REGIONAL REGULATION:
AN OPTION IN THE ARRAY OF REGULATORY INSTITUTIONS FOR A RESTRUCTURED ELECTRICITY SECTOR

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The regulatory framework for electricity in the United States has evolved in two tiers, on both a horizontal and a vertical basis. Horizontally, the two tiers are de jure and voluntary, or de facto. Vertically, of course, the two tiers are state and federal, subsets of the de jure tier. De jure regulation has, as might be expected evolved along political or policy or even legal fiction boundary lines. The voluntary regulatory scheme, perhaps best illustrated by the regional reliability councils, has tended to evolve along market or physical characteristics and bear, with the possible exception of ERCOT, at best, little resemblance to any political or jurisdictional boundaries Not surprisingly, as the electricity market has evolved, the de facto regulatory system, in a geographic, perhaps even geo-political sense, more accurately reflects the realities of the marketplace. Simply stated, the markets evolving are neither state specific nor national in scope, rather they are, at one and the same time, both regional and international.

It is not at all surprising that the most commonly discussed structural proposals for addressing the evolution of the market are largely of a regional nature in scope. The most notable examples, are the Regional Transmission Groups (RTGs) and the Independent System Operators (ISOs). They are, as the names themselves indicate, logical extensions of the voluntary, horizontal, regulatory framework. Because the proposals are extensions of the horizontal "regulatory system," they necessarily depend on agreement or consensus among rather disparate, often conflicting groups or corporate entities. There is, by definition, no effective and consistent way to assure that protocols are observed and enforced. While it can be argued that the courts or arbitrators could be utilized,

neither are the appropriate bodies with both expertise and the responsibility to protect the broad public interest rather than merely adjudicate between adverse litigants (perhaps even conspiratorial litigants whose purpose in litigating is to seek some sort of competitive advantage over an actor who is not present in any particular proceeding, a not uncommon result in regulatory matters). No individual state commission, from either a jurisdictional or policy perspective, is in position to oversee bodies that are both regional in scope and non-parochial in action. While it could be argued that such matters are jurisdictional to the FERC, the simple fact is that such matters are simultaneously, both too big and too small for the federal regulators. They are too small in the sense that FERC's scope is inherently national in scope, inherently less sensitive to regional specific matters than a more local forum might be, and perhaps too prone to follow precedents set in contexts not entirely relevant to the region in question. The issues may be too big in the sense that the matters likely to require adjudication may well be beyond the scope of FERC jurisdiction. Examples of matters that are non-jurisdictional to FERC might include the siting of new generating and/or transmission facilities, international trade in electric power, matters involving retail access, environmental considerations, resource mix, efficiency, or even matters of technology.

Historically, of course, regulatory institutions tended to evolve along the same geographic scope as the entities requiring regulation. Local power companies originally operated under municipal franchise and the regulation of city fathers. As the companies' business activities expanded out beyond municipal boundaries, so too regulation moved to state legislatures, and ultimately to state regulatory bodies. As interstate transactions developed, the Federal Power Commission (now FERC) was created to deal with those transactions.. Applied to the evolution of such regional economic entities as RTGs and ISOs, historical experience, it could well be argued,

demands that regional regulatory bodies need to be created to deal with the new reality.

The issue of regional regulation is not, of course, a new idea. Future U.S. Supreme Court Justice Felix Frankfurter and James Landis wrote of the possibility and advisability of it over seventy years ago.[1] It has reappeared as an issue over the years in the context of the Tennessee Valley Authority (TVA), Bonneville Power Administration (BPA), Northwest Power Planning Council (NWPPC), regulation of registered holding and other multi-state adulated companies, mergers and acquisitions, integrated resource planning, emissions trading and other environmental matters, transmission pricing, access, planning, and siting, and in a variety of other contexts. For many different reasons, most of the proposals have made for little other than interesting debate (NWPPC and TVA are, to some extent, notable exceptions in the sense that they represent institutions that have actually been created which exercise some degree of regional regulatory authority). In non-regulatory contexts as well there have been a number of efforts to bring about regional entities through delegations of federal authority or interstate compacts. Some, such as pacts to deal with low level nuclear waste, have been less than successful. Others, such as the Ohio and Columbia River Basin Commissions have produced modest results. Still others, such the efforts to clean up the Great Lakes, and the Port Authority of New York/New Jersey, have been notable successes. Regardless of historical experience, however, the emergence of the very real possibility of critical regional bottleneck entities compels a reexamination of the issue.

It is important, in addressing the question of regional regulation, that it be done in the context of restructuring regulation to reflect both the nature of a restructured industry and requirements of

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[1] Felix Frankfurter and James M. Landis, "The Compact Clause of the Constitution, A Study of Interstate Adjustments," Yale Law Journal, Vol XXXIV, No. 7 May, 1925

protecting the public interest. It is likely to be of little value, indeed, it may well be suicidal politically, to simply propose that a third, vertical level of de jure regulation be superimposed between the two existing layers Rather, it makes sense to think about regulatory issues in two critical contexts. The first is the identification of those matters that require some form of regulatory oversight. The second context is identifying the appropriate level for regulation, state, regional, or national. The simple, unalterable fact is that the fundamental reformation of the North American electric sector requires a thorough reexamination of the regulatory institutions that have been utilized to oversee an industry whose organization and culture is undergoing fundamental transformation. Both state and federal regulatory responsibilities require reexamination, and it would be remiss not to put regional regulation on the table for consideration as a repository of regulatory authority that is required but cannot legally, or optimally, be exercised by the two existing levels of de jure regulation.