PENTAGON PREEMPTION:
THE 5-SIDED LOSS OF STATE
ENERGY AND POWER

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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 by constructing a pentagon of preemption, which blocks 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 in any year since the

2. The average delivered price of all electricity nationwide in 2011 was $0.0966/Kwh, and $0.1109/Kwh for residential customers. Average Retail Price of Electricity to Ultimate Customers by End-Use Sector, by State, Year-to-Date through February 2011 and 2010, PUB. POL’Y INST. N.Y. STATE, http://ppinys.org/reports/jtf/2011/employ/average-retail-price-of-electricity2010-11.htm (last visited Oct. 6, 2014).
creation of the corporate income tax. Unique among inventions, electricity also is essential to operate seven of the other top fifty inventions of all time: the Internet, computers, air-conditioning, radio, television, the telephone, and semiconductors. Federal courts recently 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.

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 and the Supremacy Clause of the Constitution. Seven federal courts in the past year, including the Supreme Court, the federal circuit court of appeals, federal trial courts, plus the Federal Energy Regulatory Commission (FERC), have ruled on constitutional matters applicable to energy or utility regulation, with the vast majority holding that states are acting unconstitutionally. In these cases, state regulations were found to illegally cross a “bright line rule” 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,
- Provide greater financial regulatory incentives for certain power

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4. Fallows, supra note 1.
5. See discussion infra Sections II and III (describing state’s attempts at keeping power in-state and the preemption of state power, respectively).
7. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... [S]hall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
9. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393 (2d Cir. 2013); Ill. Commerce Comm’n v. Fed. Energy Regulatory Comm’n, 721 F.3d 764 (7th Cir. 2013); Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).
12. Infra Section II and III.
14. Infra Section II B.
production technology in the state,\textsuperscript{15} and
\begin{itemize}
  \item 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}
\end{itemize}

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:
\begin{itemize}
  \item Attempting to exclude certain power generation technologies from their states,\textsuperscript{17}
  \item Burdening interstate transport of certain energy resources, while advantaging in-state identical energy,\textsuperscript{18} and
  \item Refusing payments for regional power transmission infrastructure to move out-of-state renewable wind power to their states.\textsuperscript{19}
\end{itemize}

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. \textbf{THE INSIDE GAME – KEEPING POWER OR GENERATIONS 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.

Each of these has recently been implemented by a different state: California, New Jersey, Maryland, and Illinois.\textsuperscript{20} Each state regulation hit initial legal roadblocks, with some still engaged in on-going litigation.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{15} Infra Section II C.
\item \textsuperscript{16} Infra Section II A.
\item \textsuperscript{17} Infra Section III B.
\item \textsuperscript{18} Infra Section III B.
\item \textsuperscript{19} Infra at Section III A.
\item \textsuperscript{20} Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393 (2d Cir. 2013); Ill. Commerce Comm’n v. Fed. Regulatory Comm’n, 721 F.3d 764 (7th Cir. 2013); Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).
\item \textsuperscript{21} Entergy Nuclear Vt. Yankee, LLC, 733 F.3d at 393; Ill. Commerce Comm’n, 721 F.3d at 764; Rocky Mountain Farmers Union, 730 F.3d at 1070.
\end{itemize}
Preemption analysis pursuant to the Supremacy Clause of the U.S. Constitution takes center stage in ongoing challenges, and each was declared unconstitutional either by one of the courts hearing each of these challenges or by the Federal Energy Regulatory Commission.22

A. Preemption Pentagon Side I: States Setting Inflated Wholesale Power Rates For Favored In-State Power

A few states 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.23 This went forward despite a robust treatment in the literature warning states to be careful in setting wholesale rates.24 California, to date, has been challenged and found to be acting illegally not only recently, but also in prior similar regulation.25

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.26 Only the federal government can establish wholesale power prices for power.27 After enacting a feed-in-tariff requiring California state utilities to make wholesale power purchases at well in excess of market wholesale rates for power and in excess of avoided costs,28 there was a challenge before the

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22. Entergy Nucleur Vt. Yankee, LLC, 733 F.3d at 393; Ill. Commerce Comm’n, 721 F.3d at 764; Rocky Mountain Farmers Union, 730 F.3d at 1070.


25. Brian Potts, Regulating Greenhouse Gas ‘Leakage’: How California Can Evade the Impending Constitutional Attacks, 19 ELEC. J. 43, 44 (2006) (“[B]ecause of these two Constitutional issues, courts are likely to strike down many or all of their proposals.”).


28. FERC Conservation of Power and Water Resources, 18 C.F.R. § 292.304(e) (2014). See also 18 C.F.R. § 292.101(b)(6) (2014) defining “avoided cost” 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
Federal Energy Regulatory Commission 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 ion.

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.

facilities, such utility would generate itself or purchase from another source.

30. Id.
31. Id.
32. Id.
33. Id.
35. Id. at ¶ 15, 19.
36. Id. at ¶ 20.
37. Id.
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. 38 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. 39 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. 40

These 2010-2011 FERC opinions regarding California’s feed-in tariff clarify issues in FERC’s 1995 decision, 41 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. 42 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. 43 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. 44 Instead, it justified its feed-in tariff “to encourage cogeneration by requiring utilities to sign contracts . . . .” 45

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. 46 In its two California decisions, FERC refused California’s request to agree that facilities interconnected at the distribution level, rather

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38. Id. at ¶ 13.
40. Cal. Pub. Util. Comm’n, 133 FERC P at ¶ 31 (citing Southern Cal. Edison, San Diego Gas & Elec. Co., 71 FERC P 61269, (1995)). This doesn’t mean that a state could not justify avoided 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.” Id. 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.
43. 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 ¶ 4. In the U.S. transmission and distribution system, the cost savings and value of distributed power is distinct and not uniform. See Massimo Filippini & Jorg Wild, Regional Differences in Electricity Distribution Costs and their Consequences for Yardstick Regulation of Access Prices, CTR. FOR ENERGY POL’Y & ECON. (May 2000), http://www.cepe.ethz.ch/publications/Filippini_lugano.pdf (explaining the regional differences in electricity transmissions).
45. Id. at ¶ 6.
than the transmission level, are beyond FERC’s authority. Instead, FERC reaffirmed that FERC has “exclusive jurisdiction” 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.  

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. 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, but did not. California also has adopted renewable portfolio standards 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. California raised several legal arguments as to why existing precedent did not apply.

