in America.

Power is critically important technology. Electricity is the most important “power.” Recently, electricity was identified as the second most important invention in human history, with a delivered value of approximately $375 billion annually in the U.S. This level of commerce exceeds the total amount of corporate income taxes collected in the U.S. Unique among inventions, electricity also is essential to operate seven of the other top 50 inventions of all time: The Internet, computers, air-conditioning, radio, TV, the telephone, and semiconductors. Federal courts recently have held that the states are legally preempted from key efforts to regulate the structure of this most essential aspect of the economy in five aspects. This article dissects and analyzes this pentagon of preemption.

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3 The average delivered price of all electricity nationwide in 2011 was $0.0966/Kwh, and $0.1102/Kwh for residential customers. See, Public Policy Institute of New York State, “Average Retail Price of Electricity to Ultimate Customers by End-Use Sector, by State, Year-to-Date through February 2011 and 2010,” available at http://ppinys.org/reports/jtf/2011/employ/average-retail-price-of-electricity2010-11.htm.


6 See infra at Sections II and III.
Not only is electricity unique in the modern economy, electric power is treated differently by U.S. law from all other commerce in the United States, pursuant to the Federal Power Act\(^7\) and the Supremacy Clause of the Constitution.\(^8\) Seven federal courts in the past year, including the Supreme Court,\(^9\) the federal circuit court of appeals,\(^10\) federal trial courts,\(^11\) plus the Federal Energy Regulatory Commission,\(^12\) have ruled in constitutional matters applicable to energy or utility regulation, with the vast majority holding that states are acting unconstitutionally.\(^13\) State regulation has been found to cross illegally a legal “bright line” established by federal law and the Supremacy Clause of the Constitution.

This pentagon of preemption has both “inside” and exterior dimensions: A state regulatory “inside” game to favor in-state power, and an “outside” bar to keep certain power outside the state. In the “inside” game, analyzed in Section II of this article, states have attempted to keep power and its generation in the state, attempting to:

- force private developers to site new unregulated wholesale power generation technology inside their states\(^14\)
- provide greater financial regulatory incentives for certain power production technology in the state\(^15\)

\(^7\) 16 U.S.C. 824, et seq.
\(^8\) Article VI, Clause 2 of the Constitution states: this Constitution, and the laws of the United States which shall be made in pursuance thereof, … shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.\(^8\)
\(^13\) See infra as Section II and III.
\(^14\) See infra at Section II B.
\(^15\) See infra at Section II C.
set above-market “feed-in” prices for the purchase of certain renewable wholesale power
generated in the state, simultaneously compelling their regulated utilities and ratepayers to
purchase this more expensive power at these higher prices.\textsuperscript{16}

The exterior state “outside” power bar, dissected and analyzed in detail in Section III of this
article, examines whether it is legally preempted when certain states regulate:

- attempting to exclude certain power generation technologies from their states\textsuperscript{17}
- burdening interstate transport of certain energy resources, while advantaging in-state identical
  energy\textsuperscript{18}
- refusing payments for regional power transmission infrastructure to move out-of-state renewable
  wind power to their states\textsuperscript{19}

Section IV draws analogies and conclusions on how the Supremacy Clause of the Constitution
has been the pivotal leverage in recent decisions of federal courts to block a wide range of state regulation
related to this second most important invention of all time. This article analyzes why, and how the
Supremacy Clause aligns federalist power over the U.S. energy future.

II. **THE INSIDE GAME – KEEPING POWER OR GENERATION IN-STATE; ‘BRIGHT
LINES’ OF PREEMPTION**

Some states have attempted to promote select in-state power in preference to other power or
power created from other states. States can accomplish this by manipulating the wholesale price of
certain power. The reason for this is either (a) to provide incentives typically for renewable power or
other favored power development, (b) to cause power generation facilities to locate in the regulating state
as opposed in other states, or (c) to favor in-state energy production in lieu of the same energy traveling
from out-of-state in interstate commerce.

\textsuperscript{16} See infra at Section II A.
\textsuperscript{17} See infra at Section III B.
\textsuperscript{18} Id.
\textsuperscript{19} See Infra at Section III A
Each of these has recently been implemented by a different state: California, New Jersey, Maryland, and Illinois. Each state regulation hit initial legal roadblocks in still on-going litigation. Preemption analysis pursuant to the Supremacy Clause of the U.S. Constitution takes center stage in ongoing challenges. And each has been declared unconstitutional either by one of the courts hearing each of these challenges or by the Federal Energy Regulatory Commission.

A. **PREEMPTION PENTAGON SIDE 1: STATES SETTING INFLATED WHOLESALE POWER RATES FOR FAVORED IN-STATE POWER**

A few states\(^\text{20}\) have attempted to set above-market regulated prices for the mandatory purchase of certain renewable or other wholesale power generated in the state and compelled to be purchased by their regulated utilities at higher-than-market prices. This went forward despite a robust treatment in the literature warning states to be careful in setting wholesale rates.\(^\text{21}\) California, to date, has been challenged and found to be acting illegally not only recently, but also in prior similar regulation.

1. **California Feed-in Tariff Confronts the Supremacy Clause**

California set inflated prices and terms for certain designated wholesale power sales to regulated utilities to provide financial incentives for certain in-state power, excluding eligibility for similar generation of out-of-state power. Only the federal government can establish wholesale power prices for power.\(^\text{22}\) After enacting a feed-in-tariff requiring California state utilities to make wholesale power

\(^{20}\) California, CA Public Utilities Code § 399.20, Vermont, and Indiana, Indiana Experimental Rate 665, Revised Sheet No. 104, have tried this, at least in part. See, DSIREUSA.com.


\(^{22}\) See infra at Section III A 2.
purchases at well in excess of market wholesale rates for power and in excess of avoided costs, there was a challenge before the Federal Energy Regulatory Commission (FERC) as to whether this state regulation violated the Federal Power Act and the Supremacy Clause of the U.S. Constitution. California argued that its environmental purpose for regulation should make it exempt from preemption in setting above-market wholesale feed-in renewable tariff rates for cogeneration facilities of less than 20 Mw and that environmental costs could be considered to inflate avoided costs. The affected utilities countered that federal law does not allow state regulation of wholesale sales to achieve state environmental goals, that federal preemption cannot be avoided based on an environmental purpose of the preempted state regulation, and states may not under the guise of environmental regulation adopt an economic regulation that requires purchases of electricity at a wholesale price outside the framework of the Federal Power Act, or if acting under PURPA, at a price that exceeds avoided cost.

FERC did not agree that a state may set a state feed-in tariffs, and held that wholesale generators can receive no more than system-wide avoided cost for power sales: "even if a QF has been exempted pursuant to the Commission’s regulations from the ratemaking provisions of the Federal Power Act, a state still cannot impose a ratemaking regime inconsistent with the requirements of PURPA and this Commission’s regulations—i.e., a state cannot impose rates in excess of avoided cost." FERC rejected all of California’s arguments regarding any environmental rationales for wholesale rates in excess of limits under federal law or FERC regulation.

23 18 C.F.R. 292.304(e). Avoided cost is defined as “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.” 18 C.F.R. § 292.101(b)(6).
26 Id.
27 Id.
28 Id.
After losing before FERC, California moved for FERC rehearing, or in the alternative a clarification, of this FERC order. While FERC dismissed a rehearing of whether California had authority over federally preempted wholesale power sale rates, FERC did issue a clarification that the avoided costs determined by states only for a Qualifying Facility (“QF”) selling power to the utility could be determined with respect to actual costs incurred by the purchasing electric utility, and reflecting requirements or restrictions imposed under state law on the technologies eligible, thus yielding different tariffs for different technologies subject to state law supply mix requirements. This clarified that a state can utilize its long-standing authority to specify what mix of power generation technologies a regulated utility should procure going forward. Therefore, a state could require that a certain amount of a specific type of power output required to be procured by a regulated private utility.

FERC turned down California’s argument that avoided cost did not have to be the lowest cost for procurement of a particular type or technology of power resource. The avoided cost that a utility would be ordered to pay for wholesale power, subject to state technology supply requirements imposed on regulated utilities and retail suppliers, would be the cost at which the particular purchasing utility could either itself construct or purchase such type of power. This is still a real limitation pursuant to the Federal Power Act and the Filed Rate Doctrine applying the Supremacy Clause of the Constitution, as this PURPA avoided cost cannot exceed the most cost-effective power purchase avoided by the utility finding the best option for the mandated type of power to its grid.

30 Id. at paras. 15, 19.
31 Id. at para. 20.
32 Id.
33 Id. at para. 13.
34 18 C.F.R. 292.304(e).
These 2010-2011 FERC opinions regarding California’s feed-in tariff clarify issues in FERC’s 1995 decision,\textsuperscript{36} to the effect that different technologies could be subject to different avoided costs, if and only if the amount, location, and “ability to sell to the utility” for these technologies is differentially set forth by state law.\textsuperscript{37} However, no state with a feed-in tariff had taken such steps or done such a detailed determination when FERC issued its 2010-2011 opinions.\textsuperscript{38} California, in fact, had not justified its feed-in tariff as even an approximation of avoided cost or as implemented under its federally-delegated authority under PURPA.\textsuperscript{39} Instead, it justified its feed-in tariff “to encourage cogeneration by requiring utilities to sign contracts…”\textsuperscript{40}

The California FERC decision establishes precedent beyond the particular cogeneration technologies at issue in that law and extends to any state power feed-in tariffs.\textsuperscript{41} In its two California decisions, FERC refused California’s request to agree that facilities interconnected at the distribution level, rather than the transmission level, are beyond FERC’s authority.\textsuperscript{42} Instead, FERC reaffirmed that cost “adders” to the base price which utilities would be ordered to pay for wholesale power, but that it must do so more precisely than picking an arbitrary uniform state value that ignores actual transmission and distribution system costs and benefits. FERC reaffirmed its prohibition of additions to avoided costs that reflect general environmental externality bonuses or “adders,” unless they “…are real costs that would be incurred by utilities.” A state could quantify the distinct benefits for transmission, distribution, reliability, capacity, peak-time availability, line losses avoided for the system, length of commitment, and other factors for specific transmission locations and nodes. Id. at n. 33, paras. 23 and 26.\textsuperscript{36}

\textsuperscript{36} In re: Southern California Edison, San Diego Gas & Electric Company, 71 FERC P 61269 (F.E.R.C.) at 62078.


\textsuperscript{38} Id. For example, in the disputed matter, California had added an arbitrary 10% bonus or adder for all combined heat and power facilities as a non-specific transmission system proxy value “for every kilowatt hour delivered to the electrical grid …at a price determined by the Commission,” Id. at para. 9. In the U.S. transmission and distribution system, the cost savings and value of distributed power is distinct and not uniform. F. Philippini & J. Wild, “Regional Differences in Electricity Distribution Costs and their Consequences for Yardstick Regulation of Access Prices,” Centre for Energy Policy and Economics, May 2000, available at http://www.cepe.ethz.ch/publications/Filippini_lugano.pdf.


\textsuperscript{40} Id.

\textsuperscript{41} See, for example, David Yaffe, “Are State Renewable Feed-In Tariff Initiatives Truly Throttled by Federal Statutes after the FERC California Decision?” 23 Electricity Journal 9 (October 2010).

FERC has “exclusive jurisdiction”\(^{43}\) regardless of location geographically and whether on the transmission or lower voltage system was not legally relevant to exclusive FERC jurisdiction over all wholesale power sales.\(^{44}\)

2. **The Inside Story**

State regulation of electric power does not occur *ad hoc*. As one of the last regulated industries in the U.S., state regulation occurs by legislation and a quasi-judicial process at the state public utility commissions.\(^{45}\) In this instance, California was seeking to subsidize and provide financial incentives for the development of certain kinds of power development on a distributed basis in California. Legally, it could have done that with tax subsidies,\(^{46}\) but did not. California also has adopted renewable portfolio standards,\(^{47}\) but wanted to add additional financial incentives. The feed-in tariff (“FiT”) that California mandated provided additional subsidies to certain projects without doing so through the transparent mechanism of a tax subsidy. Instead, costs were invisibly imposed on all utility ratepayers who are required to reimburse utilities’ power acquisition expenses, which were required to be under the FiT more than the market price of power.

In California, it actually was not these affected utilities or their ratepayers which initiated legal review of this FiT scheme. Rather, it was the state of California, itself, which initiated review at FERC, attempting to overturn past decisions holding that California did not have authority to set wholesale prices.\(^{48}\) California raised several legal arguments as to why existing precedent did not apply.

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\(^{43}\) Id. at para. 72 n. 99, citing *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964).

\(^{44}\) Id. at para. 72.


First, the California Attorney General, representing the state, argued that the state mandating that regulated utilities only “offer” to purchase wholesale power at substantially above wholesale market rates, is different than a requirement to actually “purchase” the sold power. California was not successful arguing that it was regulating only the buyers of power and not the sellers of power in the transaction. This argument was held unpersuasive by FERC. It held that FERC’s authority under the Federal Power Act includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce, and preempts any state authority.

Second, California argued that its environmentally beneficial purposes should make it exempt from preemption of its authority in setting non-market-conforming wholesale rates for a state FiT. FERC found state purpose to not permit illegal establishment of FiTs requiring purchases of electricity at inflated wholesale prices, and renewable wholesale generators could receive no more than fair wholesale market prices under federal law. FERC reiterated that only the federal government can regulate commerce between the states, and California cannot attempt to regulate commerce outside its borders. This final extra-territorial limitation on California energy regulation, arose again on the fifth


54 Id. paras. 17–18. FERC rejected all of California’s arguments regarding generic environmental rationales for wholesale rates in excess of limits under federal law or set by FERC. Id.


