Legal After-Shocks on the Energy Seismograph: Judicial Prohibition of Recent State Regulation and Promotion of Power

by Steven Ferrey

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I. Tripwires for State Regulation of Energy

Notwithstanding the technical merits of distributed generation, state incentives for and regulation of the power sector have come under significant legal attack during the past five years. In 23 constitutional challenges to state sustainable and distributed energy regulation, the states lost at some level in 17 of the 23 cases, or the cases were settled in favor of the challengers; five were dismissed on procedural grounds or are still pending. States that lost legal challenges can be ordered to pay plaintiffs' legal fees into the millions of dollars. States are discovering that they have only a highly circumscribed and restricted ability to regulate the new wholesale energy markets that characterize 21st century America.

A 2013 U.S. Supreme Court decision further tightened that restriction by granting greater federal agency discretion to draw the line. In *City of Arlington, Texas v. FCC*,[1] the Court addressed whether a federal regulatory agency could broadly construe its own jurisdiction pursuant to judicial *Chevron*[2] deference. The Court ruled that *Chevron* applies to an agency's interpretation of the scope of its own statutory jurisdiction, stating that "statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[3] "[If] the agency's answer is based on a permissible construction of the statute," the Court said, "that is the end of the matter."[4] As will be shown later in the Comment, this decision has increased the power of the Federal Energy Regulatory Commission (FERC).

In the last three years, courts have held that leading states including California, Maryland, Michigan, Minnesota, New Jersey, and Vermont have acted in an unconstitutional manner by promulgating and enforcing energy regulation that conflicts with federal regulation, in violation of the Supremacy and Commerce Clauses. The aftershocks from this legal epicenter now radiate through state renewable energy and distributed energy programs, causing serious policy ramifications for how we construct the sustainable energy future.

Power is treated differently from all other commodities in the United States due to the Federal Power Act (FPA)[5] and the Supremacy Clause of the U.S. Constitution.[6] In 2013 and 2014, federal courts, including the Supreme Court,[7] federal circuit courts of appeals,[8] and federal district courts,[9]

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1. City of Arlington, Tex. v. Federal Communications Comm'n (FCC), 133 S. Ct. 1863, 43 ELR 20112 (May 20, 2013).
2. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).
3. *City of Arlington*, 133 S. Ct. at 1868 (*citing* AT&T Corp. v. Iowa Utilities Bd. 525 U.S. 366, 397 (1999)).
4. *City of Arlington*, 133 S. Ct. at 1868 (*citing Chevron*, 467 U.S. at 842).
5. Federal Power Act (FPA), 16 U.S.C. §§824 et seq.
6. U.S. Const., art. VI, cl. 2.
7. American Trucking Ass'ns v. City of Los Angeles, 133 S. Ct. 927, 43 ELR 20128 (2013); *City of Arlington*, 133 S. Ct. 1863.
8. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 43 ELR 20201 (2d Cir. 2013); Illinois Commerce Comm'n v. Federal Energy Regulatory Comm'n (FERC), 721 F.3d 764 (7th Cir. 2013); Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 43 ELR 20216 (9th Cir. 2013).
9. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 233, 42 ELR 20029 (D. Vt. 2012); Rocky Mtn. Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1099, 42 ELR 20013 (E.D. Cal. 2011); PPL Energyplus, LLC v. Nazarian, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014); PPL Energyplus, LLC v. Hanna, 977 F. Supp. 2d 372 (D.N.J. 2013), *aff'd*, PPL Energyplus, LLC v. Solomon, 766 F.3d 241, 44 ELR 20207 (3d Cir. 2014).

plus FERC,[10] confronted several cases alleging state violation of the Supremacy Clause and the Commerce Clause.[11] At either the trial or appellate court levels, the states have lost each of these cases in a significant aspect. Unconstitutional state regulation, when challenged, can result in the challengers' attorneys fees being picked up by state taxpayers, so there is much at risk.[12]

There are three legal tripwires that states have not always heeded: (1) the Supremacy Clause and preemption of state power; (2) the Commerce Clause and prohibition on certain state regulation; and (3) state administrative law issues in state electricity regulation. This Comment provides an introduction to recent barriers that states have encountered with the first two constitutional tripwires, and briefly summarizes the most recent administrative entanglements in a single state, California.