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

48. See id. at ¶ 72 (citing FPC v. S. Cal. Edison Co., 376 U.S. 205 (1964)).
49. Id. at ¶ 72.
53. See Cal. Pub. Util. Comm’n, 132 FERC P at ¶ 70 (holding that the CPUS may not, in implementing the feed-in tariff program, charge rates that are above “the purchasing utility’s avoided cost”).
54. Id. at ¶ 3.
55. Id. at ¶ 4.
56. Id. at ¶ 5.
57. Id. at ¶ 72; see also, Teresa Morton & Jeffrey Peabody, Feed-in Tariffs: Misfits in the Federal and State Regulatory Regime?, 23 ELEC. J. 17, 20–22 (2010) (discussing the California FiT decision).
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 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 any 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 Ass’n*, 36 F.3d 848 (9th Cir. 1994), 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

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61. Id. at ¶¶ 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. at ¶ 70.
62. Id.
63. Id. at ¶ 72. 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 supplied “outside the confines of, and, in addition to the PURPA avoided cost rate, through the creation of renewable energy credits (RECs).” Cal. Pub. Utils. Comm’n S. Cal. Edison Co. Pac. Gas & Elec. Co. San Diego Gas & Elec. Co., 133 FERC P 61059, ¶ 31 (Oct. 21, 2010).
64. See infra Section III B (discussing the preemption pentagon).
65. Yaffe, supra note 46, at 12.
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 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. After losing before FERC, California moved for FERC rehearing, or in the alternative a clarification, of this FERC order. 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

67. Id. at 858.
68. Id.
70. Id.
71. Id.
75. 18 C.F.R. § 292.101(b)(6) (1994) (defining avoided cost as “the incremental costs to an electric
apparently change because of environmental or climate change goals: “[a]s the electric utility industry becomes increasingly competitive, the need to ensure that the states are using procedures which ensure that QF rates do not exceed avoided cost becomes more critical.”\(^76\)

The Ninth Circuit Court of Appeals agreed in deciding a recent California case.\(^77\) 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.\(^78\) Moreover, while addressing state/local environmental regulation, the Supreme Court held that federal law is preemptive of state and local law.\(^79\) 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.\(^80\)

California’s arguments that 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 that articulate the borders of federal and state authority over energy and environmental matters, federal authority preempted state authority in five of these cases,\(^81\) and the sixth was

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.”.


77. Pub. Util. Dist. No. 1 of Snohomish Cnty. 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 Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty. Wash., 554 U.S. 527 (2008), and thereafter was remanded to FERC for more clarification, its holding was not overturned before the Supreme Court:

The judgment below is nonetheless affirmed on alternative grounds, based on two defects in FERC’s analysis. First, the analysis was flawed or incomplete to the extent FERC looked simply to whether consumers’ rates increased immediately upon conclusion of the relevant contracts, rather than determining whether the contracts imposed an excessive burden “down the line,” relative to the rates consumers could have obtained (but for the contracts) after elimination of the dysfunctional market. Sierra’s “excessive burden” on customers was the current burden, not just the burden imposed at the contract’s outset. See [Federal Power Comm’n v. Sierra Pac. Power Co., 350 U.S. 348 (1956)]. Second, it is unclear from FERC’s orders whether it found respondents’ evidence inadequate to support their claim that petitioners engaged in unlawful market manipulation that altered the playing field for contract negotiations. In such a case, FERC should not presume that a contract is just and reasonable. Like fraud and duress, unlawful market activity directly affecting contract negotiations eliminates the premise on which the Mobile-Sierra presumption rests: that the contract rates are the product of fair, arms-length negotiations. On remand, FERC should amplify or clarify its findings on these two points.


78. Fed. Power Comm’n v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964) (“Our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest.”); Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash., 471 F.3d at 1065 (“FERC tempered this expectation by promising to ‘continue our case-by-case approach’ to granting market –based rate authority. . . . FERC’s ‘case-by-case approach’ includes ensuring that sellers seeking market-based rate authority lack, or have sufficiently mitigated, market power and that FERC has a sufficient ‘means of monitoring the market in which [the seller’s] sales will take place.’”).


81. Id.; Morgan Stanley Capital Grp. Inc., 554 U.S. at 545 (“There is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff–the just-and-reasonable standard. The
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.\(^{82}\)

This first side of the preemption pentagon is constructed from more than 75 years of consistent Supreme Court interpretation of the Supremacy Clause\(^ {83}\) 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.\(^ {84}\)

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 seventy-five 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.\(^ {85}\) The Federal Power Act sections 205 and 206\(^ {86}\) empower FERC exclusively to regulate rates for the interstate and wholesale


83. This began with the Supreme Court decision in *Pub. Util. Comm’n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927) (“[T]he paramount interest in the interstate business carried on between the two companies is not local or either state, but is essentially national in character. The rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress[,]” which inspired the Federal Power Act a few years later.).

84. *Ferrey*, *supra* note 50, at 4-102.2-4-102.3.


sale and transmission of electricity. 87 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.” 88

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. 89 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. 90 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. 91 “FERC has exclusive authority to set and to determine the


89. Fed. Power Comm’n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964) (“Our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest.”).

90. See New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (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, Art. I, § 8, cl. 3, 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 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.”). When the filed rate doctrine applies to state regulators, it does so as a matter of federal pre-emption through the Supremacy Clause.”; Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 371 (1988) (“FERC has exclusive authority to determine the reasonableness of wholesale rates.”); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986) (“FERC clearly has exclusive jurisdiction over the rates to be charged Nantahala’s interstate wholesale customers.”); Montana-Dakota Co. v. Pub. Serv. Comm’n, 341 U.S. 246, 251 (1951) (“Section 317 of Federal Power Act in its present form confers on the district court of the United States exclusive jurisdiction of violations of this Act or the rules, regulation, and orders thereunder, and of all suits in equity . . . .”)

91. New England Power, 455 U.S. at 340 (“Congress enacted Part II of the Federal Power Act . . . which delegated to the Federal Power Commission, now the Federal Energy Regulatory Commission, exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce,
The Federal Power Act defines “sale at wholesale” as any sale to any person for resale.93 The Congress in the Federal Power Act “adopt[ed]...”92 Wholesale rates for sales in interstate commerce are wholly beyond any state authority.95 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 ab initio.”96 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:97 “FERC has exclusive authority to determine the reasonableness of wholesale rates.”98

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 authority to determine the reasonableness of wholesale rates.92 The plain text of the FPA states that “[a]ll rates ... shall be just and reasonable.”16 U.S.C. § 824d(a). See also 16 U.S.C. § 824d (2012).93

16 U.S.C. § 201(d) (“The term ‘sale of electric energy at wholesale’ when used in this Part means a sale of electric energy to any person for resale.”); see also 16 U.S.C. § 824d (2012).