56 FERC Order Granting Clarification and Dismissing Rehearing, In re: California Public Utilities Commission, Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company, 133 FERC P 61059 (F.E.R.C.), 2010 WL4144227 (October 21, 2010). FERC also reaffirmed that since a state cannot add a bonus or “adder” to the tariff that is not real and actually incurred by the buying utility, a bonus can be
side of the preemption pentagon when California regulated liquid renewable fuels. The 2010-2011 FERC articulation of the total lack of state authority over wholesale power sale policy was nothing new, but the reemphasis of the basic jurisdictional lines since the beginning of power and its regulation 75 years ago:

“FERC’s FIT Order did not create a new policy dilemma: It simply reminded California and the states that the states’ rights to establish Policy concerning electric generation resource selection does not include power to impose prices under state law where sale of electricity for resale and form of interstate transmission are involved.”

Third, California argued that past judicial and FERC precedent in similar California matters should no longer apply, because of the new emphasis on addressing climate change. There was precedent regarding California decisions fifteen years earlier preempting certain California clean energy regulation altering wholesale renewable prices. In Independent Energy Producers Association, the California state utility commission authorized utilities to suspend payment to renewable power-selling Qualifying Facilities (QFs) if the utility found that the QF did not comply with federal standards, and substitute a 20% lower, alternative power purchase rate. In this prior case, the court stated that the rate paid by utilities for electricity must be determined by calculating the federally-specified avoided cost that the utility would pay if it had to purchase electricity outside the renewable QF contract price. The court also commented that federal PURPA full avoided cost rates are the “statutory ceiling.” Thus, the federal wholesale power sale rate could not be altered by state legislation or state regulatory action.

Going the other direction on power purchase rates – increasing them as FiTs do, rather than reducing them -- raising renewable energy prices as an incentive to the power producer was previously supplied “outside the confines of, and, in addition to the PURPA avoided cost rate, through the creation of renewable energy credits (RECs).” Id. at para. 31.

57 See infra at Section III B.
58 David Yaffe, “Are State Renewable Feed-In Tariff Initiatives Truly Throttled by Federal Statutes after the FERC California Decision?” 23 Electricity Journal 9 (October 2010).
60 Id.
61 Id.
stricken in California. Fifteen years before the 2010-2011 case, in *Southern California Edison Company, San Diego Gas & Electric*, FERC refused to sanction a higher California price for renewable power supply. The California PUC had ordered two of its investor-owned and regulated utilities to sign long-term fixed-price contracts with renewable QF power sellers to purchase electricity at prices that were competitive with what it cost for the developer move forward on a renewable energy project, but nonetheless in excess of the utilities’ avoided cost and/or the price of wholesale power in the market. Edison, one of the affected utilities, had wholesale electricity supply options available for purchase at $0.04 per kWh or less, while the PUC required purchase of renewable power at prices as high as $0.066 per kWh. Under the filed-rate doctrine, any dispute about these matters may not be arbitrated by the state, but is reserved exclusively to federal authority.

Having lost this 1994 decision in the federal court of appeals on a similar effort by California to establish a wholesale price beyond that allowed by FERC, the 2010 action by FERC replayed this previously stricken state action. The California 2010-vintage feed-in tariffs contain a price premium for renewable power substantially greater than this earlier 1994 50% premium. In the recent 2010-2011 California decision, FERC rejected California’s argument that prior legal precedent no longer applied because California now sought to address climate change, and made it clear that PURPA does not permit either the FERC or the states to require a wholesale power purchase rate which exceeds the utilities’ avoided cost. This legal requirement does not apparently change because of environmental or climate change goals: “[a]s the electric utility industry becomes increasingly competitive, the need to ensure that

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63 Id.
64 Id.
66 See supra at n. 64.
67 18 C.F.R. § 292.101(b)(6). Avoided cost is defined as “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.” Id.
the states are using procedures which ensure that QF rates do not exceed avoided cost becomes more critical."68

The federal Court of Appeals agreed in deciding a recent California case.69 The court ruled that Congress did not intend that the scope of FERC’s jurisdiction over the interstate sale of electricity at wholesale be determined by a case-by-case analysis of the impact of state regulation on national interests.70 Moreover, while addressing state/local environmental regulation, the Supreme Court held that federal law is preemptive of state and local law. In 2013, the Supreme Court held that a city in California was preempted by the Federal Aviation Administration Act of 1994 from imposing additional regulation on diesel truck emissions for those trucks that accessed the port.71

California’s arguments that it or its motivations or rationales were entitled to special status, were not successful before the courts or FERC. In the six California matters discussed in this section which articulate the borders of federal and state authority over energy and environmental matters, federal authority preempted state authority in five of these cases,72 and the sixth was procedurally dismissed, without reaching the merits, because of a lack of subject matter jurisdiction. Three of the six decisions were rendered by the U.S. Supreme Court.73

69 Pub. Util. Dist. No. 1 of Snohomish County Wash. v. Fed. Energy Regulatory Comm’n, 471 F.3d 1053, 1066 (9th Cir. 2006). While this decision proceeded on appeal to the U.S. Supreme Court, Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1 of Snohomish County Wash., 554 U.S. 527 (2008), and thereafter was remanded to FERC for more clarification, its holding was not overturned when before the Supreme Court.
71 American Trucking Ass’ns v. City of Los Angeles, 133 S.Ct. 927 (2013).
This first side of the preemption pentagon is constructed from more than 75 years of consistent Supreme Court interpretation of the Supremacy Clause and the Federal Power Act. A ‘bright line’ demarcates this side of preemption, with no exceptions, despite California’s arguments, and no case-by-case analysis of exceptions to the rule. Any regulation of the price or terms of any wholesale power sales are not within any state power: Even when states determine avoided cost, states are acting as delegates of federal authority, not exercising any independent authority over wholesale prices.

3. The Federal Power Act’s ‘Bright Line’ Between State and Federal Jurisdiction

This first side of the preemption pentagon is meant by federal law to establish a ‘bright line’ between federal and state authority regarding energy regulation. The 2010-2011 California FERC decision conforms with 75 years of authority under the Federal Power Act, which directs FERC to regulate all interstate electricity transmission and to ensure the reliability of the national electricity grid.

The Federal Power Act sections 205 and 206 empower FERC exclusively to regulate rates for the interstate and wholesale sale and transmission of electricity. FERC case law exerts exclusive jurisdiction over the "transmission of electric energy in interstate commerce,” over the ”sale of electric energy at wholesale in interstate commerce,” and over "all facilities for such transmission or sale of electric energy.”

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74 This began with the Supreme Court decision in Public Utils. Comm’n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927), which inspired the Federal Power Act a few years later.
75 Steven Ferrey, Law of Independent Power, supra, at Section 4:30, at page 4-102.2-.3.
77 16 U.S.C. §§ 824d and 824e.
The U.S. Supreme Court held that Congress meant to draw a “bright line,” easily ascertained and not requiring case-by-case analysis, between state and federal jurisdiction. When a transaction is subject to exclusive federal FERC jurisdiction and regulation, state regulation is preempted as a matter of federal law and the U.S. Constitution’s Supremacy Clause, according to a long-standing and consistent line of rulings by the U.S. Supreme Court. The rates, terms, and provisions of any wholesale sale or transmission of electricity in interstate commerce are exclusively within federal jurisdiction and control, not state authority, under the Federal Power Act, according to U.S. Supreme Court: “FERC has exclusive authority to set and to determine the reasonableness of wholesale rates.” The Federal Power Act defines “sale at wholesale” as any sale to any person for resale.

The Congress in the Federal Power Act “adopt[ed] the test developed in the Attleboro line [of cases] which denied state power to regulate a sale ‘at wholesale to local distributing companies’ and allowed state regulation of a sale at ‘local retail rates to ultimate consumers.’” Wholesale rates for sales


81 New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). The Supreme Court overturned an order of the New Hampshire Public Utilities Commission which restrained within the state, for the financial advantage of in-state ratepayers, low-cost hydroelectric energy produced within the state: “Our cases consistently have held that the commerce clause of the Constitution precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom.” Id. at 338. See also, Montana-Dakota Co. v. Public Service Commission, 341 U.S. 246, 251 (1951), Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988); Entergy Louisiana, Inc. v. Louisiana Public Service Commission, 539 U.S. 39 (2003).
84 Federal Power Act, Section 201(d), 16 U.S.C. § 824(d)(”sale of electric energy at wholesale’ . . . means a sale of electric energy to any person for resale.”).
in interstate commerce are wholly beyond any state authority.\textsuperscript{86} If states impose a rate in excess of avoided cost by either “law or policy,” with avoided cost being the only wholesale power sale rate that states can set as delegates of federal authority, the “contracts will be considered to be void \textit{ab initio}.”\textsuperscript{87} The rates, terms, and provisions of any wholesale sale, or transmission of electricity in interstate commerce, are exclusively within federal jurisdiction and control, not state authority, pursuant to the Federal Power Act.\textsuperscript{88} “FERC has exclusive authority to determine the reasonableness of wholesale rates.”\textsuperscript{89}

The U.S. Supreme Court held that Congress meant to draw a “bright line,” easily ascertained and not requiring case-by-case analysis, between state and federal jurisdiction.\textsuperscript{90} Power moves interstate constantly pursuant to federal law: The U.S. Supreme Court held that “it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in this respect.”\textsuperscript{91} Moreover, the courts have determined that electrons in interstate commerce cannot be traced, although we know that they move effortlessly interstate through the very design of the interconnected interstate transmission system.\textsuperscript{92}

4. \textbf{The Legal Shift in Power Transactions}

\textsuperscript{87} \textit{Connecticut Light and Power Company}, 70 FERC P 61012 (F.E.R.C.) at 61029-61030.
\textsuperscript{91} \textit{FERC v. Mississippi}, 456 U.S. 742, 757 (1982).
An increasing larger majority of U.S. power now proceeds through a wholesale power sale prior to its ultimate retail sale and disposition, thereby fundamentally altering the legal analysis of what is and is not now jurisdictional for a state and the federal government to regulate. Restructuring and deregulation of the retail electric power sector, commencing at the state level in approximately 1997, dramatically changed the regulatory paradigm. About 40% of the states restructured prior to the electric sector problems in California in 2000–2001, whereafter the other 60% of the states retained traditionally structured retail electric sectors.

Much power generation, and particularly new wind and solar facilities, are not owned by the retail utilities that deliver power to retail customers, but instead are owned by independent wholesale market participants. The amount of power wholesaled before it is sold at retail, has shifted from only 8% in the 1960s to a majority today. As noted by the federal courts and affirmed by the Supreme Court, these independent market participants are the new competitive reality in power and energy markets.

When combined with federal preemption law, one crucial result of these energy market regulatory reforms has been ‘a massive shift in regulatory jurisdiction from the states to FERC.’ The upshot of these federal and state innovations in electricity regulation is

93 “In the 1970s, vertically integrated utility companies (investor-owned, municipal, or cooperative utilities) controlled over 95 percent of the electric generation in the United States…… by 2004 electric utilities owned less than 60 percent of electric generating capacity. Increasingly, decisions affecting retail customers and electricity rates are split among federal, state, and new private, regional entities.” | Electric Energy Market Competition Task Force, “Report to Congress on Wholesale and Retail Competition Markets for Electric Energy,” at 10.
94 Id. at 149–50.
95 See Steven Ferrey, The Law of Independent Power, supra., at Sections 5-26 through 5-28; Steven Ferrey, Environmental Law: Examples and Explanations, supra. at 560-61.
97 See Ferrey, “Sale of Electricity,” supra note 96, at 217–18. This spun generation assets, including nuclear generation, out into independent ownership not subject to state regulation. See id. The costs of these independent wholesale power entities are not recovered through state-regulated retail rates, but rather through wholesale rates subject to FERC’s exclusive jurisdiction. See id. Relevant to the area in which this facility operates, see ISO-NE 2012 GIS Load Asset Listing, February 27, 2012, available at http://www.iso-ne.com/stlmnts/gis; http://www.iso-ne.com/support/asset_info/index.html.
99 See S. Ferrey, THE NEW RULES, supra, at 269–70.
that state regulators, despite their continued authority over rates charged directly to consumers, have much less actual authority over those rates than they did [earlier]. Local utilities now obtain power largely through wholesale contracts subject to FERC’s exclusive regulation, rather than through self-generated and transmitted power. Although state regulators formerly took an extremely active role so as to ensure the just and reasonable retail power rates, FERC has exclusive jurisdiction over the wholesale rates that now drive the electric power market and, as a practical matter, largely determine the rates ultimately charged to the public.100

This entrance of new wholesale power market participants shifts regulatory jurisdiction from states to FERC. In this newly deregulated environment in some states, the cost of building and operating facilities is no longer recovered directly through retail rates.101 Instead, retail customers pay for the retail distribution utility’s cost of buying wholesale power in a wholesale transaction, subject to FERC’s exclusive jurisdiction over wholesale power transactions.102 As a result, much of the traditional state responsibility for regulating power has now shifted to FERC through its exclusive regulatory authority over the rates, terms, and conditions of wholesale sales and transmission of power,103 and to the competitive power market in approximately one-third of the states.104

The United States Supreme Court has repeatedly held that states are preempted by the Supremacy Clause of the United States Constitution105 from directly or indirectly interfering with federal power regulation.106 When applied to electric power issues, the Supremacy Clause of the Constitution107 is embodied in the Filed Rate Doctrine, which establishes an absolute line the states may not cross to regulate electric power.108 The court held that the Federal Power Act invests the Federal Energy

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102 Id.
103 16 U.S.C. § 824a-3 (2006); see also S. Ferrey, ENVIRONMENTAL LAW, supra, at 569.
104 See S. Ferrey, ENVIRONMENTAL LAW, supra, at 594.
105 U.S. CONST. art. VI, cl. 2.
106 FERC v. Mississippi, 456 U.S. 742, 760–61 (1982), see Sections II and III.
107 U.S. CONST. Art. VI.
Regulatory Commission with “‘exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.’”\(^{109}\)

The Supreme Court in 1986,\(^{110}\) and again in 1988,\(^{111}\) 2003,\(^{112}\) and 2008,\(^{113}\) reaffirmed and enforced the Filed Rate Doctrine as applied through the Supremacy Clause, when states attempted to assert jurisdiction in areas subject to FERC’s exclusive authority. The 1986 Supreme Court decision concluded that the Filed Rate Doctrine limitations also apply “…to decisions of state courts.”\(^{114}\) The Filed Rate Doctrine is an absolute prohibition of state regulation of wholesale power rates, contracts and terms, which are reserved exclusively to federal authority: “The filed rate doctrine is not limited to ‘rates’ per se: ‘our inquiry is not at an end because the orders do not deal in terms of prices or volumes of purchases.’”\(^{115}\) The Supreme Court in 2008 reiterated that the Federal Power Act creates a “‘bright line’ between state and federal jurisdiction with wholesale power sales….falling on the federal side of the line.”\(^{116}\) This most recent decision articulated an unbroken line of Supremacy Clause application barring state regulation:

“Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreement affecting wholesale rates are reasonable.”\(^{117}\)


\(^{114}\) Nantahala Power & Light Co., supra. at 963 (1986).