II. The Supremacy Clause

A. *Supremacy and Preemption*

Sections 205 and 206 of the FPA[13] empower FERC exclusively to regulate rates for the interstate and wholesale sale and transmission of electricity.[14] FERC and its case law exercise 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."[15] The 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.[16] When a transaction is subject to exclusive FERC jurisdiction and regulation, state regulation is preempted as a matter of federal law and the Supremacy Clause, under a long-standing and consistent line of rulings by the Supreme Court.[17] As the Court said in *New England Power Co. v. New Hampshire*,[18] "FERC has exclusive authority to set and to determine the reasonableness of wholesale rates."[19] Wholesale rates for sales in interstate commerce are wholly beyond any state authority.[20] "It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject."[21] The FPA "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,"[22] the Court said in *New England Power Co.* If states impose a rate in excess of avoided cost by either "law or policy" (avoided cost being the only wholesale power sale rate that states can set as the delegates of federal authority), the "contracts will be considered to be void ab initio."[23] Power moves interstate constantly pursuant to federal law.

B. *States Encounter Power Tripwires*

Some states want power plants sited in their states in order to reap the benefits of short transmission, jobs, and tax benefits. Other states take the opposite position—*not* wanting power plants to operate in their states. However, when those are independently owned private power projects (a description that characterizes the majority of power plants constructed each year in the United States), states cannot manipulate, even indirectly, price and economic factors to accomplish this, without violating the Supremacy Clause tripwire.

10. FERC Order on Petitions for Declaratory Order, In re California Pub. Utils. Comm'n, Southern Cal. Edison Co., Pacific Gas & Elec. Co., San Diego Gas & Elec. Co., 132 FERC P 61047 (F.E.R.C.), 61337-38 (2010).
11. U.S. Const., art. I, §8, cl. 3.
12. In *Solomon*, the plaintiffs were allowed to submit an application for the state to cover their legal fees. *See* PPL EnergyPlus, LLC v. Solomon, No. 3:11-CV-00745-PGS-DEA, 2011 WL 5007972 (D.N.J. 2011) (scheduling order entered Oct. 18, 2013). Similarly, in *Hanna* and the *Entergy* cases, applications for attorneys fees were granted or awarded. *Hanna*, 977 F. Supp. 2d 372, *aff'd*, *Solomon*, 766 F.3d 241; *Shumlin*, 838 F. Supp. 2d at 233.
13. 16 U.S.C. §§824d, 824e.
14. Public Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC, 471 F.3d 1053, 1058 (9th Cir. 2006), *aff'd in part and rev'd in part sub nom.* Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008).
15. 16 U.S.C. §4(b). S*ee, e.g.*, Pennsylvania Power & Light Co., 23 FERC P 61006 (F.E.R.C.) at 61018, *reh'g denied*, 23 FERC P 61325 (F.E.R.C.) (1983); 37 FERC P 61256 (F.E.R.C.) at 61652 (1986); Florida Power & Light Co., 85 P.U.R. 4th 1 (F.E.R.C.), 40 FERC P 61045 at 61120-21, *reh'g denied*, 41 FERC P 61153 (F.E.R.C.) at 61382 (1987); Houlton Water Co. v. Maine Pub. Serv. Co., 60 FERC P 61141 (F.E.R.C.) at 61515 (1992); Northern Ind. Pub. Serv. Co., 66 FERC P 61213 at 61488 (1994); Connecticut Light & Power Co., 70 FERC P 61012 (F.E.R.C.) at 61030, *reconsideration denied*, 71 FERC P 61035 (F.E.R.C.) (1995); Central Vt. Pub. Serv. Corp., 84 FERC P 61194 at 61973-75 (1998); Progress Energy, Inc., 97 FERC P 61141 (F.E.R.C.) at 61628 (2001); Armstrong Energy Ltd. P'ship, LLP, 99 FERC P 61024 (F.E.R.C.) at 61104 (2002); Niagara Mohawk Power Corp., 100 FERC P 61019 at ¶ 17 (2002); Barton Village, Inc. v. Citizens Utils. Co., 100 FERC P 61244 (F.E.R.C.) at ¶ 12 (2002); Virginia Elec. & Power Co., 103 FERC P 61109 (F.E.R.C.) at 6 (2003); Southern Cal. Edison Co., 106 FERC P 61183 (F.E.R.C.) at ¶¶ 14, 19 (2004); Midwest Indep. Transmission Sys. Operator, Inc., 106 FERC P 61337 (F.E.R.C.) at ¶ 14 & n.17 (2004); Entergy Servs., Inc., 120 FERC P 61020 (F.E.R.C.) at ¶ 28 (2007); Aquila Merchant Servs., Inc., 125 FERC P 61175 at ¶ 17 (2008).
16. Federal Power Comm'n (FPC) v. Southern Cal. Edison Co., 376 U.S. 205, 215-16 (1964).
17. New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). *See also* Montana-Dakota Co. v. Pub. Serv. Comm'n, 341 U.S. 246, 251 (1951), Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988); Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n, 539 U.S. 39 (2003).
18. *New England Power Co.*, 455 U.S. at 340.
19. *Mississippi Power & Light Co.*, 487 U.S. at 371 ("FERC has exclusive authority to determine the reasonableness of wholesale rates."); *accord Public Util. Dist. No. 1 of Snohomish Cnty.*, 471 F.3d at 1066; *aff'd in part and rev'd in part sub nom. Morgan Stanley Capital Grp., Inc.*, 554 U.S. 527.
20. Independent Energy Producers Ass'n v. California Pub. Utils. Comm'n, 36 F.3d 848 (9th Cir. 1994); FPC v. Southern Cal. Edison Co., 376 U.S. 205, 214 (1964); Southern Cal. Edison Co., 159 P.U.R. 4th 381 (F.E.R.C.), 70 FERC P 61215 (1995).
21. *Mississippi Power & Light Co.*, 487 U.S. at 377 (Scalia, J., concurring in the judgment).
22. *New England Power Co.*, 455 U.S. at 340 (*citing* United States v. Public Utils. Comm'n of Cal., 345 U.S. 295, 311 (1953). *See also* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 956 (1986) (stating that the Commission "has exclusive jurisdiction over interstate wholesale power rates").
23. Connecticut Light & Power Co., 70 FERC P 61012 (F.E.R.C.) at 61029-30.