Indep. Energy Producers Ass’n v. Cal. Pub. Utils. Comm’n, 36 F.3d 848, 859 (9th Cir. 1994) (“We conclude that the CPUC program is preempted by PURPA insofar as it authorizes the Utilities to determine that a QF is not in compliance with the Commission’s operating and efficiency standards and to impose a reduced avoided cost rate on that QF.”); S. Cal. Edison Co., San Diego Gas & Electric Co., 70 FERC P 61215 (1995) (“PURPA expressly directed this Commission, and not the states, to prescribe rules governing QF rates. PURPA gave the states responsibility for ‘implement[ing]’ the statute and the Commission’s rules. As a result, a state may prescribe a particular per unit charge only if the process if it uses to establish the per unit charge is in accordance with the Commission’s rules.”).

Conn. Light and Power Co., 70 FERC P 61012 at 61029–30 (1995) (“[I]f parties are required by state law or policy to sign contracts that reflect rates for QF sales at wholesale that are in excess of avoided cost, those contracts will be considered to be void ab initio.”).

New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982) (“Congress enacted Part II of the Federal Power Act ... which delegated to the Federal Power Commission, now 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 .... The 1935 enactment was a ‘direct result’ of this Court’s holding in Pub. Utilities Comm’n v. Atleeboro Steam & Electric Co .... that the states lacked power to regulate the rates governing interstate sales of electricity for resale.”).


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and federal jurisdiction. 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. 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.

4. The Legal Shift in Power Transactions

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 one-third of the states restructured prior to the electric sector problems in California in 2000–2001, whereafter the other two-thirds of the states retained traditionally structured retail electric sectors.

99. Fed. Power Comm’n, 376 U.S. at 215–16 (“Our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest.”).

100. Id.

101. Id.


103. Elec. Energy Mkt. Competit. Task Force, Report to Congress on Wholesale and Retail Competition Markets for Electric Energy 10 (2005) (“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.”).

104. Ferrey, supra note 50 at 591; Ferrey, supra note 51, at 5-26–5-28.

105. Ferrey, supra note 51, at 149–50.

106. See Steven Ferrey, Sale of Electricity, in The Law of Clean Energy: Efficiency and Renewables 218–19 (Michael B. Gerrard ed., 2011) (“Starting in California, Rhode Island, and Massachusetts in the late 1990s, several states sought to place their traditional monopoly utilities in the different position of remaining as power distribution monopolies . . . restructured retail power markets now constitute almost one-third of the states’ retail power suppliers. Progress nationwide in this direction was frustrated by the collapse of the California restructured power market in 2000–2001.”); see also VT. DEP’T OF PUB. SERV., Vt. COMPREHENSIVE ENERGY PLAN 2 (vol. 1, 2011), available at http://www.vtenergyplan.vermont.gov (“Vermont already consistently leads the nation in electric efficiency investments . . . We also have, for many of the last 20 years, enjoyed electricity prices that are favorable compared to our New England neighbors . . . Nearly half of our electricity supply is currently renewable . . . In total, nearly a quarter of Vermont’s energy usage presently is from renewable sources.”). Vermont is the one state in New England that did not engage in electric sector restructuring or creating an RPS system. However, ten years later than the 1997–1998 restructuring in New England, Vermont has one of the cleanest
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 5% in the 1960’s 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 the FERC.’ The upshot of these federal and state innovations in electricity regulation is 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.

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. 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. As a result, much of the traditional state responsibility portfolios of power and the lowest electricity rates in New England. Power comes from the large Vermont Yankee Nuclear Power Plant owned by Entergy and importation of power from Canada.

107. See Ferrey, supra note 50, at 581–82. This spun generation assets, including nuclear generation, out into independent ownership not subject to state regulation. 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. Id. See also 2012 GIS Load Asset Listing, ISO-NE (February 27, 2012), http://www.iso-ne.com/support/asset_info/index.html (providing data relevant to the area in which this facility is located).

108. See Steven Ferrey, The New Rules – A Guide to Electric Market Regulation 10–11 (2000) (“In the 1960s, only about 5% of power passed through a wholesale transmission transaction before being sold. In 1984, 32% of all power that reached end-users had first passed through a sale-for-resale transaction. In the future, a majority of power will pass through a wholesale transmission transaction before being sold at retail.”); Ferrey, supra note 50, at 587 (“In 1983 about 8% of power was sold wholesale prior to being sold at retail, which has dramatically increased.”).

109. See generally Ferrey, supra note 108, at 269–70 (discussing how Congress opened the door to electric industry competition).


112. Id.
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,113 and to the competitive power market in approximately one-third of the states.114

The United States Supreme Court has repeatedly held that states are preempted by the Supremacy Clause of the United States Constitution115 from directly or indirectly interfering with federal power regulation.116 When applied to electric power issues, the Supremacy Clause of the Constitution117 is embodied in the Filed Rate Doctrine, which establishes an absolute line the states may not cross to regulate electric power.118 The 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.”119

The Supreme Court in 1986,120 and again in 1988,121 2003,122 and 2008,123 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.”124 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.”125 The Supreme Court in 2008 reiterated the notion that the Federal Power Act created a bright line between state and federal jurisdiction, with wholesale power sales falling on the federal side of the line.126 This most recent decision articulated an unbroken line of

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113. 16 U.S.C. § 824a-3 (2012); Ferrey, supra note 50, at 569.
114. Ferrey, supra note 50, at 594.
115. U.S. CONST. art. VI, cl. 2.
117. U.S. CONST. art. VI, cl. 2
122. Entergy La., Inc., 539 U.S. at 50.
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 agreements affecting wholesale rates are reasonable.127

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.128 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.129 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,130 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,131 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.132 The high-voltage transmission network, at 230 kV and higher, comprises 167,000 miles of line in America.133 The transmission system operates at fifteen different voltage levels.134

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130. Ferrey, supra note 51, at Section 8.3.
132. Ferrey, supra note 51, at Section 8.3, p. 8-16–8-17.
operates the “largest centrally dispatched power market . . . in the world,” covering sixty million customers and 185,000 megawatts (MW) of power generation, including all or part of 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 an 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 thirteen state area. New capacity payments are