\(^{117}\) FERC v. Mississippi, 487 U.S. 354.
B. PREEMPTION PENTAGON SIDE 2: THE GEOGRAPHY OF NEW POWER

1. The New State Offer and Potential Conflict with Federal Authority

Some east coast states have been accused of attempting to manipulate wholesale power prices as a mechanism to cause new projects for power generation to locate within their states. In a traditional regulatory structure, this would have been within state authority, as there would be no transmission or interstate wholesale sale of power when utilities constructed the power generation capacity which they required. However, with several states having followed Massachusetts’ lead to deregulate retail power sales and to cause their utilities to divest all of their power generation capacity, regulatory authority has shifted. With wholesale acquisition of power now required for utilities to obtain power resources for customers in these deregulated and divested states, and power moving in interstate commerce to a much higher degree, the Federal Power Act now substitutes federal jurisdiction over these wholesale power transactions, divesting state authority.

The “grid” is composed not only of the approximately 4,800 interconnected power generation resources in the United States, but also of the cable to connect them with consumers, and the hardware to manage them in an energized instantaneous network. The high-voltage transmission network at 230 kV and higher, comprises 167,000 miles of line in America. The transmission system operates at 15 different voltage levels. PJM operates the “largest centrally dispatched power market . . . in the world,” covering 60 million customers and 185,000 megawatts (MW) of power generation, including all or part of

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119 Steven Ferrey, The Law of Independent Power, supra., at Section 8.3, at n. 7-8.
121 Steven Ferrey, The Law of Independent Power, supra., at Section 8.3, p. 8-16 through 8-17.
thirteen states including New Jersey and Maryland. See Figure 1. PJM operates pursuant to a tariff approved by FERC, the “Open Access Transmission Tariff.” PJM, an ISO, is a FERC-created and authorized entity, managing regional power transmission entities pursuant to filed tariffs that are approved by FERC.

Figure 1: MISO and PJM Geographic Service Areas of Independent System Operator

PJM provides capacity payments for the siting of new power generation as needed throughout this 13 state area. New capacity payments are awarded to generators by PJM through a bidding process conducted once annually, approximately 3 ½ years before the capacity is deemed needed and will be compensated in capacity payments. This 3 ½ year lag time between determination and obligation is to allow enough time for any project that is awarded capacity to

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126 Id. at 7.
127 In the PJM ISO, which serves multiple Eastern states, there are two retail energy markets, a real-time (spot) and a day-ahead (forward) market. The basis of calculating the electricity price in either market is Locational Marginal Pricing. PJM's capacity-market model, the Reliability Pricing Model, was implemented in 2007 as the successor to its Capacity Credit Market design, as a series of auctions for a delivery year approximately three years in the future. PJM’s demand curve, the Variable Resources Requirement, defines the price for a given capacity commitment relative to the applicable reliability requirement, defined for each constrained Locational Delivery Area. See, http://www.pjm.com/documents/agreements.aspx; see also, http://www.ferc.gov/market-oversight/mkt-electric/pjm.asp.
128 Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs) are FERC-approved and regulated entities which facilitate commercial electricity transfers, through a private corporation that functions as a tariff administrator. RTOs are responsible for managing both electrical and financial transactions, including scheduling transmission transactions, dispatching generation, and managing the entire accounting for the grid capacity and energy charges and transmission fees. See, Steven Ferrey, Law of Independent Power, supra. at Sections 8:10, 10:87, 10:91; S. Ferrey, The New Rules, supra. at 49-50.
get built prior to it being required to be on-line. This process is overseen by the Federal Energy Regulatory Commission. Projects are separately paid for the actual energy that they produce and sell. PJM insures that supply and demand are matched almost perfectly in real time at all times.\(^\text{129}\) PJM “plan[s] expansions to transmission to improve the ability to transmit energy from where it is generated to serve load.”\(^\text{130}\)

Maryland and New Jersey, both operating within PJM, each attempted somewhat similar regulation of energy markets to take advantage of the regional PJM capacity market payments and have power plants locate within their states. The legal issues presented were similar: Are such state actions regarding the federally FERC-approved PJM operation, preempted? “It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.”\(^\text{131}\) The Federal Power Act “delegated to . . . the Federal Energy Regulatory Commission, exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production.”\(^\text{132}\) Two 2013 federal court decisions decided whether within the PJM interconnection, a state could take individual incentives by regulation to attempt to cause power plants to exploit the PJM capacity market and to locate within the state taking such actions.

2. **Maryland Inside Regulation**

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\(^\text{130}\) Id. (Stipulated Facts ¶ 11). PJM is responsible for the “dispatching” of generation in real time to meet fluctuating demand. Id at 8.


A dispute in federal district court in Maryland invoked two prongs of the Constitution.\textsuperscript{133} It construed Maryland's requirement for its utilities to enter long-term "contract for differences" (a form of power purchase agreements (PPAs)) with certain designated independent power producers willing to locate new generation capacity constructed in Maryland or the District of Columbia, as a violation of the Constitution.\textsuperscript{134} The Maryland contract for differences ("CfD") provided that regardless of the price set by the FERC/PJM federally regulated wholesale market, the Maryland utilities would assure that the Maryland-selected in-state power projects received a guaranteed price augmented by state funds and fixed by a contractual formula.\textsuperscript{135} The CfD contained provisions which enabled the selected supplier to receive its proposed "contract price" for each unit of energy and capacity sold at wholesale to PJM in the PJM markets up to a ceiling amount.\textsuperscript{136} Maryland ratepayers supply the wedge price between the in-state projects’ winning PJM bids and the PPA rates. This wedge has some impact in a competitive PJM bidding process to artificially suppress the capacity payments cleared for all winning generators.

The successful winning bidders in this in-Maryland energy regulation countered that while the plant location was geographically limited, an out-of-state company could compete to build the plant as long as it similarly was situated within Maryland.\textsuperscript{137} They argued that the geographic situs of the commerce was overshadowed by the lack of geographic requirement for the location of the owner of the facility. Congress, in the Federal Power Act of 1935, demarcated a ‘bright line’ between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas

\begin{flushleft}
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 3.
\textsuperscript{136} Id. at 65.
\textsuperscript{137} Id. at 3.
\end{flushleft}
where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable.  

The 2013 federal court decision in Maryland\(^\text{139}\) determined that Maryland's "contract for differences" requiring local utilities to enter into long term PPAs was an impermissible intrusion of state regulation on regional wholesale rates, disrupting FERC-approved wholesale power markets.\(^\text{140}\) Maryland retail utilities, which were required to divest their power generating facilities, must purchase energy on federally regulated wholesale markets. FERC exercises exclusive jurisdiction in this field and has fixed the price for wholesale energy and capacity sales in the PJM markets at the market-based rate produced by the auction processes approved by FERC and utilized by PJM.\(^\text{141}\)

The court assessed whether the CfD state compensation mechanism impermissibly set wholesale prices for the regulated state utilities’ energy and capacity power sales into the regional PJM markets.\(^\text{142}\) The court concluded that when Maryland manipulates the prices of wholesale power markets, the utilities and, correspondingly Maryland ratepayers, are directly affected by the resulting wholesale prices determined on the federally regulated wholesale PJM markets.\(^\text{143}\) The Court held the Maryland regulation violates the Supremacy Clause of the United


\(^{140}\) Id. at 5. The court was persuaded in part by expert testimony explaining that the CfD went beyond a mere financing arrangement because it reflected the same factors typically used to establish rates and dictated the manner in which CPV (the winning bidder) could participate in PJM markets.

\(^{141}\) Id. at 93. Like the federal court in New Jersey at the same time (see infra at Section III C), this court cited the preemption holding of Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992).

\(^{142}\) Id. at 87.

\(^{143}\) Id. at 2.
States Constitution by virtue of field preemption, but plaintiffs had not proven their additional claim that it violates the dormant Commerce Clause.\textsuperscript{144} State action that regulates within this wholesale power field was void under the doctrine of field preemption:\textsuperscript{145}

“The doctrine of field preemption forecloses state regulation in a field occupied entirely by the federal government, even if the state’s purpose is admirable or the state regulation does not conflict with achievement of the federal scheme. See Arizona v. United States, 132 S. Ct. 2492, 2502 (2012).”\textsuperscript{146}

Based on this principle, Maryland cannot secure the development of a new power plant by regulating in such a manner as to intrude even indirectly into the federal field of wholesale electric energy and capacity price-setting.\textsuperscript{147} Maryland had stated its purpose to cause the construction of sufficient reliable electric energy for Maryland. Maryland is in a highly congested portion of the regional PJM electric transmission system, which increases the price to transmit power into the state.\textsuperscript{148} However, the court held that no rationale permits a state to cross the ‘bright line’ limiting jurisdiction or “invasion into a federally occupied field.”\textsuperscript{149} States cannot dictate the ultimate price received for wholesale energy and capacity sales in the PJM markets under the Federal Power Act and the Supremacy Clause.\textsuperscript{150}

3. **New Jersey Inside Regulation**

Similar to the Maryland in-state situs requirement for new power generation capacity, New Jersey had a state law with a similar objective. The state of New Jersey imports a

\textsuperscript{144} Id. at 4.
\textsuperscript{145} Id. at 83.
\textsuperscript{146} Id. at 111-112.
\textsuperscript{147} Id. at 85.
\textsuperscript{148} Id. at 53.
\textsuperscript{149} Id. at 85-86 (“Where a state action falls within a field Congress intended the federal government alone to occupy, the good intentions and importance of the state’s objective are immaterial to the field preemption analysis. Field preemption requires the state to ‘yield to the force of federal law . . ., notwithstanding that [the state’s action] is constructed upon values familiar to many and cherished by most, and notwithstanding that it may fit neatly within or alongside the federal scheme.’ See French v. Pan Am Exp., Inc., 869 F.2d 1, 6 (1st Cir. 1989)).
\textsuperscript{150} Id. at 111.
substantial amount of its electricity from other states, which requires paying more transmission
charges to move the power to New Jersey consumers. In 2011, New Jersey enacted the LCAPP
program as a subsidy program with "contracts for differences,"\(^{151}\) to encourage the acquisition by
utils of the output of 2,000 Mw of new independent unregulated in-state power projects.\(^{152}\)
New Jersey provided selected new in-state projects financial compensation in the form of a
contracts for differences, and requiring them to obtain capacity payments through participation in
the PJM capacity auction.\(^{153}\) Six hundred eighty Mw of additional generation has been placed in
service in New Jersey since RPM began, some from reactivations of pre-existing non-operating
generation facilities.\(^{154}\)

After conducting a competitive bid process with public utilities, the New Jersey Board of
Public Utilities, the state energy regulatory agency, was directed to enter into standard offer
capacity agreements ("SOCAs"), long-term fifteen-year contracts which guarantee these state
selected generating companies a fixed price for their capacity.\(^{155}\) Winning projects would be
financially “topped off” by state money for winning the federally-approved PJM capacity reverse
auction, which cause the winning project to receive some of their cash inflow from regional (out-
of-state) ratepayers.

Power generators in the North Atlantic region filed a complaint at FERC alleging
discrimination caused by New Jersey’s statute ordering utilities to sign long-term contracts only

§§ 48:3-51, 48:3-98.2-.4 ("LCAPP"). After conducting a competitive bid process with public utilities, the BPU is
directed to enter into standard offer capacity agreements ("SOCAs"), which are long term fifteen-year contracts
which guarantee the state selected generating companies a fixed price for their capacity.

\(^{152}\) New Jersey A. 3442.


\(^{154}\) Of the 6,000 Mw retired within the PJM grid since 2002, one-third of these deactivations of power generation
facilities have been in New Jersey. See http://www.state.nj.us/bpu/pdf/energy/LSPower_comments.pdf.