1. Maryland Control of Electricity Generation Siting

In a dispute in federal court in Maryland,[24] the state required its utilities to enter long-term Contracts for Differences (known as CfDs, a form of power purchase agreement (PPA)) only with certain designated independent power producers willing to locate their new electricity generation capacity in Maryland or the District of Columbia. The Maryland CfD provided that, regardless of the price set by the FERC/PJM[25] federally regulated and approved wholesale electricity market,[26] the Maryland utilities would ensure that the Maryland-selected in-state power projects received a guaranteed price augmented by state funds and fixed by a contractual formula. The law did affect the geographic situs of the commerce; however, there was no requirement for the owner of the in-state facility to be an in-state company.

PJM operates pursuant to a required Open Access Transmission Tariff approved by FERC. It provides capacity payments for the siting of new power generation as needed throughout its 13-state area, which includes Maryland and New Jersey. Maryland ratepayers supply the wedge price between the winning PJM bid by the selected supplier and the PPA rates guaranteed by the state. In *PPL Energyplus, LLC v. Nazarian*,[27] the state regulation was held to be unconstitutional under the Supremacy Clause. The prevailing plaintiffs submitted applications to recover their attorney fees.

The 2013 district court decision determined that Maryland's CfD requiring local utilities to enter into long-term PPAs was an impermissible intrusion of state regulation into wholesale rates, disrupting FERC-approved wholesale power markets. Under the FPA and the Supremacy Clause, states cannot dictate the ultimate price received for wholesale energy and capacity sales in the PJM markets. The district court quoted *West Lynn Creamery, Inc. v. Healy* in concluding that, "Such state economic protectionism 'violates the principle of the unitary national market by handicapping out-of-state competitors."[28] The court found that when Maryland manipulates the prices of wholesale power markets even indirectly, the utilities and correspondingly Maryland ratepayers are directly affected by the resulting wholesale prices determined by the federally regulated wholesale PJM markets. The court held that the Maryland regulation violates the Supremacy Clause by virtue of field preemption.

2. New Jersey Control of Electricity Generation Siting

New Jersey had a law similar to the Maryland in-state situs requirement for new power generation capacity. In 2011, New Jersey enacted the Long-Term Capacity Pilot Project (LCAPP) program as a subsidy program with CfDs to encourage the acquisition by utilities of the output of 2,000 megawatts (MW) of new independent unregulated in-state power projects.[29] New Jersey provided selected new in-state projects financial compensation in the form of CfDs. The state required the projects to obtain capacity payments through participation with the PJM capacity auction. Winning projects would be financially "topped off" by state money for winning the federally approved PJM capacity reverse auction, to provide some of their cash inflow from regional (out-of-state) ratepayers.