137. Id.
138. Id.
139. 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 Amended and Restated Operating Agreement of PJM Interconnection Inc., PJM (July 14, 2011), http://www.pjm.com/~media/documents/agreements oa.ashx (defining locational marginal pricing and explaining process for an RPM auction); see also ELECTRIC POWER MARKETS: PJM, FED. ENERGY REGULATORY COMM’N, http://www.ferc.gov/market-oversight/mkt-electric/pjm.asp (last visited Oct. 6, 2014) (providing overview of PJM’s market description, geography and RTOs/ISOs, in addition to other company information).
140. 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. Ferrey, supra note 51, at Sections 8:10, 10:87, 10:91; Ferrey, supra note 108, at 49–50.
141. PPL EnergyPlus, LLC, 977 F. Supp. 2d at 386.
awarded to generators by PJM through a bidding process conducted once annually, approximately three years before the capacity is deemed needed and will be compensated in capacity payments. This three year lag time between determination and obligation is to allow enough time for any project that is awarded capacity to 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. PJM “plan[s] expansions to transmission to improve the ability to transmit energy from where it is generated to serve load.” 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.” 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.” 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

A dispute in the Federal District Court of Maryland invoked two prongs of the Constitution. 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. The Maryland contract for differences (“CID”) provided that regardless of the price set by the

142. Id. at 388.
143. Id. at 379.
144. Id.
145. Id. (PJM is responsible for the “dispatching” of generation in real time to meet fluctuating demand.)
150. Nazarian, 974 F. Supp. 2d at 796.
151. Id. at 831, 840.
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. 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. 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. They argued that the geographic sites 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 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 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. 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.

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152. Id. at 796.
153. Id. at 891.
154. Id. at 799, 802.
155. Id. at 802.
158. Id. at 834–35. The court was persuaded in part by expert testimony explaining that the CID 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. Id.
159. Id. at 795.
160. Id. at 830. 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).
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. 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. The Court held the Maryland regulation violates the Supremacy Clause of the United States Constitution by virtue of field preemption, but plaintiffs had not proven their additional claim that it violates the dormant Commerce Clause. State action that regulates within this wholesale power field was void under the doctrine of field preemption. “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).”

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. 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. However, the court held that no rationale permits a state to cross the ‘bright line’ limiting jurisdiction or “invasion into a federally occupied field.” 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.

3. New Jersey Inside Regulation

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

162. Id. at 795.
163. Id. at 796.
164. Id. at 840.
165. Id.
166. Id.
167. Id. at 839–40.
168. Id. at 840.
169. Id. at 828–30:
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.’ Id. at 830.
170. Id. at 840.
New Jersey imports a 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,” to encourage the acquisition by utilities of the output of 2,000 Mw of new independent unregulated in-state power projects. New Jersey provided selected new in-state projects financial compensation in the form of contracts for differences, and requiring them to obtain capacity payments through participation in the PJM capacity auction. 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.

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. 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 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

173. N.J. STAT. ANN. §§ 48:3-98.3 (2011) (repealed 2013). After conducting a competitive bid process with public utilities, the BPU is directed to enter into standard offer capacity agreements (“SOCAs”), which guarantee the state selected generating companies a fixed price for their capacity.
176. See LS POWER ASSOCIATES, L.P., supra note 172 (stating that of the six thousand Mw retired within the PJM grid since 2002, one-third of these deactivations of power generation facilities have been in New Jersey).
177. *Id.* After the New Jersey BPU selects a generator program, it enters into a 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.
178. *Id.*
181. After the New Jersey BPU selects a generator program, they enter into a 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.
auction without selective subsidies for certain in-state capacity resources.\footnote{182}

This caused the regional PJM to guarantee these New Jersey generators a substantial capacity payment every month at a cost which is passed on not just to New Jersey electric ratepayers, but to all PJM ratepayers who reside in many of the thirteen PJM states and Washington, D.C. in the PJM region.\footnote{183} 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.\footnote{184} Plaintiffs also alleged a violation of the Constitution’s dormant Commerce Clause because of state 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.”\footnote{185}

In defense, New Jersey asserted that its LCAPP is a mere planning measure, with only incidental effect on FERC authority.\footnote{186} New Jersey contended that FERC oversight authority is “limited to sales of the actual physical electricity (or capacity) to a buyer”\footnote{187} and “[c]ontracts that do not effect a physical sale of electricity... are not subject to [Commission] jurisdiction.”\footnote{188} 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.\footnote{189} There are certain regulatory actions which are only within federal authority, and which states do not have power to undertake.\footnote{190} Article VI, the Constitution’s Supremacy Clause, and the Federal Power Act,\footnote{191} establish judicially defined “bright line” prohibitions of state regulation of wholesale transactions in power.\footnote{192}

The 2013 federal district court decision in New Jersey held that the state was impermissibly regulating wholesale energy prices to promote the

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185. Hanna Northey, Utilities Challenge N.J. Law While Preparing to Reap Its Benefits, E & E PUBLISHING, LLC (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. Id. LCAPP awarded contracts to Hess Corp., Competitive Power Ventures and NRG Energy. Id.
186. N.E. Hub Partners, L.P. v. CNG Transmission Corp., No. 1-CV-99-0082, 2000 WL 339120, at *9 (a state regulatory process was field preempted where the result of such process was within federal authority), rev’d, 239 F.3d 333, 348 (3rd Cir. 2001).
188. Id.
189. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (declaring that state law will be preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress”).
190. Id.
192. U.S. CONST., art. VI, cl. 2 (“[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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
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construction of new generation facilities in New Jersey. The state LCAPP regulation was held to:

intrude 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.

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

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 are located, the New Jersey federal court disavowed any need to compare the two programs. However, the two cases merit some comparison:

- 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

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193. Northey, supra note 185. The complaint also alleged a violation of the Constitution’s dormant Commerce Clause because it is predicated on in-state “favoritism,” which the court did not find. The utilities pay a cost equal to the difference between the FERC-approved PJM market clearing price and a contractually established New Jersey regulatory benchmark price.
195. Id. at 410 (explaining the Commission has exclusive authority to regulate wholesale prices).
196. Id. at 410.
197. Id. at 406.
198. See supra Section II B 2 (discussing the similarities of Maryland’s and New Jersey’s statutes).
199. Hanna, 977 F. Supp. 2d at 404 (“[T]he Court is not able to discern whether Maryland’s proposal is sufficiently similar to the LCAPP.”).
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 located 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.

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. 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: “[I]t 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.” 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

200. Id. at 411 (“‘[C]ommunity benefit’ points awarded to generators in New Jersey effectively prohibited out-of-state generators from competing to be eligible generators under the LCAPP Act.”).