\(^{155}\) Id. After the New Jersey BPU selects a generator program, it enters into a standard offer capacity agreements
(SOCA) with the BPU, which obligates the generator to produce a fixed amount of electricity that is sold to New
Jersey retail utilities in return for a fixed price for the power.
with in-state generation facilities which successfully bid to receive regional multi-state PJM ISO capacity payments. The case raised field preemption and conflict preemption of the New Jersey LCAPP CfD proposal, where a fixed price from New Jersey for select New Jersey generators allows such generation effectively to bid below the true cost of new entry for the regional multi-state FERC-approved PJM auction, and thereby obstructs the federal goal of a truly competitive auction without selective state subsidies. This was argued to obstruct the federal goal of a competitive auction without selective subsidies for certain in-state capacity resources.

This caused the regional PJM to guarantee these New Jersey generators a substantial capacity payment every month which cost is passed on not just to New Jersey electric ratepayers, but to all PJM ratepayers who reside in many of the 13 PJM states and Washington, D.C. in the PJM region. It was alleged that this artificially influenced behavior of New Jersey new generation units also tended to drive down the market-clearing price at the PJM annual capacity auction, resulting in lower clearing prices and capacity revenues to all participants than if such state-subsidized entrants had not been influenced to bid under these circumstances. Plaintiffs also alleged a violation of the Constitution's dormant Commerce Clause because of state

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158 After the New Jersey BPU selects a generator program, they enter into a standard offer capacity agreements (SOCA) with the BPU, which obligates the generator to produce a fixed amount of electricity that is sold to New Jersey retail utilities in return for a fixed price for the power.
regulatory in-state "favoritism," alleging the New Jersey act to be a "blatant and explicit effort to promote the construction of new generation facilities in New Jersey."161

In defense, New Jersey asserted that its LCAPP is a mere planning measure, with only incidental effect on FERC authority.162 New Jersey contended that FERC oversight authority is "limited to sales of the actual physical electricity (or capacity) to a buyer" and "[c]ontracts that do not effect a physical sale of electricity . . . are not subject to [federal Commission] jurisdiction."163 Even in the absence of field preemption, state law can still be superseded based on conflict preemption if the state law interferes with a federal goal.164 There are certain regulatory actions which are only within federal authority, and which states do not have power to undertake. Article VI, the Constitution’s Supremacy Clause, and the Federal Power Act,165 establish a judicially defined “bright line” prohibitions of state regulation of wholesale transactions in power.166

161 Hanna Northey, Utilities Challenge N.J. Law While Preparing to Reap Its Benefits, E&E (Mar. 2, 2011), http://www.eenews.net/public/Greenwire/2011/03/02/4. Plaintiffs alleged that because the eligibility requirements, including deadlines, pre-qualification requirements, and other criteria favored in-state generators, the selection process for LCAPP-sponsored generators favored in-state generators: All generators selected to participate in the New Jersey LCAPP program were from New Jersey. LCAPP awarded contracts to Hess Corp., Competitive Power Ventures and NRG Energy. Id.

162 N.E. Hub Partners, L.P. v. CNG Transmission Corp. et al., 2001 WL 339120020 (a state regulatory process was field preempted where the result of such process was within federal authority), reversed in N.E. Hub Partners, L.P. v. CNG Transmission Corp. et al., 239 F.3d 333 (3rd Cir. 2001).

163 PPL Energyplus, LLC, et al., v. Hanna, supra. at 54.

164 Hines v. Davidowitz, 312 U.S. 67 (1941) (State law will be preempted if it stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress).


166 U.S. Constitution, Article VI, Section 2 ("the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.")
The 2013 federal trial court decision in New Jersey held that the state was impermissibly regulating wholesale energy prices to promote the construction of new generation facilities in New Jersey.\(^\text{167}\) The state LCAPP regulation was held to:

“intrude[s] upon the exclusive jurisdiction of the Commission, by establishing the price that LCAPP generators will receive for their sales of capacity. The Court finds that in doing so, the LCAPP ‘places a direct burden upon interstate commerce’ within the meaning of the Attleboro decision. Accordingly, the LCAPP Act invades the field occupied by Congress and is preempted by the Federal Power Act.”\(^\text{168}\)

The court held that conflict preemption “prevents state regulation of, or influence over, the wholesale price for energy transactions.”\(^\text{169}\) A government-imposed price interferes with FERC’s method for the wholesale sale of electricity in interstate commerce,\(^\text{170}\) and intrudes upon the Commission’s authority to set wholesale energy prices through its preferred regional RPM auction process.\(^\text{171}\)

4. **Comparing Two Most Recent Federal Court Preemption Decisions**

Despite the similarities of the New Jersey regulation with the simultaneous Maryland effort to control where power plants located,\(^\text{172}\) the New Jersey federal court disavowed any need to compare the two programs.\(^\text{173}\) However, the two cases merit some comparison:

\(^{168}\) PPL EnergyPlus, LLC, et al., v. Hanna, supra at 60.
\(^{170}\) Id. at 62.
\(^{171}\) Id. at 54
\(^{172}\) See supra, at Section II B 2.
\(^{173}\) PPL EnergyPlus, supra at 51 (Court is not able to discern whether Maryland’s proposal is sufficiently similar to the LCAPP).
• Both require eligible projects to locate in-state or in a specified geographic region

• Both require regulated utilities in the state to enter mandatory contracts to purchase wholesale power

• Both utilize state contracts-for-differences as a subsidy mechanism at a price above market prices

• Both require eligible independent power projects to win the PJM auction for new capacity, and top-off these winning bids by providing state Cfd incentives

• This theoretically lowers the winning capacity bids reflecting the subsidies, extracts some of the compensation for power production from the regional 13-state PJM market and their ratepayers, and suppresses the PJM capacity market by virtue of these state subsidies

• This causes in-state new power production capacity to win some of the limited capacity for new projects in the PJM auction, depriving other projects of a winning bid and capacity payments as part of future operation, causing many to fail

• This influences the location of new power projects through state subsidies designed to tilt the geographic outcome for winners of the regional 13-state PJM capacity auction

Maryland and New Jersey had an understandable motive for wanting more new power production capacity to locate in-state near their consumers: This reduces the transmission charges that in-state ratepayers will have to pay to transmit retail power from generators out-of-state to in-state consumers. The state also receives any tax and job benefits of additional development in the state. Since power flows from its point of generation to the nearest point of retail load or demand, having generation in-state proximate to consumers reduces the risk of transmission problems or insufficient supply at peak times, increasing power supply reliability.

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175 Power moves according to Kirchhoff’s Law almost at the speed of light on this energized grid. This law is also called Kirchhoff’s first law, Kirchhoff’s point rule, Kirchhoff’s junction rule, and Kirchhoff’s first rule. The principle of conservation of electric charge implies that at any point in an electrical circuit where charge density is not changing in time, the sum of currents flowing towards that point is equal to the sum of currents flowing away from that point. People can tap into this energizing service, although technically they do not purchase a conventional commodity. See, S. Ferrey, “Inverting Choice of Law in the Wired Universe: Thermodynamics, Mass and Energy,”
How did we arrive at this legal landscape? It was Maryland and New Jersey themselves which elected to require their regulated retail utilities to divest their power generation capacity in the interests of promoting competition approximately a decade ago.\textsuperscript{176} In doing so, they introduced the necessity of each retail utility purchasing its power from independent wholesale power generators. And in doing so, states shifted their control over the prior predominately retail energy sales to FERC as the regulator of all wholesale transactions and of power transmission:

“it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in this respect.”\textsuperscript{177}

This shift from jurisdiction states to FERC was engineered entirely by the states themselves. This is not a transfer that can be facilely reversed; the “bright line” jurisdiction over power has been national law for more than seventy-five years, while the Supremacy Clause has existed since the genesis of American Constitutional law. FERC has promoted greater competition\textsuperscript{178} and promoted regional coordination by ISOs, such as PJM.\textsuperscript{179} And two separate federal district courts in Maryland and New Jersey, when confronted with separate challenges to similar state energy regulation, came to the almost identical conclusion that this state “inside

\textsuperscript{176}Steven Ferrey, The Law of Independent Power, supra. at Section 10:9, pages 10-394 through 10-394.
\textsuperscript{177}FERC v. Mississippi, 456 U.S. 742 (1982).
\textsuperscript{178}FERC Order 888, April 24, 1996, 18 CFR Parts 35 and 385, FERC Docket Nos. RM95-8-000 and RM94-7-001, 888-A, 888-B, 888-C.
game” clearly violated the Supremacy Clause.\textsuperscript{180} This is the second side of the pentagonal energy preemption.

**C. PREEMPTION PENTAGON SIDE 3: RIGHTS OF FIRST REFUSAL FOR INCUMBENT IN-STATE POWER TRANSMISSION COMPANIES**

Can states require that additional power transmission facilities proposed by a competitive entity actually be turned over and ceded to be built and owned by incumbent in-state businesses? Incumbents typically are the traditional utilities in a state, which operate only within that state.\textsuperscript{181} Several states are insisting on enforcing state rights of first refusal (“ROFRs”) for existing in-state monopolies to commandeer any competitive or out-of-state electric power transmission proposals.\textsuperscript{182}

The high-voltage transmission network was recognized by engineers as the most important engineering feat of the 20\textsuperscript{th} century.\textsuperscript{183} Its operation requires a constant simultaneous balancing of supply and demand on that system.\textsuperscript{184} FERC is promoting competition among independent transmission entities; the conflict where states refuse and recognize only in-state traditional power entities raises the third side of the pentagon of federal preemption.

1. **FERC ORDER 1000**

\textsuperscript{180} PPL v. Hanna, supra; PPL v. Solomon, supra.
\textsuperscript{181} S. Ferrey, The New Rules, supra at 38.
\textsuperscript{182} See infra at Section II C 3.
\textsuperscript{184} Steven Ferrey, Environmental Law, supra. at 568.
FERC Order 1000 introduced competitive bidding into the construction process for transmission facilities. FERC Order 1000 requires incumbent transmission providers, utilities, and the regional transmission organizations (“RTOs”) which manage regional multi-state transmission access to the grid, to remove rights-of-first-refusal from FERC-approved transmission tariffs. FERC Order No. 1000 addressed the difference between an obligation to build in one’s transmission zone and a federal right of first refusal: “[W]e do not believe that [the] obligation [to build] is necessarily dependent on the incumbent transmission provider having a corresponding federal right of first refusal to prevent other entities from constructing and owning new transmission facilities located in that region.”

FERC directed, in its Notice of Proposed Rulemaking (“NOPR”) prior to issuance of its Order 1000, that public utility transmission providers “eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.” This was kept intact when the final FERC Order 1000 rule was promulgated, and in the subsequent FERC Orders 1000-A and 1000-B. Failure of

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188 136 FERC P 61051 (July 21, 2011) (Order 1000).
189 Id. para. 313. Non-incumbent transmission developer rights must be “consistent with state or local laws.” Id. at para 317.
RTOs and ISOs to consider and evaluate independent non-incumbent transmission projects could violate the FERC Order 890 planning principle of “openness” in transmission planning. ¹⁹¹

Order 1000 does not require removal from Commission-jurisdictional tariffs or agreements references to state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities. ¹⁹² In terms of scope, Order 1000 only applies to jurisdictional public utilities, which include under the Federal Power Act only the investor-owned utilities and the RTOs which manage them. This would include only approximately less than 200 entities among the approximately 3,000 utilities in the U.S. ¹⁹³ Excluded are all federal government power marketing administrations, ¹⁹⁴ all rural electric cooperatives ¹⁹⁵ and membership utility cooperatives, municipal utilities, ¹⁹⁶ and all utilities not engaging in interstate commerce in Alaska, Hawaii, and the majority of Texas within the ERCOT RTO zone which does not interconnect with any other states and therefore technically does not engage in interstate commerce. ¹⁹⁷ These slightly less than 200 affected utilities own about 25% of the transmission and distribution infrastructure, measured as distance of lines, in the U.S.

2. **FERC Preemptive Authority**

The Supremacy Clause of the United States Constitution establishes preemption of federal law over state and local regulation: “[T]he laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the

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¹⁹¹ See Order 1000 at ¶229.
¹⁹² Id. at para. 253, n.231; Order No. 1000-A, FERC Stats. & Regs ¶ 31,132 at para. 381.
¹⁹³ S. Ferrey, Environmental Law, supra. at 579.
¹⁹⁴ Federal Power Act, Section 201(f), 16 U.S.C. 824(f).
¹⁹⁵ Id.
¹⁹⁶ Id.
¹⁹⁷ Federal Power Act, Section 201(f), 16 U.S.C. 824(b)(1).
Constitution or laws of any State to the contrary notwithstanding.” The Federal Power Act creates this “bright line” between state and federal jurisdiction. Sections 205 and 206 of the Federal Power Act empower FERC to regulate rates and related terms for any transmission of electricity in interstate commerce.

Applicable preemption doctrine under the Federal Power Act also expressly distinguishes wholesale from retail regulation. All transmission tariffs are exclusively within FERC, rather than state, jurisdiction. The Federal Power Act directs FERC to regulate all interstate electricity transmission and to ensure the reliability of the national electricity grid.

FERC case law exerts exclusive jurisdiction over the "transmission of electric energy in interstate commerce” and over "all facilities for such transmission or sale of electric energy.”

198 U.S. CONST. art. VI, cl. 2.
199 Id.
202 See infra Section III.
203 See, FERC Order 1000 at ¶287.
FERC approves all RTO and Independent System Operator (ISO) terms of service and the financial tariffs. However, FERC does not regulate the construction of transmission facilities themselves, only economic tariffs for transactions moving power over them.