The New Jersey LCAPP CfD proposal was challenged on field preemption and conflict preemption grounds,[30] insofar as a fixed price for select New Jersey generators allows such generation effectively to bid below the true cost of new entry for the regional multistate FERC-approved PJM auction and thereby obstructs the federal goal of a competitive auction without selective subsidies for capacity resources.[31] This will cause the regional PJM to guarantee these New Jersey generators a substantial capacity payment every month. The cost is passed on not merely to New Jersey ratepayers, but to all PJM ratepayers who reside in many of the 13 PJM states and Washington, D.C.[32]

The 2013 New Jersey district court decision ruled that the state was impermissibly regulating wholesale energy prices to promote the construction of new generation facilities in New Jersey. It stated that the LCAPP

24. PPL Energyplus, LLC v. Nazarian, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014).
25. PJM, an independent system operator (ISO), is a FERC-created and authorized entity. In the PJM ISO serving 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. For more information on PJM's models, visit their web page http://www.pjm.com/documents/agreements.aspx. For more information on FERC's market oversight of PJM, visit the Commission's web page http://www.ferc.gov/market-oversight/mkt-electric/pjm.asp.
26. *See generally* Steven Ferrey, The Law of Independent Power: Development, Cogeneration, Utility Regulation (36th ed. 2015), at §§8:10, 10:87, 10:91 [hereinafter Ferry, Law of Independent Power]; *see also* Steven Ferrey, The New Rules: A Guide to Electric Market Regulation 49-50 (2010) [hereinafter Ferrey, New Rules].
27. 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014).
28. 974 F. Supp. 2d 790, slip op. at 114, *quoting* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994).
29. New Jersey Long-Term Capacity Pilot Project (LCAPP) Act, Pub. L. No. 2001, c. 9 (Jan. 28, 2011), codified at N.J. Stat. Ann. §§48:3-51, 48:3-98.2-.4. After conducting a competitive bid process with public utilities, the New Jersey Board of Public Utilities (BPU) is directed to enter into standard offer capacity agreements (SOCAs), which are long-term 15-year contracts that guarantee the state-selected generating companies a fixed price for their capacity.
30. PPL Energyplus, LLC v. Hanna, 977 F. Supp. 2d 372 (D.N.J. 2013), *aff'd*, PPL Energyplus, LLC v. Solomon, 766 F.3d 241, 44 ELR 20207 (3d Cir. 2014). The complaint is available at http://www.rogerwitherspoon.com/docs/psegfederalcourtchallenge-2-11.pdf.
31. After the New Jersey BPU selects a generator program, they enter into an 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.
32. For information on PJM's market, visit their web page About PJM: Who We Are, http://www.pjm.com/about-pjm.aspx.

> intrude[s] 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" . . . . . Accordingly, the LCAPP Act invades the field occupied by Congress and is preempted by the Federal Power Act.[33]

The court held that conflict preemption prevents state regulation of, or influence over, the wholesale price for energy transactions. A state 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, the district court found. The plaintiffs were allowed to submit an application for the state to reimburse their legal fees.

These two decisions in Maryland and New Jersey, rendered by separate federal courts, reach the same conclusion regarding the unconstitutionality of quite similar state statutes. Both statutes attempted to require eligible projects to locate in-state and require utilities in the state to enter mandatory CfDs to subsidize them at above-market prices and extract some of the compensation for power production from the regional 13-state PJM independent system operator (ISO) market and their ratepayers. Both courts found that these laws violate the Supremacy Clause.

