The Retail-Wholesale Divide

Topics in the intersection of federal & state jurisdiction

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Cooperative Federalism?

- The national government may grant states the privilege of regulating a federally pre-empted field, and condition the states’ exercise of that regulation on compliance with federal standards. *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981)

- However, “the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.” *Printz v. United States*, 521 U.S. 898 (1997)

- It may not “conscript state [agencies] into the national bureaucratic army.” *FERC v. Mississippi* (O’Connor concurring), 456 U.S. 742, 775 (1982)

- Where does encouragement end and “conscription” begin? “We have no need to fix a line… It is enough for today that whatever that line may be, this statute is surely beyond it.” *NFIB v. Sebelius*, invaliding the ACA’s state Medicaid expansion requirement.
The premiere example of states’ regulation of an otherwise pre-empted field under the aegis of a formal legal regime, the Public Utility Regulatory Policies Act of 1978.

Recent resurgence in FERC policing, under Sec. 210(h), in non-RTO environments, nearly all concerning episodes where incumbent monopolies have refused to negotiate with QFs, and where states have provided no avenue for QFs to obtain development opportunities.

FERC deference to states on actual calculation of avoided cost remains strong.
Distributed Generation

- Hype aside, DG makes up a small part of nearly every state’s resource mix, except in those places with ratemaking that departs from cost-causation principles in extraordinary ways (California) or where resources are unavailable or costly (Hawaii).

- DG is an energy transaction which, unlike PURPA projects, federal law has not specifically brought into the federal ambit.

- However, DG is probably a FERC-jurisdictional transaction, regulated by states only as a matter of tradition and convenience.
  - FERC has jurisdiction over the “sale of electric energy at wholesale,” which is “a sale of electric energy to any person for resale.” 16 US §824(b)(1) & (d).
The Demand Response Bombshell

- FERC has issued many orders on demand-side resources, including 2 important rules: Ord. 719 & 745.
- In just 16 pages, the D.C. Circuit Court dismantled much of that. *Electric Power Supply Ass’n v. FERC*
- “Demand response—simply put—is part of the retail market. It involves *retail* customers, their decision whether to purchase *at retail*, and the levels of *retail* electricity consumption.”
- [A]s the Commission concedes, demand response is not a wholesale sale of electricity; in fact, it is not a sale at all.”
- “A buyer is a buyer, but a reduction in consumption cannot be a ‘wholesale sale.’”
States RPSes: Kings in their own Castles

• Parochialism has turned state Renewable Portfolio Standards into a jumble of requirements, balkanizing renewable energy development

• Four impositions to a more free-flowing commerce:
  o Locational discrimination: Some states require projects to be located within a state, and even to be owned by citizens of that state.
  o Size discrimination: a preference for smaller projects.
  o Resource discrimination: some renewable resources are not ‘renewable.’
  o Extraneous requirements: Projects required to pay ‘prevailing wage,’ or use locally made materials, etc.

• The result? Dozens of different REC markets.