

# The Retail-Wholesale Divide

Topics in the intersection of federal & state jurisdiction

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Cambridge, June 12, 2014



# 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*, invalidating the ACA's state Medicaid expansion requirement.

# PURPA

- 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:
  - Locational discrimination: Some states require projects to be located within a state, and even to be owned by citizens of that state.
  - Size discrimination: a preference for smaller projects.
  - Resource discrimination: some renewable resources are not 'renewable.'
  - Extraneous requirements: Projects required to pay 'prevailing wage,' or use locally made materials, etc.
- The result? Dozens of different REC markets.