3. Vermont Regulation of Electric Energy Generation and Sale

Vermont moved in the opposite direction from Maryland and New Jersey, and attempted to restrict an existing, approved power generation facility from continuing to operate in interstate commerce, becoming the first state to attempt this with an existing federally licensed power generation facility.[34] As a requirement for granting a license for future operation of this existing wholesale power generation facility, Vermont legislators required the facility owners to provide discounts from the future market-based wholesale price of power to be sold to in-state incumbent Vermont utilities.[35] Absent such a significant discount, the state Senate voted not to approve or permit a continuing license.[36] The district court held that this Vermont regulation of energy violated the Supremacy Clause and was preempted; with respect to a third ground, one of the preemption claims was found not ripe for determination.[37] The court held that the FPA invests FERC with "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, and struck state regulation as unconstitutional."[38] The court stated:

> 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. Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 374 (1988). . . . 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." Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986). . . . Under the "filed-rate doctrine," state courts and regulatory agencies are preempted by federal law from requiring the payment of rates other than the federal filed rate. See 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.'").[39]

On appeal, the U.S. Court of Appeals for the Second Circuit agreed with the district court that the Vermont law was preempted and permanently enjoined as unconstitutional, even though a distinct preemption issue was not ripe for review because FERC review had not yet occurred.[40] While not disagreeing with the trial court's substantive decision on the dormant Commerce Clause compelling an in-state below-market power sale price for sale of power by the independent generator, the Second Circuit concluded that this claim was not ripe for review until the plaintiffs actually entered the forced PPA with the state.[41]

4. Midwest

a. Illinois and Michigan Renewable Energy Siting

Several states in the Midwest, including Illinois and Michigan, challenged FERC's decision to share costs among Midwest states for out-of-state new regional transmission infrastructure "for the purpose of subsidizing wind-energy

33. *Hanna*, 977 F. Supp. 2d at 375, *aff'd*, *Solomon*, 766 F.3d 241. 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.
34. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 198-200, 42 ELR 20029 (D. Vt. 2012).
35. *Id.*
36. *See Senate Votes to Close Vermont Yankee Nuclear Plant in 2012*, Burlington Free Press, Feb. 24, 2010, *available at* http://www.burlingtonfreepress.com/viewart/20100224/NEWS02/100224050/Senate-votes-close-Vermont-Yankee-nuclear-plant-2012.
37. *Shumlin*, 838 F. Supp. 2d at 241, *aff'd in part, rev'd in part*, 733 F.3d 393, 43 ELR 20201 (2d Cir. 2013).
38. *Id.*; *see also* New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982); 16 U.S.C. §824(b)(1).
39. *Id.* (*quoting* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 962 (1986)).
40. *Shumlin*, 733 F.3d at 407.
41. *Id.* at 428 ("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.").

transmission in areas where the local utilities and generators could not (or would not) pay the costs of grid upgrades necessary to transmit their product."[42] In *Illinois Commerce Commission v. FERC*, the U.S. Court of Appeals for the Seventh Circuit panel unanimously affirmed FERC's approval of the Midwest Independent Service Operator's (MISO's)[43] proportionate customer utility allocation of transmission costs for high-voltage transmission lines.[44]

b. Midwest States' Refusal to Allow Transmission Competiton

FERC Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, introduced competitive bidding into the construction process for transmission facilities.[45] Order No. 1000 required incumbent transmission providers, utilities, and the regional transmission organizations (RTOs), which manage regional multistate transmission access to the grid, to remove from FERC-approved transmission tariffs any rights-of-first-refusal (ROFRs) for traditional utilities or others to take over all transmission functions.[46] Order No. 1000 was upheld unanimously by a three-judge panel of the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit in 2014.[47]

In Order No. 888,[48] FERC established the foundation for the development of competitive bulk power markets: nondiscriminatory open-access transmission service by electric utilities. In Order No. 2000,[49] the Commission encouraged the development of RTOs to form "competitive wholesale electric markets,"[50] that had to incorporate nondiscriminatory transmission service.[51] In Order No. 890,[52] the Commission amended Order No. 888's 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.[53] Failure of RTOs and ISOs to consider and evaluate independent non-incumbent transmission projects could violate the planning principle in Order No. 890 of "openness" in transmission planning.[54]

Notwithstanding FERC Order No. 1000's federal prohibition of state ROFRs, Indiana, Minnesota, North Dakota, Oklahoma, and South Dakota enacted state ROFR statutes.[55] In fall 2012, the 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.[56] In spring 2013, the Commission determined that MISO's proposed new provision for state or local ROFRs must be removed from its tariff filing.[57]

If there is incorporated a state ROFR 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. FERC approves all RTO and ISO terms of service and the financial tariffs.[58] The Supreme Court in 2008 reiterated that the FPA creates a "'bright line' between