201. For treatment of tax aspects of power generation, see Ferrey, supra note 51, at Tables 3.13, 3.15, 3.19.

202. 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. Steven Ferrey, Inverting Choice of Law in the Wired Universe: Thermodynamics, Mass and Energy, 45 WM. & MARY L. REV. 1839, 1909–14 (2004); Ferrey, supra note 51, at 10-394.

203. Ferrey, supra note 51, at 10-10, 10:12, 10-91.

204. Id. at Section 3-19.


FERC has promoted greater competition and promoted regional coordination by ISOs, such as PJM. 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 game” clearly violated the Supremacy Clause. 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. 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.

The high-voltage transmission network was recognized by engineers as the most important engineering feat of the 20th century. Its operation requires a constant simultaneous balancing of supply and demand on that system. 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

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.

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207. U.S. CONST., art. VI, § 2.
208. FED. ENERGY REGULATORY COMM’N, FINAL ORDER 888, PROMOTING WHOLESALE COMPETITION (1996).
211. FERREY, supra note 108.
212. Discussed infra at Section II C 3.
214. FERREY, supra note 50, at 568.
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 RTOs and ISOs to consider and evaluate non-incumbent transmission projects could violate the FERC Order 890 planning principle of “openness” in transmission planning.

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. In terms of scope, Order 1000 only applies to jurisdictional public utilities, which include only the investor-owned utilities, and the RTOs which manage them under the Federal Power Act. This would include only approximately less than 200 entities among the approximately 3,000 utilities in the U.S.

Excluded are all federal government power marketing administrations, all rural electric cooperatives and membership utility cooperatives, municipal utilities. Additionally 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.) are excluded.228 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.229

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 Constitution or laws of any State to the contrary notwithstanding.”230 The Federal Power Act creates this “bright line”231 between state and federal jurisdiction232 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.233

The applicable preemption doctrine under the Federal Power Act also expressly distinguishes wholesale from retail regulation.234 All transmission tariffs are exclusively within FERC, rather than state jurisdiction.235 The Federal Power Act directs FERC to regulate all interstate electricity transmission and to ensure the reliability of the national electricity grid.236

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.”237 FERC approves all RTO and

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229. FERREY, supra note 50, at 579.
230. U.S. CONST. art. VI, cl. 2.
231. Id.
234. Infra Section III.
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 wholesale electric markets,” 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 granted 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 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.

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

- federal law could explicitly establish the lines for state preemption;
- 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

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250. *See, e.g.* Pacific Coast Fed. of Fishermen’s Ass’n v. Gutierrez, 606 F. Supp. 2d 1122 (E.D. Cal. 2008) (regarding the effects a company’s water projects had on endangered salmonid species); Nat’l Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322 (E.D. Cal. 2007) (regarding water diversion projects and the effects the projects would have on the Delta smelt population).
251. 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. Piedmont Envtl. Council v. Fed. Energy Regulatory Comm’n, 558 F.3d 304 (4th Cir. 2009).
252. *Id.* at 313.
left ‘no room for the States to supplement it;’ or state law could clearly conflict with the federal law.

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. State law is not allowed to overrule or supplant federal determinations by adding requirements not consistent with those in federal law.

3. 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, nonetheless. Other states have proposed statutes. 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. 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.

255. See id. at 79 (“in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.”); Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 218 (D. Vt. 2012).

256. Id.


258. Granite Rock Co. v. Cal. Coastal Comm’n, 480 U.S. 572, 581 (1987); see, e.g., Nat’l Meat Ass’n v. Harris, 132 S. Ct. 965, 969–71 (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).

259. States with either enacted or proposed ROFR laws include: Minnesota – MINN. STAT. § 216B.246 (2012), New Mexico – S.B. 175, 51st Leg., 1st Sess. (N.M 2013), and South Dakota Codified Laws – S.D. Codified L. § 49-32-19 (2011)).

260. See GARG, supra note 216, at 1 (explaining that states have started passing laws in response to FERC Order 1000).

261. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC P 61051, Order No. 1000 (July 21, 2011), order on reh’g and clarification, 139 FERC P 61132, Order No. 1000-A (May 17, 2012), order on reh’g and clarification, 141 FERC P 61044, Order No. 1000-B (October 18, 2012).

262. FERC Order On Compliance Filings & Tariff Revisions, Re: Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners, et al., 142 FERC P 61215, ¶ 205 (2013). 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.
transmission facilities. 263

This state-federal preemption fight has been recently decided by a federal court.264 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 Chevron deference in this determination.265 On both issues, the Supreme Court’s answer was yes.266 In Arlington v. FCC, the majority held that Circuit precedent holding that Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., applies to an agency’s interpretation of the scope of its own statutory jurisdiction: “[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.”267 There is no distinction in terms of deference afforded the agency between an agency’s “jurisdictional” and “nonjurisdictional” interpretations.268 “If ‘the agency’s answer is based on a permissible construction of the statute,’ that is the end of the matter.”269 This most recent Supreme Court decision on agency deference is consistent with recent determinations by FERC about its own scope of authority on ROFR.270

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, 271 and the Communications Act of 1934.272 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.273

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266. Id. at 1874–75.
267. Id. at 1868. 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. Chevron v. Nat’l Res. Def. Council, 467 U.S. 837, 842–43 (1984). 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.
268. City of Arlington, 133 S. Ct. at 1871 (“no ‘exception exists to the normal deferential standard of review’ for ‘jurisdictional or legal questions concerning the coverage’ of an Act.”). “[T]here is no principled basis for carving out some arbitrary subset of such claims as ‘jurisdictional.’” Id. at 1865.
FERC regulates interstate, wholesale, and transmission transactions. The FCC regulates communication utilities, FERC regulates other electric and gas utilities.

Since Order 1000 has been upheld by the D.C. Circuit on appeal, state ROFR legislation would 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.
- Disadvantaging out-of-state fuels because of the greater global warming effect of transporting that fuel a longer distance into the state.

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.

274. Supra, Section II.B.
278. Id.
279. Infra Section III.A.1.
280. Infra Section III.A.2.
281. Infra Section III.A.3.
282. Infra Section III.B. The state regulation to burden out-of-state energy is now propounded in the furtherance of control of climate change. Id. 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. Id. Therefore, the more distance between the commerce fabrication and consumption, the more effects on the environment, ceteris paribus. Id. 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.
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. Because this is wholesale power in interstate commerce, Constitutional Supremacy Clause issues are raised. Some states regulation has been constitutionally stricken.