There is a multi-year evolution of the federal regulatory history regarding greater competition in electric power transmission. Enforcing the Federal Power Act, the Federal Energy Regulatory Commission (FERC) for a quarter century has promoted competition in the operation of regulated energy markets. In Order No. 888, the Commission established the foundation for the development of competitive bulk power markets: non-discriminatory open access transmission service by electric utilities. In Order No. 2000, the Commission encouraged the development of Regional Transmission Organizations to form “competitive

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*See 136 FERC P 61051(F.E.R.C.) (July 21, 2011) (Order 1000), P 287. This pertains only to Commission-jurisdictional tariffs or agreements and does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements. See id., n. 231. FERC noted that Order 1000 does not address the prudence of investment decision nor determine which particular entity should construct any particular transmission facility, but merely to allow more entities to be considered for potential construction responsibility. Id. at at P 290.*


that had to incorporate non-discriminatory transmission service. In Order No. 890, the Commission amended the Order No. 888 pro forma tariff to require transmission providers to plan for the needs of their customers on a comparable basis to planning for their own needs.

Section 216 by the Energy Policy Act of 2005 directs the U.S. Department of Energy to study transmission congestion in consultation with the states, and designate certain transmission-constrained areas as national interest electric transmission corridors ("NIETCs"). Section 216 grants FERC authority to issue permits to construct transmission facilities in these NIETCs under certain circumstances. FERC implementation hit multiple suits for failure to adequately assess GHG impacts involving NEPA, and Endangered Species Act challenges regarding failure to assess GHG impacts could follow. A federal appeals court blocked FERC from acting to "backstop" and grant a federal permit under Section 216 for a new transmission line, where the state had failed for twelve months to act on the permit. As long as the state took some action, including a denial of the permit, this did not trigger FERC's Section 216 authority to intercede.

In 2011, the Ninth Circuit ruled that the DOE failed to properly consult with affected states in


\(^{212}\) See 18 C.F.R. §35.34(k)(7).


\(^{214}\) N.Y. Reg’l Interconnect, Inc. v. FERC, 634 F.3d 581, 584 (D.C. Cir. 2011); Order No. 890, para. 435.


\(^{218}\) See, for example, Pacific Coast Fed. of Fishermen’s Ass’ns v. Gutierrez, 606 F.Supp.2d 1122 (E.D. Cal. 2008); N.R.D.C. v. Kempthorne, 506 F.Supp.2d 322 (E.D. Cal. 2007).

\(^{219}\) Piedmont Environmental Council v. FERC, 558 F.3d 304 (4th Cir. 2009). In 2007, the PJM ISO approved the construction of the PATH transmission line to move power within the region through West Virginia, Virginia, and Maryland to constrained population centers along the Atlantic coast. None of the states cooperated. The economic crisis eased the need for the project and PJM rescinded its order.
preparing the Congestion Study, as required by section 216, and failed to consider the
environmental effects of designating NIETCs under the National Environmental Protection Act
for corridors in mid-Atlantic and Southwestern states.\textsuperscript{220}

There are three recognized circumstances in which federal law may preempt state law:

- federal law could explicitly establish the lines for state preemption;\textsuperscript{221}

- in the absence of explicit preemption, state law “may be preempted if it regulates conduct
  in a field Congress intended the federal government to occupy exclusively, either because
  the federal regulatory scheme is ‘so pervasive’ that a court may infer Congress left ‘no
  room for the States to supplement it;’”\textsuperscript{222} or

- state law could clearly conflict with the federal law.\textsuperscript{223}

A state cannot create a conflict or obstacle to federal licensing of federally regulated
energy generation facilities that are within the exclusive federal authority of a federal agency.\textsuperscript{224}
State law is not allowed to overrule or supplant federal determinations by adding requirements
not consistent with those in federal law.\textsuperscript{225}

3. \textbf{State Refusals to Remove ROFR for In-State Incumbents}

Notwithstanding this federal FERC prohibition in FERC Order 1000 of state ROFR,
Minnesota, North Dakota, South Dakota, Indiana and Oklahoma enacted state ROFR statutes,

\textsuperscript{220} \textit{California Wilderness Coalition v. U.S. Dept. of Energy}, 631 F.3d 1072 (9th Cir. 2011).
\textsuperscript{222} \textit{Entergy Nuclear}, 838 F. Supp. 2d at 218; \textit{see also English}, 496 U.S. at 79.
\textsuperscript{223} \textit{Id}.
\textsuperscript{225} \textit{Granite Rock Co. v. Cal. Coastal Comm’n}, 768 F.2d 1077, 1082 (9th Cir. 1985); \textit{Nat’l Meat Ass’n v. Harris}, 181
L.Ed.2d 950, 132 S. Ct. 965, 969 (2012) (deciding unanimously that federal law prohibits states from enforcing
requirements regarding “premises, facilities and operations” that are “in addition to or different from” those in
federal law).
nonetheless.\textsuperscript{226} Other states have proposed statutes.\textsuperscript{227} If there were a state right-of-first-refusal provision, the deck is effectively stacked against non-incumbents, even if the opportunity to compete is theoretically open to them through an RTO-administered competitive project selection process.

In Fall 2012, the Midwest Independent Transmission System Operator (“MISO”) and a subset of the MISO utility transmission owners made a compliance filing to FERC containing member state ROFRs, pursuant to the directives and timing requirements contained in FERC’s Order Nos. 1000, 1000-A and 1000-B.\textsuperscript{228} In spring 2013, FERC determined that MISO’s proposed new provision for state or local Rights of First Refusal must be removed from its tariff filing.\textsuperscript{229} FERC with regard to a PJM filing held that nothing in the commission’s regulations allows transmission owners to bar a non-incumbent transmission developer from cost-based recovery for its transmission facilities.\textsuperscript{230}

This state-federal preemption fight is now before the federal courts.\textsuperscript{231} In spring 2013, the Supreme Court rendered a decision on whether the Federal Communications Commission (FCC) can broadly construe its own jurisdiction, and whether it is entitled to judicial \textit{Chevron}

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\textsuperscript{226} States with either enacted or proposed ROFR laws include: Minnesota (Minn. Stat 216B.246 (2012)), New Mexico – Proposed (Senate Bill 175/House Bill 163 (2013 Current Session)) and South Dakota Codified Laws §49-32-19 (2011)).
\textsuperscript{227} See, Rishi Garg, supra.
\textsuperscript{229} FERC Order On Compliance Filings And Tariff Revisions, Re: Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners, et al., 142 FERC P 61215 (F.E.R.C.), Docket No. ER13-198-000 (March 22, 2013), at para. 205. FERC directed MISO to strike the following language: “Transmission Provider shall comply with any Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner.” Id.
\textsuperscript{230} 16 U.S.C. §§ 824 and 824e.
\textsuperscript{231} \textit{South Carolina Public Service Authority et. al v. FERC}, Cases Nos. 12-1232, 12-1233, 12-1250, 12-1276, 12-1279, 12-1280, 12-1285, 12-1292, 12-1293, 12-1296, 12-1299, 12-1300, 12-1304, 12-1448, and 12-1478 (D.C. Cir. 2013).
\end{flushright}
deference in this determination. On both issues, the Supreme Court’s answer was “yes.” In *Arlington v. FCC*, the majority held that Circuit precedent holding that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, applies to an agency’s interpretation of the scope of its own statutory jurisdiction: “statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. See *Iowa Utilities Bd.*, 525 U. S., at 397.” There is no distinction in terms of deference afforded the agency between an agency’s “jurisdictional” and “nonjurisdictional” interpretations. [If] “the agency’s answer is based on a permissible construction of the statute,” that is the end of the matter. *Chevron*, 467 U. S., at 842. This most recent Supreme Court decision on agency deference is consistent with recent determinations by FERC of about its own scope of authority on ROFR.

While the FCC is not FERC, it is a federal utility regulatory agency, and its relevance to the pending FERC ROFR energy issue is significant. Both federal agencies operate under federal statutes of similar vintage: The Federal Power Act of 1935, and the Communications

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233 *Arlington, slip op. at 5*. Under Chevron, the court must first ask whether Congress directly spoke to the precise question at issue; if so, the court must give effect to Congress’ unambiguously expressed intent. 467 U. S., at 842–843. However, if “the statute is silent or ambiguous,” the court must defer to the administering agency’s construction of the statute so long as it is permissible. Id., at 843.


Act of 1934. The division between federal and state authority under each of these statutes is similar: Local authorities approve the siting and construction of cell phone towers and facilities, subject to federal limitations interpreted by FCC regulation. FERC regulates interstate, wholesale, and transmission transactions. The FCC regulates communication utilities, FERC regulates other electric and gas utilities.

If Order 1000 is upheld by the D.C. Circuit on appeal, state ROFR legislation would likely then face strict scrutiny, under which legislation does not usually survive, under a Supremacy or Commerce Clause challenge. This is the third side of the preemption pentagon which will soon be construed by the federal courts.

III. THE OUTSIDE ENERGY BAR AND PREEMPTION OF STATE POWER

Not all state energy regulation attempts to provide incentives to certain in-state power. Some states have attempted to disadvantage certain energy when it would compete in state markets. This has manifested in four regulatory mechanisms:

- Banning continued operation of an individual power generation facility unless it sells its wholesale power to in-state entities at a significant discount to market rates
- Refusing to treat out-of-state wholesale renewable energy on an equal basis to in-state wholesale renewable energy
- Banning out of state fuels or their use to generate power in the state

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238 47 U.S.C. §151 et seq.
240 See supra. at Section II B.
241 South Carolina Public Service Authority et. al v. FERC, Cases Nos. 12-1232, 12-1233, 12-1250, 12-1276, 12-1279, 12-1280, 12-1285, 12-1292, 12-1293, 12-1296, 12-1299, 12-1300, 12-1304, 12-1448, and 12-1478 (D.C. Cir. 2013). Oral arguments have been scheduled for March 20, 2014.
242 See infra at Section III A 1.
243 See infra at Section III A 2.
244 See infra at Section III A 3.
Disadvantaging out-of-state fuels because of the greater global warming effect of transporting that fuel a longer distance into the state.\textsuperscript{245}

Does this allow a state to regulate interstate commerce extraterritorially? Do state environmental purposes overrule the Constitution’s Supremacy Clause ‘bright line’ on energy? Sides 4 and 5 of the pentagon feature these constitutional issues.

A. PREEMPTION PENTAGON SIDE 4: EXCLUDING CERTAIN POWER GENERATION FACILITIES AND THEIR POWER FROM A STATE

Some states have attempted to either disadvantage or exclude existing power generation facilities or their power generated from their states.\textsuperscript{246} Because this is wholesale power in interstate commerce, Constitutional Supremacy Clause issues are raised. Some states regulation has been Constitutionally stricken.\textsuperscript{247}

1. Wholesale Power Sale Price Constitutional Trip-Wires

Preemption of state power to regulate energy matters and state violations of the dormant Commerce Clause in 2012 were found by a federal court in a much-watched case in Vermont.\textsuperscript{248} As part of its regulation, Vermont attempted to extract financial concessions from the private power owners as a condition of a continued license to operate the generating facility in the

\textsuperscript{245} See infra at Section III B. The state regulation to burden out-of-state energy is now propounded in the furtherance of control of climate change. Distance of travel of commerce requires more use of fossil fuels to transport the commerce, which increases emissions of greenhouse gases (“GHGs”) with each additional mile. Therefore, the more distance between the commerce fabrication and consumption, the more effects on the environment, ceteris paribus. This rationale has been used by California to burden certain energy fuels that either travel a long distance to California, or are fabricated in the Midwest where more high-GHG coal is used to make the fuel. Id.

\textsuperscript{246} See infra Section III A 1-3, B.

\textsuperscript{247} See infra Section III A 1-3.

Whether a state can regulate to favor in-state consumer interests, without fundamentally violating the Constitution’s Supremacy Clause is a fundamental legal issue.