42. Illinois Commerce Comm'n v. FERC, 721 F.3d 764 (7th Cir. 2013). The cert. petition is available at a law firm's website, http://www.bancroftpllc.com/wp-content/uploads/2013/10/2013-10-07-FirstEnergy-cert-petition-FINAL.pdf.
43. The MISO 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.
44. Illinois Commerce Comm'n v. FERC, 721 F.3d 764 (7th Cir. 2013). MISO allocated the costs of the transmission projects among all of the utilities that draw power from the MISO grid in proportion to each utility's overall volume of usage.
45. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, Final Rule, Docket No. RM10-23-000, 136 FERC P 61051 (F.E.R.C.) (July 21, 2011), 76 Fed. Reg. 49842 (Aug. 11, 2011); Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000-A, Order on Rehearing and Clarification, Docket No. RM10-23-001, 139 FERC P 61132 (F.E.R.C.) (May 17, 2012), 77 Fed. Reg. 32184 (May 31, 2012); Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000-B, Order on Rehearing and Clarification, Docket No. RM10-23-002, 141 FERC P 61044 (F.E.R.C.) (Oct. 18, 2012), 77 Fed. Reg. 64890 (Oct. 24, 2012).
46. 136 FERC P 61051 (F.E.R.C.) (July 21, 2011) (Order 1000), at ¶ 7; Order No. 1000-A, FERC Stats. & Regs. ¶ 31132; Order No. 1000-B, 141 FERC P 61044 (F.E.R.C.) (2012).
47. South Carolina Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014).
48. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31036, 61 Fed. Reg. 21540 (1996), *clarified*, 76 FERC P 61009 (F.E.R.C.) and 76 FERC P 61347 (F.E.R.C.) (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31048, 62 Fed. Reg. 12274, *clarified*, 79 FERC P 61182 (F.E.R.C.) (1997), *on reh'g*, Order No. 888-B, 81 FERC P 61248 (F.E.R.C.), 62 Fed. Reg. 4688 (1997), *on reh'g*, Order No. 888-C, 82 FERC P 61046 (F.E.R.C.) (1998), *aff'd*, Transmission Access Pol'y Study Grp. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd*, New York v. FERC, 535 U.S. 1 (2002).
49. Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31089 (1999), *on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31092 (2000), *petitions for review dismissed*, Public Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC, 272 F.3d 607 (D.C. Cir. 2001).
50. Maine Pub. Utils. Comm'n v. FERC, 454 F.3d 278, 280-81 (D.C. Cir. 2006).
51. *See* 18 C.F.R. §35.34(k)(7).
52. Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12266 (Mar. 15, 2007), *on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), *on reh'g*, Order No. 890-B, 123 FERC ¶ 61299 (2008), *on reh'g*, Order No. 890-C, 126 FERC P 61228 (F.E.R.C.) (2009).
53. New York Reg'l Interconnect, Inc. v. FERC, 634 F.3d 581, 584 (D.C. Cir. 2011); Order No. 890, ¶ 435.
54. *See* Order No. 1000 at ¶ 229.
55. States with either enacted or proposed ROFR laws include Minnesota (Minn. Stat. §216B.246 (2012)); New Mexico (S.B. 175/H.B. 163 (2013 Current Session)); and South Dakota (S.D. Codified Laws §49-32-19 (2011)).
56. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 136 FERC P 61051 (F.E.R.C.) (2011), *order on reh'g*, Order No. 1000-A, 139 FERC P 61132 (F.E.R.C.), *order on reh'g and clarification*, Order No. 1000-B, 141 FERC P 61044 (F.E.R.C.) (2012).
57. FERC Order on Compliance Filings and Tariff Revisions, Re Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners, 142 FERC P 61215 (F.E.R.C.), Docket No. ER13-198-000 (Mar. 22, 2013), at ¶ 205. 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.*
58. *See* Ferrey, New Rules, *supra* note 26 at 49-50. The issue of state-federal preemption was raised before the D.C. Circuit Court of Appeals, but the court ultimately denied review. *See* South Carolina Pub. Serv. Auth. v. FERC, Nos. 12-1232 et al. (D.C. Cir. Oct. 17, 2014), *at* http://www.ferc.gov/legal/court-cases/pend-case.asp#S.

state and federal jurisdiction with wholesale power . . . falling on the federal side of the line."[59]

5. Minnesota Bar to Certain High-Carbon Energy Use

Minnesota enacted a statute to ban the import of foreign coal for power generation or coal-produced power into Minnesota.[60] 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. 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 energy from other states. North Dakota and representatives of its coal industry sued Minnesota on preemption grounds, alleging that Minnesota violated the Constitution by imposing measures that regulated the wholesale price and transmission of power within exclusive federal authority.[61] In an April 2014 decision, the Minnesota district court held the statute to be a violation of the Commerce Clause in that it"assert[ed] extraterritorial jurisdiction over persons or property . . . exceed[ing] the inherent limits of State's power." The court concluded that it need not reach the separate claim under the Supremacy Clause.[62] The case has been appealed.