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. 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 state. 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 the 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

283. *Infra Section III.A.1–3, B.*
284. *Infra Section III.A.1–3.*
286. *Id.*
287. U.S. CONST. art. VI, cl. 2.
290. See Vt. STAT. ANN. tit. 30, § 248(e)(2) (2008) (Requiring, in Act 160, a legislative vote as 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.”). (emphasis added).
291. *Id.*
292. Shumlin, 838 F. Supp. 2d at 192 (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.
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.\textsuperscript{293} Hearings in Vermont on the PSB agency petition, advancing in an adjudicatory forum,\textsuperscript{294} were halted when the state senate voted not to approve or permit such a new CPG in early 2010.\textsuperscript{295}

Judicial relief was sought by the existing facility owner.\textsuperscript{296} The federal trial court ruled that this Vermont regulation of energy violated 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{297} On appeal, the Second Circuit did not disagree with the substantive decision on the dormant Commerce Clause, but procedurally held the issue also was not yet ripe for review until plaintiffs actually entered a forced PPA with the state.\textsuperscript{298} 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{299}

The state of Vermont could not control sale of power interstate outside of its origin in Vermont.\textsuperscript{300} The federal trial court held that the Federal Power


\textsuperscript{294} For discussion of administrative law adjudicatory proceedings, see generally \textit{Ferrey}, supra note 50, at 45–48 (stating that 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). 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.} at 47–48. Appeal is allowed to the courts based on either procedural issues or a decision not based on formal substantial evidence. \textit{Id.} at 48 (contrasting a decision of a state legislature, which has no such formal legal protections).

\textsuperscript{295} \textit{Senate Votes to Close Vermont Yankee Nuclear Plant in 2012.} BURLINGTON FREE PRESS (Feb. 24, 2010), http://www.burlingtonfreepress.com/viewart/20100224/NEWS02/100224050Senate-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).


\textsuperscript{297} \textit{Id.}

\textsuperscript{298} Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 428 (2d Cir. 2013). 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.’ . . . However, 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 430–31.

\textsuperscript{299} \textit{Id.} at 433.

\textsuperscript{300} Entergy Nuclear Vt. Yankee, L.L.C. v. Shumlin, 838 F. Supp. 2d 183, 224 (D. Vt. 2012). The court held:

[States are ‘without power to prevent privately owned articles of trade(124,102),(874,860)

violating
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.” The Vermont federal trial court decision held:

Under the Federal Power Act, 16 U.S.C. § 791a et seq.:
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.

“[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.”

The difference between the Vermont federal district 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:

- 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.
- 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. The trial court thus declined to enjoin the defendants on the basis of this Federal Power Act claim,” and both the district and Second Circuit courts agreed that this issue was not yet ripe for review since FERC
review had not yet occurred.\textsuperscript{306}

- 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.”\textsuperscript{307} 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.\textsuperscript{308}

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.’”\textsuperscript{309}

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.”\textsuperscript{310}

2. \textit{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.\textsuperscript{311}

Transmission infrastructure is distinct from distribution infrastructure.\textsuperscript{312} More straightforward approaches to determining what is transmission and what is distribution was blurred by FERC Order 888, which created a seven-factor

\begin{itemize}
\item \textsuperscript{306} Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 407 (2d Cir. 2013).
\item \textsuperscript{307} Shumlin, 838 F. Supp. 2d at 239.
\item \textsuperscript{308} See Shumlin, 733 F.3d at 438 (“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.”); id. at 430 (“[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.’”).
\item \textsuperscript{309} Id. at 430.
\item \textsuperscript{310} Id. at 431.
\item \textsuperscript{311} NORTH AMERICAN ELECTRIC RELIABILITY COUNCIL, LONG-TERM RELIABILITY ASSESSMENT 23 (Oct. 2010).
\item \textsuperscript{312} See generally Ferrey, supra note 51, at 5–10 (“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.”).
\end{itemize}
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.

In a recent decision of the Seventh 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 Tenth 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 Commerce Clause: “it trips over an insurmountable constitutional objection.


315. Id. at 769 (showing that 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).

316. Id. at 765 (providing that 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.)

317. The six challenges were: Does FERC’s approval of the MISO transmission tariff violate the Tenth 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? Id. at 772–73.

318. Id. (explaining the rejections made by the Seventh Circuit Court of Appeals).

319. Id. at 772–73.

320. 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. Ill. Commerce Comm’n, 721 F.3d at 774.

321. Id. at 776; Ferrey, supra note 52, at 59 (having been cited by Seventh Circuit on Constitutional authority regarding state energy regulation).
Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy.322 The Commerce Clause is another prong of Constitutional contours within which state regulation must fit,323 which is beyond the scope of this article. The Supreme Court has denied certiorari for this case.324

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 was addressed in 2014 by a federal court in the Midwest.325

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:326 “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 dioxide emissions.”327 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.328 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

322. Ill. Commerce Comm’n, 721 F.3d at 776. 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.

323. Id.


326. 2007 Minn. Laws Ch. 136, art. 5, § 3; Minn. Stat. § 216H.03, subd. 3 (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).

327. Minn. Stat. § 216H.03, subd. 3 (establishing the provision which limits increases in statewide power sector carbon dioxide emissions).

328. 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.”). 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.
energy from other states.  

North Dakota and others sued Minnesota as the statute was a violation of the dormant Commerce Clause by discriminating against North Dakota’s use of coal and export of power in interstate commerce. North Dakota alleged that it affects the wholesale price and transmission of power and burdens interstate power sales. 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-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.

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 Federal Court highlighted precedent of the Supreme Court and many appellate courts including a prior decision of the Seventh Circuit which was also deciding the 

Ilinois v. FERC case which used extraterritoriality rationale for aspects not focused on price regulation. Price regulation seemed to be the only scrutiny imposed by the California federal court in the Rocky Mountain case.

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329. Id. Exemptions were made for the proposed Excelsior 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 (2008) 2009 Minn. PUC LEXIS 6; 2010 Minn. PUC LEXIS 458.
330. Minn. Stat. § 216H.03, subd.7.
333. Id. at *22.
334. Id. at *24.
335. Id. at *16.
336. Id. at *16.
337. See Nat’l Solid Wastes Mgmt. Ass’n v. Meyer, 63 F.3d 652, 658 (7th Cir. 1995) (“The practical impact of the Wisconsin statute on an economic activity completely outside the State reveals its basic infirmity . . . .”).
338. Ill. Commerce Comm’n v. Fed. Energy Regulatory Comm’n. 721 F.3d 764 (7th Cir. 2013), see discussion supra Section III.A.2 (discussing the Constitutionality of transmission and renewable power credits).
340. Infra. Section III.B.
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.” 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, “[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.