The change at issue involved when an existing statute was fundamentally altered by Vermont in 2006 immediately after the project owner filed to extend its federal operating license, by adding state amendments to Section 248, by Act No. 160, requiring discretionary approval as a condition for extension of an existing state energy generating facility operating license, from both the legislature and from the state Public Service Board. Prior to these 2006 amendments, under the original Section 231 of state statute, only the Public Service Board, a quasi-judicial semi-independent authority, had approval authority for such extensions through its tightly constrained adjudicatory process. Vermont legislators required Vermont Yankee to provide discounts from the future market-based wholesale price of power to be sold to in-state incumbent utilities as a requirement for granting a CPG for future operation of Vermont Yankee as an existing wholesale power generation facility. Hearings in Vermont on the PSB agency

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249 Id.
250 U.S. CONST. art. VI, cl. 2.
251 Consideration of what would become Act 160, began by the Vermont legislature one week after Entergy applied to the NRC for a license extension in 2006. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393 (2nd Cir 2013), slip op. at 11.
253 The legislative vote required in Act 160 (Sec 2e (2)) is a prerequisite additional step: “[T]he board may commence proceedings under this section and under 10 V.S.A. chapter 157, relating to the storage of radioactive material, but may not issue a final order or certificate of public good until the general assembly determines that operation will promote the general welfare and grants approval for that operation.” Act 160 at § 2(e)(2) (emphasis added).
254 Id.
255 Entergy Nuclear Vt. Yankee, L.L.C. v. Shumlin, 838 F. Supp. 2d 183, 192 (D. Vt. 2012) (citing VT. STAT. ANN. tit. 30, §§ 11–12 (2008)) (“At the time the 2002 MoU was signed, the Public Service Board was the quasi-judicial entity bestowed with statutory authority to consider petitions and grant CPGs . . . [and] is required to ‘make . . . findings of fact,’ to ‘state its rulings of law when they are excepted to,’ and its decisions can be appealed to the Vermont Supreme Court, which is required to accord them deference.”). Moreover, there is specific precedent as to what constitutes the Board’s public convenience, through a history of determinations and orders. See Vt. Pub. Serv. Bd., http://psb.vermont.gov/statutesrulesandguidelines (listing the Public Service Board’s determinations and orders).
256 Id., Complaint for Declaratory and Injunctive Relief, supra. at 30.
petition advancing in an adjudicatory forum\textsuperscript{257} were halted when the state senate voted not to approve or permit such a new CPG in early 2010.\textsuperscript{258}

Judicial relief was sought by the existing facility owner.\textsuperscript{259} The federal trial court ruled that this Vermont regulation of energy violated both the Supremacy Clause in two different regards and was preempted, as well as the dormant Commerce Clause Constitutional limitations on state energy regulation, although in one regard one of the preemption claims was not yet ripe.\textsuperscript{260} On appeal, the Second Circuit did not disagree with the substantive decision on the dormant Commerce Clause, but procedurally held that that issue also was not yet ripe for review until plaintiffs actually entered a forced PPA with the state.\textsuperscript{261} The Second Circuit concurred that it was ripe to find the Vermont statute preempted on one of the two claims by federal law, and struck the statute as unconstitutional.\textsuperscript{262}

\textsuperscript{257}For discussion of administrative law adjudicatory proceedings, see generally Steven Ferrey, \textit{Environmental Law}, supra. at 45–48. Proceedings before a state electric energy regulatory agency have the attributes of a trial to protect all participants. Formal legal rules govern the trial-like process. \textit{Id.} at 47–48. There is formal presentation of sworn evidence, cross-examination by counsel, procedural motions, discovery of documents, briefs filed by the parties, and a decision that must be based on the formal transcribed record and based on the weight of substantial evidence. \textit{Id.} Appeal is allowed to the courts based on either procedural issues or a decision not based on formal substantial evidence. \textit{Id.} at 48. This is in contrast to a decision of a state legislature, which has no such formal legal protections.

\textsuperscript{258}“\textit{Senate Votes to Close Vermont Yankee Nuclear Plant in 2012,}” BURLINGTONFREEPRESS.COM (Feb. 24, 2010), available at http://www.burlingtonfreepress.com/viewart/20100224/NEWS02/100224050/Senate-votes-close-Vermont-Yankee-nuclear-plant-2012. The federal NRC had renewed the plant’s federal operating license in March 2011 for an additional twenty years past its scheduled expiration. \textit{Id.}


\textsuperscript{260}\textit{Id.}

\textsuperscript{261}\textit{Entergy Nuclear Vt. Yankee, LLC v. Shumlin}, 733 F.3d 393 (2Nd Cir 2013), slip op. at 46 (There was needed still “a factual record concerning incidental effects of such an agreement on interstate commerce…..This case therefore does not present a ‘concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III,’ and is therefore not ‘ripe within the constitutional sense.’…..no [PPA] agreement is before us. Accordingly, the analysis required under the dormant Commerce Clause may not be performed, and so Entergy’s claim is unripe at this time.” \textit{Id.} at 49-50.

\textsuperscript{262}\textit{Id.}
The state of Vermont could not control sale of power interstate outside of its origin in Vermont. The federal trial court held that the Federal Power Act invests the Federal Energy Regulatory Commission with “exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, and struck state regulation as unconstitutional.”


Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable. Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 374 (1988)…..a state “must . . . give effect to Congress’ desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.” Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986)…..Under the “filed-rate doctrine,” state courts and regulatory agencies are preempted by federal law from requiring the payment of rates other than the federal filed rate. See Entergy La., Inc. v. La. Pub. Serv. Comm’n, 539 U.S. 39, 47 (2003) (“The filed rate doctrine requires ‘that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.’”

The difference between the federal trial court and the Second Circuit opinions is one of slight distinction on the procedural ripeness of one issue presented, prior to that issue being handled by FERC, rather than of substance:

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263 Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 224 (D. Vt. 2012) (‘states are ‘without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State…[a] ‘protectionist regulation’ violating the Commerce Clause (quoting New England Power, at 338-39).”). Id. slip op. at 83-84.  
264 Id. slip op. at 82-83; also see New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982); also see 16 U.S.C. §824(b)(1).  
265 Id. slip op. at 83-84 (quoting Nantahala, 476 U.S. at 962).
• On the first federal preemption claim in Count 1: Both courts agreed that the Vermont law was preempted and permanently enjoined its enforcement as unconstitutional.266

• On the second preemption claim in Count 2: “The [trial] court then held that even if Entergy were to be forced to enter into a new PPA [power purchase agreement] in violation of the market-based tariff, its recourse would be to have the agreement reviewed by FERC. Id. at 235. The trial court thus declined to enjoin the defendants on the basis of this Federal Power Act claim,” and both the trial and Second Circuit courts agreed that this issue was not yet ripe for review since FERC review had not yet occurred.267

• On the third preemption claim in Count 3: The trial court found unconstitutional and issued an injunction “enjoin[ing] Defendants from conditioning Vermont Yankee’s continued operation on the existence of a below-market PPA with Vermont utilities.”268 The Second Circuit did not disagree with the substantive decision on the dormant Commerce Clause and found preemption likely, but procedurally held that this issue was not yet ripe for review until plaintiffs actually entered such a forced PPA with the state.269

The distinction made by the Second Circuit was only procedurally based on the issue not yet being ripe for review – a final decision on Count 3 needed to await until there was a PPA entered and there was developed

“a factual record concerning incidental effects of such an agreement on interstate commerce…..This case therefore does not present a ‘concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III,’ and is therefore not ‘ripe within the constitutional sense.’”270

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266 The Second Circuit, in agreement with the trial court, conducted an in-depth analysis of the legislative intent, quoting one of its pervious decisions, Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100, 108 (2d Cir.1999):

“We do not blindly accept the articulated purpose of [a state statute] for preemption purposes. If that were the rule, legislatures could nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.” Id. at 416 (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 106, (1992) abrogated on other grounds by Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, (2001)).

267 Entergy Nuclear Vermont Yankee, LLC v. Shumlin, 733 F.3d 393 (2nd Cir 2013), slip op. at 17.


269 Entergy Nuclear Vermont Yankee, LLC v. Shumlin, 733 F.3d 393 (2nd Cir 2013), slip op. at 46 (“Vermont argues, however, that the district court erred in issuing an injunction on the basis of its finding mere intent on the part of the defendants to seek a favorable PPA, and that the issue was therefore not ripe for judicial review. We agree.”), at 49 (needing “a factual record concerning incidental effects of such an agreement on interstate commerce…..This case therefore does not present a ‘concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III,’ and is therefore not ‘ripe within the constitutional sense.’”).

270 Id. at 49.
The fact that no PPA had been entered made Counts 2 and 3 not yet ripe procedurally for court decision: “…no [PPA] agreement is before us. Accordingly, the analysis required under the dormant Commerce Clause may not be performed, and so Entergy’s claim is unripe at this time.”

2. The Constitutional Line on Transmission and Renewable Power Credits

When dealing with power, can states be compelled to pay for the infrastructure to move power that they do not want? This infrastructure is not the power itself, but the transmission infrastructure used to move power in America. A study by the U.S. Department of Energy forecasts that 39,000 miles of additional high voltage transmission circuits to be constructed in the next decade.

Transmission infrastructure is distinct from distribution infrastructure. More straightforward approaches to determining what is transmission and what is distribution was blurred by FERC Order 888, which created a seven-factor test regarding the purpose for which power is moved in individual transactions, to determine whether it is transmission or distribution. The distinction between transmission and distribution facilities is more than an engineering question about voltage. It has profound implications for the structure of preemption.

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271 Id. at 50.
273 The former traditionally is comprised of the higher voltage copper and aluminum lines, typically operating at above 69 kV. The latter traditionally includes lower voltage lines, typically operating below 69 kV. See generally, Steven Ferrey, Law of Independent Power, supra, at Section 5:10.
In a recent decision of the 7th Circuit Court of Appeals, what was at issue was clearly transmission infrastructure. Judge Richard Posner, speaking for the Seventh Circuit Court of Appeals in a unanimous Circuit decision, affirmed the Federal Energy Regulatory Commission’s approval of the Midwest Independent Service Operator’s (MISO) proportionate customer utility allocation of transmission costs for high-voltage transmission lines to move renewable wind power to populated areas. The petitioning states raised six challenges, each of which was rejected by the Seventh Circuit Court of Appeals. The court dismissed the 10th amendment challenge as “frivolous,” noting that it was “…a far cry from the federal government’s conscripting a state government into federal service.” The court deferred to the federally sanctioned determination of cost allocation.

For authority for its holding on the respective jurisdiction of state and federal government to regulate electricity, the opinion relied on a 2012 law review article on Constitutional energy issues authored by Professor Ferrey. The Seventh Circuit declared unconstitutional state regulation limiting state renewable portfolio standards to in-state generation, as a violation of the

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275 MISO’s service area extends from the Canadian border, east to Michigan and parts of Indiana, south to northern Missouri, and west to eastern areas of Montana. See Figure 1, supra.
276 Illinois Commerce Commission, et al. v. Federal Regulatory Commission, 721 F.3d 764, (7th Cir. 2013). MISO allocated the costs of the transmission projects among all of the utilities who draw power from the MISO grid in proportion to each utilities’ overall volume of usage; FERC approved MISO’s rate design, which led some states to initiate court appeal.
277 The six challenges were: Does FERC’s approval of the MISO transmission tariff violate the 10th Amendment to the Constitution by coercing states into approving all MVPs proposed within their borders? Are the benefits associated with the transmission projects proportional to the costs imposed? Did FERC have to conduct an administrative evidentiary hearing during its consideration of MISO’s proposed financing mechanism? May MISO allocate the total costs of new transmission among the load of member utilities on the basis of their overall power consumption while allocating no costs to generation? Can MISO allocate costs associated with the transmission to non-member utilities which are members of PJM ISO? Can MISO allocate costs to utilities which are leaving MISO?
279 Id. Judge Posner noted that the petitioners failed to provide any estimates of costs and benefits associated with the new facilities to contradict MISO’s estimated $297 million cost savings. Id.
280 Id. (Steven Ferrey, Threading the Constitutional Needle with Care,” 7 University of Texas Journal of Oil, Gas and Energy Law, 59 (2012)(cited by 7th Circuit on Constitutional authority regarding state energy regulation).
Commerce Clause: “it trips over an insurmountable constitutional objection. Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy.”\(^\text{281}\) The Commerce Clause is another prong of Constitutional contours within which state regulation must fit,\(^\text{282}\) which is beyond the scope of this article.

3. **Transmission and Generation of High-Carbon Power**

Section III A1, above, addressed interpretation of preemption when states manipulate wholesale prices of power sale for power generated within their states, and Section III A 2, above, addressed Constitutional limits on states burdening interstate renewable power sales originating from a source exterior to the regulating state. A combination of both elements comes together when a state attempts to bar certain types of power generation in the state or import of certain types of power transmitted into the state. This issue as addressed in 2014 by federal court in the Midwest.\(^\text{283}\)

Minnesota's Next Generation Energy Act is a law aimed at reducing carbon dioxide emissions from large power plants outside the state and banned the import of foreign coal for power generation or coal-produced power into Minnesota:\(^\text{284}\) “no person shall...import or commit to import from outside the state power from” coal production facilities or “enter into a new long-term power purchase agreement that would increase statewide power sector carbon

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\(^{281}\) Id., slip op. at 15. Michigan actually initiated the issue of in-state electric power discrimination in its RPS program as a demonstration that out-of-state powered transmitted to it was not recognized as of the same value as in-state electricity, therefore Michigan should not pay a share of power line tariffs transmitting power from out of state that did not have equal recognition and benefit. Instead of supporting its position, this assertion caused Judge Posner and the Court to respond to this assertion, even though it was not the tariff issue before the Court. Id.

\(^{282}\) Steven Ferrey, *Threading the Constitutional Needle with Care,* 7 University of Texas Journal of Oil, Gas and Energy Law, 59 (2012).