6. California Handicapping Renewable Liquid Fuels

California enacted a low-carbon fuel standard (LCFS) to reduce greenhouse gas (GHG) emissions by reducing the full fuel-cycle, carbon intensity of the transportation fuel used in California based on the the amount of life-cycle GHG emissions, per unit of energy of fuel delivered.[63] The LCFS goal is to reduce the carbon content of transportation fuels sold in California by 10% by the year 2020 from the year 2010 baseline.[64] The LCFS regulates transportation fuels that are sold, supplied, or offered for sale in California.

The LCFS rule promulgated by the California Air Resources Board (CARB) includes the life-cycle GHG emissions of fuel, including emissions produced from energy use during the production and transportation of fuels to California.[65] Corn-derived ethanol produced in the Midwest is assigned a higher carbon intensity score by CARB than is chemically similar corn-derived ethanol produced anywhere in California. That is because of the use of more carbon-intensive coal-fired power for electricity production in the Midwest and the longer distance of fuel product transport from the Midwest to California, which utilizes petroleum, regardless of its transportation within California.[66]

Industry plaintiffs challenged the LCFS regulations on the ground that they were preempted by federal environmental law[67] because California closed the state's retail markets to out-of-state federally permitted (and legally grandfathered) bio-refineries allowed to operate by federal law.[68] The defendants opposed the preemption argument not on its merits, but on procedural defenses based on the plaintiffs' lack of standing and lack of causation.[69] The Eastern District of California held that while individual plaintiffs had not provided evidence of individual standing, at least one of the industry plaintiff members suffered an actual injury that established associational standing.[70] Because the plaintiffs brought a facial preemption challenge to the LCFS' constitutionality, while the state defended on the ground that it was constitutional as-applied,[71] the district court deferred a decision until future briefing on these different issues and the standards of review that the court should use.[72] The U.S. Court of Appeals for the Ninth Circuit agreed that the preemption issue was not ripe for review and remanded for further trial court development of the record on this issue.[73]

7. California Wholesale Renewable Energy Subsidies

A few states[74] have compelled their regulated utilities to purchase certain power at above-market wholesale prices.

59. Public Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC, 471 F.3d 1053, 1066 (9th Cir. 2006), *aff'd in part and rev'd in part sub nom.* Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008), *vacated*, 547 F.3d 1081 (9th Cir. 2008) (*citing* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964); and Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354 (1988)).
60. Minn. Stat. §216H.03, subd. 3.
61. North Dakota v. Heydinger, 15 F. Supp. 3d 891 (D. Minn. 2014).
62. *Id.*, slip op. at 17 (*citing* Edgar v. MITE Corp., 457 U.S. 624, 642 (1982)).
63. Cal. Code Regs. tit. 17, §95480.
64. *See* State of California Environmental Protection Agency Air Resources Board, California's Low Carbon Fuel Standard, Final Statement of Reasons (2009), *available at* http://www.arb.ca.gov/regact/2009/lcfs09/lcfsfsor.pdf.
65. Cal. Code Regs. tit. 17, §95481(a)(28).
66. *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 distances between10 other states and California. Thus, all fuel, wherever produced in California and wherever consumed, does not incur a higher carbon efficiency factor for purposes of this regulation.
67. The petitioners asserted that the 2007 Energy Independence and Security Act (EISA) amendment to the Clean Air Act (CAA), 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618, precluded CARB from enforcing its state-level LCFS program. Rocky Mtn. Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1099, 42 ELR 20013 (E.D. Cal. 2011), Brief of Plaintiffs. The CAA contains a saving clause for states, providing that"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).
68. *Goldstene*, 843 F. Supp. 2d at 1095.
69. *Id.* at 1095.
70. *Id.* at 1099-1100.
71. 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. *Id.* at 1102.
72. *Id.* at 1102-03.
73. *Id.*
74. *See, e.g.*, Cal. Pub. Util. Code §399.20. Indiana and Vermont have also tried this, at least in part. *See* Indiana Experimental Rate 665, Revised Sheet No. 104, *available at* http://www.indianadg.net/wp-content/uploads/2014/10/Cause-No-44393-Stipulation-and-Settlement-Agreement_FINAL-as-filed.pdf and http://www.nipsco.com/docs/default-source/elec-