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.” 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.”

The federal court in Minnesota made a critical distinction between

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342. Id. at *16.
343. Id. at *2 (internal citations omitted).
344. Id. at *23.
electricity unavoidably in interstate commerce, and the more controllable liquid ethanol fuels in commerce in the Rocky Mountain Commerce Clause litigation 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.

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. This is a physical reality not always brought to the attention of courts, but when it is, the Supreme Court 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.

B. Preemption Pentagon Side 5: The Rocky Mountain Divide on Interstate Energy Commerce

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 pool 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

345. See discussion infra Section III.B (discussing interstate energy commerce after the Rocky Mountain decision).
347. Ferrey, supra note 202, at 1861–84; Ferrey, supra note 51 at 2–8; Ferrey, supra note 50, at 568.
349. See infra Section III.B (explaining interstate energy commerce after the Rocky Mountain decision).
351. See infra Section III.B.2 (discussion of California regulation of Low Carbon Fuel).
amount of lifecycle greenhouse gas emissions, per unit of energy of fuel
delivered, expressed in grams of carbon dioxide per megajoule.\textsuperscript{354}

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.\textsuperscript{355} The LCFS is a “set of regulations to govern the marketing of gasoline-ethanol blends sold in California.”\textsuperscript{356} 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 standards.\textsuperscript{357} CARB’s LCFS rule includes the lifecycle GHG emissions of fuel, including emissions produced during production and transportation of fuels to California.\textsuperscript{358} 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.\textsuperscript{359}

To accomplish this carbon intensity reduction, the LFCS assigns carbon intensity scores to all covered fuels.\textsuperscript{360} To lower their carbon intensity scores, providers may blend low-carbon ethanol into gasoline.\textsuperscript{361} 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.\textsuperscript{362} 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.\textsuperscript{363} 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

\begin{footnotes}
\item[354.] Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1081 (E.D. Cal. 2011).
\item[355.] CAL. AIR RES. BD., \textit{supra} note 353 at 180.
\item[356.] Rocky Mountain Farmers Union v. Goldstene, 719 F. Supp. 2d 1170, 1177 (E.D. Cal. 2010).
\item[357.] \textit{Id}.
\item[358.] \textit{Id}.
\item[359.] CAL. CODE REGS. tit. 17 § 95481(a)(38) (2012). 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.
\item[360.] \textit{Goldstene, 719 F. Supp. 2d at 1177; Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1082 (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.}
\item[361.] \textit{Goldstene, 719 F. Supp. 2d at 1177. Providers may also buy credits generated from another fuel provider that has credits in order to meet LFCS standards.}
\item[362.] \textit{Id. at 1178.}
\item[363.] \textit{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 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.}
\end{footnotes}
providers seeking to meet the California fuel standard requirements.

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?

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

364. Id.
365. Poet, LLC v. Cal. Air Res. Bd., 160 Cal. Rptr. 3d 69, 83 (Cal. Ct. App. 4th 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. Id. Poet alleged that CARB’s LCFS rule exceeds the scope of authority delegated to it by the legislature. Id. at 76–77.
366. Id. at 77.
368. Citizens for Better Forestry v. USDA, 341 F.3d 961, 970 (9th Cir. 2003).
369. Id. at 971 (internal citations omitted).
370. Exxon Mobil Corp. v. Env’t Prot. Agency, 217 F.3d 1246, 1255 (9th Cir. 2000). The petitioners asserted that the 2007 amendment to the Clean Air Act, the Energy Independence and Security Act (EISA), precluded CARB from its state-level LCFS program. Brief for Plaintiffs at 3. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071 (E.D. Cal. 2011). There is a “savings clause” for states in the Clean Air Act (“nothing in this act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce [any pollution standard] . . . except that such State . . . may not adopt or enforce any standard which is less stringent than the [federal] standard.” 42 U.S.C. § 7146 (2012).
emissions, although not so required by federal law. Defendants opposed the 
Plaintiffs’ preemption motion not on its 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. 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 plaintiff’s members suffered an actual injury which established associational standing, 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.”

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. The court disagreed with CARB regarding the first prong of the associational standing

371. Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1094–95 (E.D. Cal. 2011). Federal objectives were asserted by the plaintiffs to include reducing the United States’ greenhouse emissions, enhancing energy independence and protecting pre-existing investment in renewable energy. Plaintiffs argue that Congress struck a balance by not mandating pre-existing bio-refineries to reduce their lifecycle carbon emissions as outlined in the statute.

372. See id. at 1095 (“[A] plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to the challenged action of the defendant, and (3) it is likely, as opposed to merely speculative, that [their] injury will be redressed by a favorable decision.”).

373. Id. at 1096–98. The Rocky Mountain Plaintiffs are comprised of “groups that have an interest in protecting the corn ethanol industry,” including corn growers, users, merchants and marketers of distillers grain, producers of corn ethanol, and importers of ethanol into California from other states. The Court noted that rather than take the opportunity in discovery to establish standing, the farmer plaintiffs responded to Defendants’ interrogatories stating that they are not fuel providers.

374. Id. at 1098.

375. Citizens for Better Forestry v. USDA, 341 F.3d 961, 965 (9th Cir. 2003).

376. Goldstene, 843 F. Supp. 2d at 1099–101. Pointing 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. Plaintiff Growth Energy had previously submitted evidence to satisfy this prong. Although they state that the LCFS targets and harms their members, the industry plaintiffs do not submit any evidence to prove this allegation.