\(^{284}\) Minnesota-based utilities operate power plants in west-central North Dakota's coal-producing region. The power stations are fueled by nearby lignite mines. The law made exceptions for Minnesota coal projects. 2007 Minn. Laws Ch. 136, art. 5, § 3; Minn.Stat. § 216H.03, subd. 3.
dioxide emissions.\textsuperscript{285} The law bans Minnesota utilities from importing power from new coal plants outside the state, and raises the cost of future purchases of coal power by assigning environmental costs to use of the fuel.\textsuperscript{286} The act prohibits construction of new coal plants in the state and restricts utilities from creating any more long-term power-purchase agreements for coal-derived energy from other states.\textsuperscript{287} The law does not prohibit an extension for existing contracts with existing coal-fired generation units.\textsuperscript{288}

North Dakota and others sued Minnesota as the statute as a violation of the dormant Commerce Clause by discriminating against North Dakota’s use of coal and export of power in interstate commerce.\textsuperscript{289} North Dakota alleged that it affects the wholesale price and transmission of power and burdens interstate power sales.\textsuperscript{290} The court addressed the balkanization that the Commerce Clause was designed to prevent. The court noted that with the presence and operation of the Midcontinent Independent System Operator (“MISO”), the area's regional transmission organization, the Act can affect out-of-state entities, including regulatory agencies:

….. If any or every state were to adopt similar legislation (e.g., prohibiting the use of electricity generated by different fuels or requiring compliance with unique, statutorily-

\begin{itemize}
\item \textsuperscript{285} Minn. Stat. §216H.03, subd. 3 (Establishing the provision which limits increases in statewide power sector carbon dioxide emissions).
\item \textsuperscript{286} Id., providing that no person shall “import or commit to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions.” Minn.Stat. § 216H.03, subd. 3(2). A “new large energy facility” is defined as “any electric power generating plant or combination of plants at a single site with a combined capacity of 50,000 kilowatts or more and transmission lines directly associated with the plant that are necessary to interconnect the plant to the transmission system.” Minn.Stat. § 216B.2421, subd. 2(1), but excludes facilities that “use[] natural gas as a primary fuel.” Minn.Stat. § 216H.03, subd. 1.
\item \textsuperscript{287} Id. Exemptions were made for the proposed Excelisor Energy integrated gasification combined cycle (IGCC) plant in northern Minnesota, the Big Stone II coal plant in South Dakota, and the Maple Grove-based Great River Energy’s Spiritwood Station plant in North Dakota. Minn. Stat. § 216B.1694, subd. 1 (2008); 2009 Minn. PUC LEXIS 6; 2010 Minn. PUC LEXIS 458.
\item \textsuperscript{288} Minn.Stat, §216H.03 subd.7.
\item \textsuperscript{289} North Dakota v. Heydinger, D. Minn., et al., supra.
\end{itemize}
mandated exemption programs subject to state approval), the current marketplace for electricity would come to a grinding halt….. Such a scenario is "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." Healy, 491 U.S. at 337.291

The court declined to even need or be required to reach the issue of whether there was undue discrimination in the substance of the Minnesota statute. Instead the court went directly to the issue that Minnesota acted extra-territorially in terms of the effects of its regulation on commerce in electricity originating in other states. The Minnesota court highlighted precedent of the Supreme Court and many appellate courts including a prior decision of the 7th Circuit292 (which was also then deciding the Illinois v. FERC case293) which used extraterritoriality rationale for aspects not focused on price regulation.294 Price regulation seemed to be the only scrutiny imposed by the California federal court in the Rocky Mountain case.295

The Minnesota federal court announced the fundamental Commerce Clause principle that “any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of State’s power.”296 Finding that it had acted clearly to affect commerce occurring outside the state, the court found this a per se violation of the Commerce Clause:

The Court finds that Minn. Stat. § 216H.03, subd. 3(2)-(3), violates the extraterritoriality doctrine and is per se invalid and, therefore, the Court need not address whether the statute is discriminatory or fails a Pike analysis. Under the extraterritoriality doctrine,

291 Id., Slip op. at 45.
292 National Solid Wastes Management Ass’n v. Meyer, 63 F.3d 652, 653-54 & n. 1 (7th Cir. 1995)(“The practical impact of the Wisconsin statute on an economic activity completely outside the State reveals its basic infirmity… “).
293 Illinois Commerce Commission, et al. v. Federal Regulatory Commission, 721 F.3d 764, (7th Cir. 2013); see discussion supra in Section III A 2.
294 North Dakota v. Heydinger, supra. at 18.
295 See infra. at Section III B.
296 North Dakota v. Heydinger, supra. at 17 (citing Edgar v. MITE Corp., 457 U.S. 624, 642 (1982)).
"[t]he Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders." Cotto Waxo Co., 46 F.3d at 793 (citing Healy, 491 U.S. at 336). In other words, a state statute is invalid "when the statute requires people or businesses to conduct their out-of-state commerce in a certain way." Id. This is true regardless of whether the commerce has effects within the state, Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982), and regardless of whether the legislature intended for the statute to have an extraterritorial effect, Healy, 491 U.S. at 336. "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." Id. (emphasis added) (citing Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)). The practical effect of a statute is evaluated by looking not only at "the consequences of the statute itself," but also at "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." Id.297

In the testimony of an expert in the case, “[o]nce the generating facility injects its output into the interconnected transmission network, the electrons move according to physical laws, unresponsive to any state law or contract provisions.”298 Weighing the effect of the Minnesota statute’s extra-territorial reach on electricity commerce, that by its very nature was unavoidably interstate, the Minnesota federal court determined that in its basic scope the Minnesota statute was discriminatory in violation of the most basic elements of the Commerce Clause, even without more detailed application of a strict scrutiny or Pike balancing test:

Therefore, in each of those cases, the courts found that the statute at issue did not require out-of-state parties to transact out-of-state business according to the regulating state's terms because the manufacturers could simply avoid engaging in the prohibited conduct when transacting out-of-state business.

297 Id. slip op. at 32.

The federal court in Minnesota made a critical distinction between electricity unavoidably in interstate commerce, and the more controllable liquid ethanol fuels in commerce in the *Rocky Mountain* Commerce Clause litigation\(^{299}\) proceeding at the same time in California:

Because of the boundary-less nature of the electricity grid, the effect of Minn. Stat. § 216H.03’s regulatory scheme on interstate commerce is much different than that of the statutes at issue in Cotto Waxo Co., National Electrical Manufacturers Ass’n, and Rocky Mountain, where the Circuit Courts declined to invalidate the regulations on extraterritoriality grounds. Those cases dealt with the regulation of tangible products (sweeping compounds, light bulbs, and ethanol, respectively) that could be shipped directly from point A to point B.\(^{300}\)

The Minnesota court treated electricity distinctly from other energy sources, which it is both in terms of its physics and its status in American law.\(^{301}\) This is a physical reality not always brought to the attention of courts, but when it is, the Supreme Court\(^{302}\) and other courts have upheld its ineluctably interstate nature. The Fifth side of the pentagon, did not find such preemption when dealing with liquid fuels.\(^{303}\)

### B. PREEMPTION PENTAGON SIDE 5: THE ROCKY MOUNTAIN DIVIDE ON INTERSTATE ENERGY COMMERCE

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\(^{299}\) See discussion infra at Section III B.

\(^{300}\) Id., slip at p. 45.


\(^{303}\) See infra Section III B.
California is accused of attempting to discriminate against interstate commerce in the transport of certain energy resources, while exempting in-state transport from an equivalent burden. All of this was to address the energy-related aspects of climate change.

1. **The California Low Carbon Fuel Standard**

The purpose of California’s low carbon fuel standard (“LCFS”) is “to implement a low carbon fuel standard, which will reduce greenhouse gas emissions by reducing the full fuel-cycle, carbon intensity of the transportation fuel used in California.” The LCFS was “designed to reduce California’s dependence on petroleum” and “to stimulate the production and use of alternative, low-carbon fuels in California.” The LCFS regulates transportation fuels that are “sold, supplied, or offered for sale in California.” and focuses on the “carbon intensity” of fuels, a metric designed to assess “the amount of lifecycle greenhouse gas emissions, per unit of energy of fuel delivered, expressed in grams of carbon dioxide per megajoule.”

The LCFS rule is to reduce the carbon content of transportation fuels sold in California by 10% by the year 2020 from the year 2010 baseline. The LCFS is a “set of regulations to govern the marketing of gasoline-ethanol blends sold in California.” The goal of LCFS is to reduce carbon intensity of fuels by 10% by 2020 through regulations requiring providers of gasoline and diesel fuels to calculate the carbon intensity (CI) of each fuel component, report such calculations to CARB, and make reductions in order to meet the carbon intensity.

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304 See infra at Section III B 2.
305 17 Cal.Code Regs. § 95480.
307 Id.
309 719 F. Supp. 2d 1170, 1177 (E.D. Cal. 2010).
CARB’s LCFS rule includes the lifecycle GHG emissions of fuel, including emissions produced during production and transportation of fuels to California. Carbon intensity is not limited to how much carbon the fuel contains, but also includes the amount of carbon released in the full fuel cycle including its transportation over distances to California markets. To accomplish this carbon intensity reduction, the LFCS assigns carbon intensity scores to all covered fuels. To lower their carbon intensity scores, providers may blend low-carbon ethanol into gasoline. But even if a provider blends low-carbon ethanol into their fuel, the provider’s carbon intensity score also is affected by the other factors of the greenhouse gas emissions lifecycle, in particular, the location of the commerce and distance from California markets. Corn-derived ethanol produced in the Midwest is assigned a higher carbon intensity score than chemically similar corn-derived ethanol produced anywhere in California, regardless of its transportation within California. Thus, a chemically identical ethanol imported from the Midwest is deemed to have a higher carbon intensity than ethanol produced anywhere in California, making the Midwest product more expensive for fuel providers seeking to meet the California fuel standard requirements.

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310 Id.
311 17 Cal.Code Regs. Section 95481(a)(28). The LCFS refers to this inclusive concept as the “lifecycle greenhouse gas emissions,” which is defined as: aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Executive Officer, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.
313 Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1099 (E.D. Cal. 2011). The LCFS does allow for providers to apply for a customized total carbon intensity value rather than be subject to the assigned default score, which providers in the Midwest have applied. Id.
314 Rocky Mountain Farmers Union v. Goldstene, 719 F. Supp. 2d 1170, 1177 (E.D. Cal. 2010). Providers may also buy credits generated from another fuel provider that has credits in order to meet LFCS standards.
315 Id. The carbon intensity calculation does not account for intrastate shipping within the state, notwithstanding that California is the third largest U.S. state geographically. California’s 770 miles in length is a greater than the distance from ten other states to California. Thus, all fuel, wherever produced in California and wherever consumed, does not incur a higher carbon efficiency factor for purposes of this regulation.
In a case distinct from a somewhat similar suit on the merits by other parties under Constitutional principles in federal court, the largest ethanol producer in the United States challenged the LCFS rule in California state court, alleging a failure to comply with the California Environmental Quality Act (CEQA). The California state appellate court held that California had, in fact, violated CEQA and the California Administrative Procedure Act by approving the regulation before the required review under CEQA. The California Supreme Court denied a petition from CARB seeking review, and the agency is required to reopen the LCFS. In a prior analogous matter, the Ninth Circuit held that the public must have an opportunity to comment on government environmental assessments and environmental Findings of No Significant Impact at all points in the rulemaking process, pursuant to the equivalent federal environmental law, NEPA:

“We have determined that an environmental plaintiff was ‘surely ... harmed [when agency action] precluded the kind of public comment and participation NEPA requires in the EIS process,’ and that this type of ‘procedural’ injury is tied to a substantive “harm to the environment”—‘ ‘the harm consists of added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment. NEPA's object is to minimize that risk, the risk of uninformed choice....’”

However, on Constitutional issues, the litigation was in federal court.

2. **Preemption of California Regulation**

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316 Id.
317 Poet, LLC v. California Air Resources Board, Poet LLC, 218 Cal. App. 4th 681 (2013). Poet argued that CARB failed to respond to numerous public comments, that it omitted documents from the rulemaking file, and that the LCFS will lead to increased GHG emissions, not the reductions it promises. Poet alleged that CARB’s LCFS rule exceeds the scope of authority delegated to it by the legislature. Id.
318 Id.
320 Citizens for Better Forestry v. U.S. Dept. of Agriculture, 341 F.3d 961, 970 (9th Cir. 2003).
321 Id. at 971 (internal citations omitted).
Plaintiffs argued that CARB’s LCFS regulations were preempted by federal environmental law, when LCFS closed off California to those federally grandfathered bio-refineries which would need either to not participate in the California ethanol fuel market or reduce their carbon emissions, although not so required by federal law. Defendants opposed the Plaintiffs’ preemption motion not on their merits, but on procedural defenses based on lack of standing and lack of causation. The Defendants’ argued that the “farmer plaintiffs” and the “industry plaintiffs” fail to establish standing even after the Court allowed limited discovery regarding this issue. The industry plaintiffs argued that they have individual and associational standing because the LCFS imposes burdens and requirements that would not be required without the regulation and it constrains the industry plaintiffs’ ability to sell corn ethanol to California.
In a prior determination, the Ninth Circuit held that plaintiffs had standing to seek injunctive relief to preclude the implementation of a new policy where the government agency allegedly failed to comply with the procedural requirements of NEPA and the Endangered Species Act prior to the promulgation of the policy.\(^{327}\) In the Rocky Mountain case, the court held that while individual plaintiffs have not provided evidence of individual standing, but that at least one of the industry plaintiffs members suffered an actual injury which established associational standing,\(^{328}\) under the three following prongs:

“its members would otherwise have standing to sue in their own right; the interests it seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”\(^{329}\)

The defendants argued that the industry plaintiffs do not meet the first and third prongs because it was not shown that any of the members suffered an injury, there is no evidence of an actual or imminent injury, and preemption requires participation of individual members of the lawsuit.\(^{330}\) The court disagreed with CARB regarding the first prong of the associational standing test, finding that at least one of the industry plaintiffs’ members suffered an actual injury and would have the right to sue on its own.\(^{331}\) Similarly, the court on the third prong held

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\(^{327}\) Citizens for Better Forestry v. U.S. Dept. of Agriculture, 341 F.3d 961 (9th Cir. 2003).

\(^{328}\) Id. at 1099-1100. The court points to two specific affidavits that name specific plants that will be harmed by the LCFS and alleges injuries that have been suffered and therefore the Court finds the first prong satisfied. Id. Plaintiff Growth Energy had previously submitted evidence to satisfy this prong. Id. Although they state that the LCFS targets and harms their members, the industry plaintiffs do not submit any evidence to prove this allegation. Id. at 1099.

\(^{329}\) Id. at 1099.

