



De-Carbonization: An End to RTO Mission Creep?

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John Coyle
Partner
Duncan & Allen
jpc@duncanallen.com
(202) 289-8400

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- FPA § 201(b)(1) is supposed to draw “a bright line, easily discerned” between federal regulation of wholesale transactions and transmission, and state regulation of generation and distribution of electricity.
- RTO centralized auction “market” constructs move and blur that “bright line.”



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- Complicated by FERC authority under FPA §§ 205 and 206 over things that “affect” wholesale rates, terms and conditions.
- Jurisdictional stresses began to play out in three 2015-2016 Supreme Court decisions: *Oneok*, *Electric Pwr. Supply Assn. v. FERC* and *Hughes v. Talen Energy Mktg., LLC*.

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- Action has quickly moved beyond *Electric Pwr. Supply Assn* and *Hughes*.
- Federal pre-emption is less of an issue; scope of FERC authority under FPA is more of an issue.
- Jurisdictional questions involved are not simple; political overlay complicates further.
- Jurisdictional issues involved have implications broader than RTO centralized auction constructs.

“The castle is falling; save the MOPR!”



No Federal De-Carbonization Policy



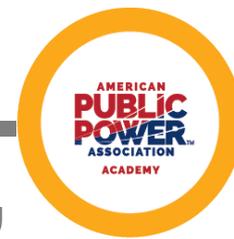
- No federal policy at present
- EPA's carbon “endangerment finding” affirmed in *UARG v. EPA*, 134 S.Ct. 2427 (2014), but
- Clean Power Plan stayed in *W. Va. v. U.S.*
- DOE Notice of Proposed Rulemaking in FERC Docket No. RM18-1-000 – *Grid Reliability and Resilience Pricing* (Notice Oct. 2, 2017) points in an opposite direction.

State De-Carbonization Policies Vary Widely



- CA and MA – Global Warming Solutions Act
- Nine-State Regional Greenhouse Gas Initiative in Northeast.
- New York REV Proceeding includes a Clean Energy Std.
- State perspectives vary within single RTOs –
 - Xcel proposes to split Northern States Pwr. into separate Minnesota and North Dakota utilities, due to divergent state rate treatment for de-carbonization

Jurisdiction Over the De-Carbonization “Product”



- Straight-up greenhouse gas emissions regulation (e.g., cap-and-trade) is State regulation of electric generation.
- Environmental attributes (RECs, ZECs and carbon pricing) are also creations of State law, according to FERC.

Jurisdiction over the Market?



Where Will Conflict Erupt First?



- Not likely in single-state ISOs (NY, CA and TX) – tend to follow state policy directives. Also, no capacity auctions in CA or TX.
 - But CAISO BA expansion with EIM will cause collision with CARB GHG.
- Not likely in SPP (no resource adequacy construct) or MISO (truly residual capacity market) --
- Highly likely in PJM and ISO New England.
 - MOPR-dependent price support for gas-fired generation
 - Divergent views among States on de-carbonization
 - States and consumer stakeholders burned before.

Ground Rules and Early Innings



- *Hughes* pre-emption holding is not much of a factor, for two reasons: (1) standing, and (2) “limited” holding.
- Court expressed skepticism about plaintiffs’ standing to seek declaratory relief under the Supremacy Clause in *Hughes* (footnote 6).
- *Armstrong v. Exceptional Child Ctr.*, 135 S.Ct. 1378, 1383 (2015) (Supremacy clause does not confer any private right of action). Less likely that future FPA pre-emption complaints could establish standing.

Hughes's "Limited" Holding



- “Nothing in this opinion should be read to foreclose . . . States from encouraging production of . . . clean generation through measures ‘untethered to a generator’s wholesale market participation.’” 136 S. Ct. at 1299.
- Subsequent pre-emption cases have taken Justice Ginsburg at her word. See next slide.

Post-*Hughes* Cases Read That Decision Narrowly



- *Allco Finance, Ltd. v. Klee*, 861 F.3d 82, 97-102 (2nd Cir. 2017) (state-directed procurement of non-carbon emitting generation resources);
- *Coalition for Competitive Electricity v. Zibelman*, ___ F. Supp.3d ___, 2017 U.S. Dist. LEXIS 116140 at *20-29 (S.D.N.Y. No. 16-cv-8164 (VEC) July 25, 2017) (New York ZECs)
- *Village of Old Mill Creek v. Star*, ___ F. Supp.3d ___, 2017 U.S. Dist. LEXIS 109368 at *39-40 (N.D. Ill. No. 17 CV 1163 (July 14, 2017) (Illinois ZECs).

Does “Public Interest” Give FERC Jurisdiction?



- Precedent strongly indicates no:
 - *NAACP v. FPC*, 425 U.S. 662, 670 (1976)
 - *Bob Jones University v. United States*, 461 U.S. 574, 611 (1983) (Powell, J., concurring)
 - *Grand Council of the Crees v. FERC*, 198 F.3d 950, 957 (D.C. Cir. 2000)
 - *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1148 (1980)

Can Two-Tiered Pricing Save the MOPR?



- Function of two-tiered pricing – one auction with MOPR bid floor, one without – is to support centralized auction price for gas-fired generation while allowing renewable generation procured at State direction to bid in secondary auction.
- Focus on “subsidization” is undue discrimination, as all generation is “subsidized” to some extent.

Can Two-Tiered Pricing Save the MOPR? (cont'd)



- “The fact of the matter is that all energy resources receive federal subsidies, and some resources have received subsidies for decades. Yet the MOPR is only concerned with state subsidies, not federal ones, though both can have a similar impact on markets.”
N.Y. Pub. Svc. Comm’n v. N.Y. ISO, Inc., 158 FERC ¶ 61,137 at 61,865 (2017) (Bay, Comm’r, concurring).

Can Two-Tiered Pricing Save the MOPR? (cont'd)



- Merchant generator response to State-directed renewables procurement: extend MOPR to existing capacity, in addition to new capacity (amended complaint in EL16-49-000 – *Calpine Corp., et al. v. PJM Interconnection*, filed January 9, 2017).
- Similar strategy expected in New England's Competitive Auctions with Sponsored Policy Resources ("CASPR") process.

Takeaways



- Best: Phase out mandatory participation in centralized capacity auctions (James Wilson whitepaper *“Missing Money” Revisited*)
- Good: Restoration of capacity self-supply rights for consumer-owned utilities – work around for mandatory centralized auctions.
- Always: Minimize size of “target” for load-based cost allocations (behind-the-meter generation, storage, efficiency, load-shifting).

Eternal Vigilance