377. Id. at 1099.

378. Id. 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.
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.\textsuperscript{379} Similarly, the court on the third prong held that individual participation of the members is not needed and therefore it only “raises a pure question of law.”\textsuperscript{380}

Because the state opposed an as-applied preemption challenge while the plaintiffs opposed a facial challenge,\textsuperscript{381} the court deferred a decision until future briefing on these different issues and the standards of review that the court should use,\textsuperscript{382} and denied “without prejudice the Rocky Mountain Plaintiffs’ summary judgment motion related to its preemption claim.”\textsuperscript{383}

Having already found the LCFS illegal on other Constitutional grounds, as discussed immediately below,\textsuperscript{384} the federal district court did not need to resolve this additional claim of preemption, holding that petitioners lacked standing to raise it.\textsuperscript{385}

The Ninth Circuit stayed the district court’s injunction in April 2012, pending appeal.\textsuperscript{386} On appeal to the Ninth Circuit, CARB\textsuperscript{387} 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,\textsuperscript{388} particularly in areas of traditional state regulation, such as pollution control.\textsuperscript{389} CARB relied on the Ninth Circuit’s decision in another environmental case involving CARB,\textsuperscript{390} arguing that federal EISA’s savings clauses clearly limit its preemptive reach,\textsuperscript{391} citing two separate savings clauses in the EISA.\textsuperscript{392}

\begin{itemize}
\item 379. 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. Growth Energy has previously submitted evidence that satisfy this prong.
\item 380. Id.
\item 381. Id. at 1102 (“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.”).
\item 382. Id. at 1102–03.
\item 383. Id. at 1103.
\item 384. See infra at Section III. B. 3. (discussing preemption in discrimination against out-of-state commerce.)
\item 385. Goldstene, 843 F. Supp. 2d at 1079.
\item 386. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1078 (9th Cir. 2013).
\item 387. Brief for Appellant at 3, Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013), (Nos. 12–15131, 12–15135).
\item 388. Id. at 111.
\item 389. Id. at 112.
\item 390. See Pacific Merchant Shipping Ass’n v. Goldstene, 639 F.3d 1154, 1167 (9th Cir. 2011) (finding air pollution prevention falls under the broad police powers of the states).
\item 391. Brief for Appellant at 112–13, Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013).
\item 392. Id. 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.”
\end{itemize}
The plaintiffs countered that the Supreme Court of the United States, in \textit{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.”\textsuperscript{393} 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.”\textsuperscript{394} 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.\textsuperscript{395} Neither party addressed at the trial level whether the LCFS regulation is severable.\textsuperscript{396}

The \textit{Rocky Mountain} plaintiffs alternatively asserted at trial that strict scrutiny still applies because under the Commerce Clause, one state’s laws cannot “control conduct beyond the boundary of the state.”\textsuperscript{397} Defendants countered at trial that the only effects the LCFS may have on out-of-state producers are indirect and therefore do not directly regulate outside California’s boundaries.\textsuperscript{398} 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.”\textsuperscript{399} The trial court held that under the Commerce Clause, states cannot place restrictions on imports “in order to control commerce in other states.”\textsuperscript{400} The court held that “this type of regulation ‘forces’ a merchant to seek regulatory approval in one State before undertaking a transaction in another,” causing the LCFS to “directly regulate[ ] interstate commerce.”\textsuperscript{401}

In December 2011, the Federal District Court for Eastern District of California 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.”\textsuperscript{402} The federal trial court reiterated that only the federal government can regulate

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\textsuperscript{394} Id.  \\
\textsuperscript{395} Rocky Mountain Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1101 (E.D. Cal. 2011).  \\
\textsuperscript{396} 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.”).  \\
\textsuperscript{397} Id. at 1090–91. 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.  \\
\textsuperscript{398} Id. at 1091.  \\
\textsuperscript{399} Id.  \\
\textsuperscript{400} Id. at 1092.  \\
\textsuperscript{401} Id. (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)).  \\
\textsuperscript{402} Id. at 1105. 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. at 1082.
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commerce between the states, and California, attempting to regulate commerce outside its borders, violates exclusive federal authority to regulate interstate commerce. A state cannot, even indirectly, regulate or burden commerce originating outside of its geographic jurisdiction. The court again distinguished motive from constitutional requirements, holding, “Although [the] goal to combat global warming may be legitimate, however, 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 were not yet ripe and remanded for further trial court development of the record on these issues. It reversed the trial court determination on extraterritorial impact of the LCFS as a violation of the Commerce Clause. The 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 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 on petitions for certiorari are now pending after the New Jersey and Maryland LCAPP trial court cases striking state regulation of locational preferences of new power generation were upheld by the Third and Fourth Circuits respectively, and as well in the Minnesota matter striking state restriction of use of foreign coal power. Certiorari was denied by the Supreme Court after the Seventh 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

403. Id. at 1084 (citing Shamrock Farms Co. v. Veneman, 146 F.3d 1177, 1179 (9th Cir. 1998)).
406. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1107 (9th Cir. 2013).
407. Id.
408. Id.
409. Id. at 1093.
410. Id. at 1089–90.
413. Ill. Commerce Comm’n v. Fed. Energy Regulatory Comm’n, 721 F.3d 764 (7th Cir. 2013), cert. denied
foreign products in interstate commerce regarding renewable fuels did not receive a majority to rehear the case *en banc* in the Ninth Circuit, and certiorari was also denied by 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 opinion, among those seven recent state energy regulatory decisions covered above, is the only decision upholding the constitutionality of state regulation of energy. The nature of the type of energy regulated by a state, with electricity occupying a distinct physical and legal space, is a key constitutional distinction. However, there is also 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. The matters now pending involve American energy, which is essential to the national economy. Electricity has been identified as the second most important innovation since the wheel. Electric power moves instantaneously in interstate commerce within the lower forty-eight states, and 3,882,600,217 Mwh of electricity was used in 2011. Power is unique compared to other tangible energy sources: A constant simultaneous balancing


* Rocky Mountain Farmers Union v. Corey, 740 F.3d 507 (9th Cir. 2014).


* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1107 (9th Cir. 2013).

* Id. at 1101.


* Failows, supra note 1.


* Data is for the most recent year data of 2011. See Table 2.2. *Retail Sales and Direct Use of Electricity to Ultimate Customers*, ENERGY INFO. ADMIN., http://www.eia.gov/electricity/annual/html/epa_02_02.html (last visited Oct. 6, 2014).
of supply and demand on the utility grid system is required, second-by-second to keep the grid operational. A loss of power would disrupt communication, transport, heating, water supply, and hospitals and emergency rooms depending on their amount of back-up generation.

States recently attempted 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, the federal circuit courts of appeals, federal trial courts, and a recent FERC opinion, have decided controversies regarding state energy or utility regulation, with the majority holding that states have acted unconstitutionally by crossing into preempted territory. 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. There is no easy

423. Ferrey, supra note 50, at 568.
426. Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013); Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393 (2d Cir. 2013); Ill. Commerce Comm’n., v. Fed. Energy Regulatory Comm’n, 721 F.3d 764 (7th Cir. 2013).
429. Thomas Edison first applied electricity commercially only in 1876 at Wannamaker’s store in
detour for a state regulation around the Supremacy Clause.

Philadelphia. Only in the 20th century did cities become electrified, and as electricity was distributed, the Federal Power Act was enacted in 1935. See, FERREY, supra note 108, at 264.