\(^{330}\) Id. at 1099. Neither the court nor the state addressed the second prong of this test because the industry plaintiffs easily meet this requirement of the organization’s purpose. Id.

\(^{331}\) Id. at 1100. The court points to two specific affidavits that name specific plants that will be harmed by the LCFS and alleges injuries that have been suffered and therefore the Court finds the first prong satisfied. Id. Growth Energy has previously submitted evidence that satisfy this prong. Id.
that individual participation of the members is not needed and therefore it only “raises a pure question of law.”

Because the state opposed an as-applied preemption challenge while the plaintiffs opposed a facial challenge, the court deferred a decision until future briefing on these different issues and the standards of review that the court should use, and denied “without prejudice the Rocky Mountain plaintiffs’ summary judgment motion related to its preemption claim.”

Having already found the LCFS illegal on other Constitutional grounds, as discussed immediately below, the federal district court did not need to resolve this additional claim of preemption, holding that petitioners lacked standing to raise it.

The Ninth Circuit stayed the district court’s injunction in April 2012, pending appeal. On appeal to the Ninth Circuit, CARB cited Rice v. Santa Fe Elevator Corp., that all preemption analyses must start with the assumption that the historic police powers of the state are not superseded by a federal act unless that was clearly the intent of Congress, particularly in areas of traditional state regulation, such as pollution control. CARB relied on the Ninth Circuit’s decision in another environmental case involving CARB, arguing that federal EISA’s

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332 Id.
333 A challenge is facial, as opposed to as-applied, when the “claim and the relief that would follow... reach beyond the particular circumstances” of the plaintiffs.” Id. at 1102.
334 Id. at 1102-3.
335 Id. at 1103.
336 See infra at Section III B 3.
337 Rocky Mountain Farmers Union v. Richard Corey, et al., 730 F.3d 1070 (9th Cir. 2013).
338 Appellants’ Opening Brief at 3, Rocky Mountain Farmers Union, et al. v. Richard Corey, et al., 730 F.3d 1070 (9th Cir. 2013).
340 Id. at 1104.
341 Pacific Merchant Shipping Ass’n v. Goldstene, 639 F.3d 1154, 1167 (2011)(air pollution prevention falls under the broad police powers of the states).
savings clauses clearly limit its preemptive reach, citing two separate savings clauses in the EISA.  

The plaintiffs countered that the Supreme Court of the United States, in *Engine Manufacturers Ass’n v. South Coast Air Quality Management District*, invoked Clean Air Act preemption “against rules enacted by a political subdivision of California that prohibited the purchase or leasing of vehicles which failed to meet certain emissions requirements.” The Court found that “a state law need not actually interfere with federal law to be considered ‘related to’ the federal law for the purposes of preemption.” Conflict preemption is triggered when a state law actually conflicts with a federal law and therefore a party cannot comply with both the state and federal law. Neither party addressed at the trial level whether the LCFS regulation is severable.

The *Rocky Mountain* plaintiffs alternatively asserted at trial that court strict scrutiny still applies because under the Commerce Clause, one state’s laws cannot “control conduct beyond the boundary of the state.” Defendants countered at trial that the only effects the LCFS may

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342 Rocky Mountain v. Corey, 730 F.3d 1070, 1104 (9th Cir. Sept. 18, 2013).
343 Id. at 112-13. The first cited savings clause states, “[e]xcept to the extent expressly provided in this Act or an amendment made by this Act, nothing in this Act or an amendment made by this Act supersedes, limits the authority provided or responsibility conferred by, or authorizes any violation of any provision of law (including a regulation), including any energy or environmental law or regulation.” The second cited clause repeats what the first states; “Except as provided in section 211(o)(12) of the Clean Air Act, nothing in the amendments made by this title to section 211(o) of the Clean Air Act shall be construed as superseding, or limiting, any more environmentally protective requirement under the Clean Air Act, or under any other provision of State or Federal law or regulation, including any environmental law or regulation.” Id.
344 Id.
345 Id.
347 Id. at 1102. “Neither party explains sufficiently their position of whether the LCFS is a series of severable restrictions on dissimilar entities or single, integrated market-based compliance mechanism that applies to all fuel providers in the California market.” Id.
348 Id. at 1090. The Rocky Mountain Plaintiffs cited such examples as the LCFS regulating land use in the Midwest and deforestation in South America rather than solely regulating ethanol carbon emissions within the borders of California. Id. at 1091.
have on out-of-state producers are indirect and therefore not do not directly regulate outside California’s boundaries. 349 The trial court had found for plaintiffs, identifying the issue as “whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” 350 The trial court held that under the Commerce Clause, states cannot place restrictions on imports “in order to control commerce in other states.” 351 The court held that “this type of regulation ‘forc[es] a merchant to seek regulatory approval in one State before undertaking a transaction in another,’ causing the LCFS to ‘directly regulate[ ] interstate commerce.’” 352

In December 2011, the federal District Court for Eastern District of California at the trial level upheld plaintiffs’ argument, invalidating certain parts of the LCFS rule on Commerce Clause issues and enjoining the rule’s enforcement, as it “discriminates against out-of-state corn-derived ethanol while favoring in-state corn ethanol and impermissibly regulates extraterritorial conduct.” 353

The federal trial court reiterated that only the federal government can regulate commerce between the states, and California, attempting to regulate commerce outside its borders, violates exclusive federal authority to regulate interstate commerce. 354 A state cannot, even indirectly, regulate or burden commerce originating outside of its geographic jurisdiction. 355 The court again distinguished motive from Constitutional requirements, holding, ”Although [the state’s]

349 Id. at 1091.
350 Id. at 1091.
351 Id. at 1092.
352 Id. at 1092. If a provider changes its part of the fuels lifecycle, such as changing its transportation mechanism to California, this change must be submitted to CARB. Id.
353 Id. at 1081. CARB attributed the difference in carbon intensity values to multiple scientific factors in addition to geographic location factors (emissions related to shipping or transportation of fuel). The court relied upon a “table” of Carbon Intensity values generated by CARB. Id.
355 S. Pac. Co. v. State of Ariz. ex rel. Sullivan, 325 U.S. 761, 779-80 (1945)(out-of-state trains travelling through Arizona had imposed on them by Arizona length limitations, affecting travel from California to Texas, which is outside the jurisdiction of Arizona’s police power).
goal to combat global warming may be legitimate, it cannot be achieved by the illegitimate means of isolating the state from the national economy."

On appeal, a split panel of the Ninth Circuit majority reversed this opinion. The Ninth Circuit agreed that the preemption issues was not yet ripe and remanded for further trial court development of the record on this issue. The Ninth Circuit reversed the trial court determination on extraterritorial impact of the LCFS as a violation of the Commerce Clause. The Ninth Circuit majority opinion determines that it is acceptable for a state to calculate transportation CO₂ in the carbon emissions index or rating of delivered fuel: “The dormant Commerce Clause does not require California to ignore the real differences in carbon intensity among out-of-state” product pathways to California, including the type of electricity consumed in the region of production and the distance of travel of the product to California. According to the Ninth Circuit majority, a state environmental purpose to reduce GHGs emitted in the state is enough to impose such regulation and any resultant costs on out-of-state commerce.

IV. THE FIVE-SIDED PENTAGON OF PREEMPTION

Constitutional interpretation is still in motion: Appeals are now pending after the New Jersey and Maryland LCAPP trial court cases striking state regulation of locational preferences of new power generation, as well as in the Minnesota matter striking state restriction of use of

356 Rocky Mountain Farmers Union v. Goldstene, supra.
357 Rocky Mountain v. Corey, 730 F.3d 1070, 1104 (9th Cir. Sept. 18, 2013).
358 Id.
359 Id. slip op. at 42.
360 Id.
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foreign coal power, and certiorari has been requested of the Supreme Court after the 7th Circuit decision noting the impermissible state discrimination in state renewable power credits while upholding federal allocation of regional power transmission costs. The Ninth Circuit opinion on California burdens on foreign products in interstate commerce regarding renewable fuels did not receive a majority to rehear the case en banc before the Ninth Circuit. Certiorari has been petitioned to the Supreme Court.

The Ninth Circuit opinion is distinct, in that it alone covers energy that is not electric energy, but tangible liquid fuels whose interstate commerce is controllable. The Ninth Circuit opinion, among those seven recent state energy regulatory decisions covered above, is the only decisions upholding the Constitutionality of state regulation of energy. The nature of the type energy regulated by a state, with electricity occupying a distinct physical and legal space, is a key constitutional distinction. However, there also is a distinction in application of the Commerce Clause: The Ninth Circuit majority described discriminatory access to markets as being an “incentive,” where other federal courts and the Supreme Court find such restriction on commercial access unconstitutional.

If certiorari is granted, the Ninth Circuit has been overturned more than a ratable share of times by the Supreme Court when it makes decisions on environmental matters: “In their reversals, the justices often expressed impatience with what they see as stubborn refusal by the lower court to follow Supreme Court precedent.”

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362 See supra n. 287.
364 Rocky Mountain v. Corey, 730 F.3d 1070 (9th Cir. Sept. 18, 2013)(petition for certiorari en banc).
2009, including in 5 environmental matters, Ninth Circuit decisions were overturned in 15 of the 16 cases reviewed that term by the U.S. Supreme Court. During the term ending in July 2011, the US Supreme Court heard 84 cases, 26 of which arose from the 9th Circuit, and 19 of the 26 were reversed or vacated, 12 by a unanimous Supreme Court. In 2013, the 9th Circuit continued to be overturned by the Supreme Court, in that case again unanimously, on an environmental matter. While the high court historically reverses the majority of all cases it reviews, the 9th Circuit is the circuit whose opinions are most overturned by the Supreme Court.

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366 Carol Williams, “U.S. Supreme Court looks over 9th Circuit's shoulder,” Los Angeles Times, June 29, 2009, available at http://articles.latimes.com/2009/jun/29/local/me-9th-scotus29 (“Experts, including former law clerks, say the Supreme Court justices are more inclined to look over the shoulders of the 9th Circuit judges they suspect of favoring the underdog.”); Jonathan H. Adler, “Is the Ninth Circuit Due for Environmental Correction?” June 20, 2012, available at http://www.volokh.com/2012/06/20/is-the-ninth-circuit-due-for-environmental-correction/. In 2008-2009, the Supreme Court heard six environmental cases, five of the six of which were from the 9th Circuit, in all of which the 9th Circuit had favored the position favored by environmental groups, and in all of which the Supreme Court reversed the 9th Circuit. See, Winter v. Natural Res. Def. Council; Summers v. Earth Island Inst.; Coeur Alaska, Inc. v. Se. Alaska Conservation Council; Burlington N. & Santa Fe Ry. Co. v. United States and Shell Oil Co. v. United States (consolidated).  
368 Id.  
369 Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., et al, 133 S.Ct. 710 (Jan. 8, 2013). The court unanimously ruled to overturn a Ninth Circuit Court decision, supporting Los Angeles County’s view that water flowing between natural and channelized sections is simply a transfer of the same water and should not be seen as a permitted discharge: “Under the Clean Water Act, does a ‘discharge of pollutants’ occur when polluted water ‘flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river,’ and then ‘into a lower portion of the same river?’” Justice Ginsberg said this was the question Justices focused on. The court ruled that “the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the Clean Water Act.” Id.  
371 See, http://books.google.com/books?id=I2zeH8lpSgC&pg=PA64&lpg=PA64&dq=Ninth+Circuit+court+of+appeals+and+Supreme+Court+and+environmental+cases&source=bl&ots=Vji484l09A&sig=GrJQF084qbO3ev5hOh2d4foriU&hl=en&sa=X&ei=IBVHUjsnL4AOi4Bo&ved=0CEIQ6AEwAg#v=onepage&q=Ninth+Circuit%20court%20of%20appeals%20and%20overturned%20and%20Supreme%20Court%20and%20environmental%20cases&f=false.

States have attempted recently to regulate this unique form of electric energy as to its:

- **Place** – forcing power generation to locate in the state or leave the state

- **Price** – Proving a higher price for certain power generated in the state or requiring utilities and their ratepayers to pay above market prices for certain power

- **Regulatory credit value** -- Providing greater credits for in-state power or fuel
These state regulations are now a major legal controversy before the federal courts:

Seven federal courts in the past year, including the Supreme Court,\footnote{378} the federal circuit court of appeals,\footnote{379} federal trial courts,\footnote{380} plus a recent FERC opinion,\footnote{381} have decided controversies regarding state energy or utility regulation, with the majority holding that states have acted unconstitutionally by crossing into preempted territory.\footnote{382} Notwithstanding more than three-quarter century of Supreme Court and other federal court decisions, there has been a recent renaissance of state attempts to regulate wholesale, transmission, and interstate electric markets in a manner which is being held at least beyond state jurisdiction, and may directly interfere with federal policy and regulation.

These legal controversies regarding the regulated energy future deployed five distinct regulatory mechanisms; all were found either at the trial or appellate levels to be legally preempted under the Supremacy Clause. This constitutes a somewhat immovable legal structure, with the Supremacy Clause in place for 225 years, and the ‘bright line’ of the Federal Power Act, in place since the virtual dawn of widespread use of electric power.\footnote{383} There is no easy detour for a state regulation around the Supremacy Clause.


\footnote{382}See supra. at Sections II and III.

\footnote{383}Electricity was first applied commercially by Thomas Edison only in 1876 at Wannamaker’s store in Philadelphia. Only in the 20th century did cities become electrified, and as electricity was distributed, the Federal Power Act was enacted in 1935. See, Steven Ferrey, The New Rules, supra, at App. A.