Despite law review articles cautioning California and other states to tread intelligently,[75] the state enacted a feed-in tariff (FiT) requiring in-state utilities to make wholesale power purchases from cogeneration facilities smaller than 20 MW in size, at a mandated regulatory price well in excess of market wholesale rates for power and in excess of federal avoided costs.[76] Utilities brought a challenge as to whether California's regulation violated the FPA and the Supremacy Clause.[77] California argued (as it did again later in the LCFS case discussed above) that its environmental purpose for regulation should make it exempt from preemption under the Clean Air Act's (CAA's) saving clause[78]; and that environmental costs could be considered to inflate avoided costs that utilities and their ratepayers were required to pay.[79] California argued that the state mandating that regulated utilities only "offer" to purchase wholesale power at substantially above wholesale market rates is different from a state requirement that regulated utilities actually "purchase" the sold power.[80] The utility plaintiffs 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 adopt an economic regulation that requires purchases of electricity at a wholesale price outside the framework of the FPA exceeding avoided cost.

FERC rejected all of California's arguments. The Commission found that renewable wholesale generators could receive no more than fair wholesale market prices at avoided cost under federal law.[81] FERC reiterated that only the federal government can regulate commerce between the states; accordingly, California cannot attempt to regulate commerce outside its borders.[82] The Commission held that its authority under the FPA 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.[83] FERC also rejected California's argument that prior legal precedent no longer applied because the state had a new goal of addressing climate change.[84] FERC did not allow any state to set a state FiT.[85]

Raising renewable energy prices as an incentive to the power producer was previously stricken by FERC in California.[86] In *Independent Energy Producers Association*, the Ninth Circuit held that state regulation of the amount that utilities must pay for renewable wholesale power at rates different than those specified by FERC was impermissible.[87] FERC had determined that a state-mandated above-market wholesale renewable power FiT was inconsistent with federal law and FERC authority; accordingly, whether imposed by "law or policy," the Commission said, the "contracts will be considered to be void ab initio."[88]

C. *Context and Resolution*

1. Context

In a traditional regulatory structure, state regulation such as California's discussed above would have been within state authority, as there would be no interstate wholesale sale of power when utilities constructed in-state and on their own the power generation capacity they required.[89] Restructuring and deregulation of the retail electric power sector, commencing at the state level in approximately 1997, dramatically changed the regulatory paradigm.[90] About 40% of the states performed their restructuring prior to the electric sector problems in California in 2000-2001, after which the other 60% of the states retained traditionally structured retail electric sectors.[91] The amount of

tric-tariffs-122711-docs/rate-665; 30 Vt. Stat. Ann. §§8001 & 8005, *see* http://vermontspeed.com/standard-offer-program.

75. *See, e.g.*, Steven Ferrey, *Goblets of Fire: State Programs on Global Warming and the Constitution*, 35 Ecology L.Q. 835 (2009); Steven Ferrey et al., *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 Duke Envtl. L. & Pol'y J. 125 (2010); Steven Ferrey et al., *FiT in the U.S.A.*, Pub. Util. Fortnightly (June 2010); Steven Ferrey, *Shaping American Power: Federal Preemption and Technological Change*, 11 Va. Envtl. L. Rev. 47 (1991); Steven Ferrey, *Follow the Money! Article I and Article VI Constitutional Barriers to Renewable Energy in the U.S. Future*, 17 Va. J. L. & Tech. 89 (2012).
76. *See* 18 C.F.R. §292.304(e). Avoided cost is defined 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 facilities, such utility would generate itself or purchase from another source." 18 C.F.R. §292.101(b)(6).
77. California Pub. Utils. Comm'n, 132 FERC ¶ 61047, 61337-38 (2010).
78. 42 U.S.C. §7604(e).
79. Order on Petitions for Declaratory Order, In re California Pub. Utils. Comm'n, Southern Cal. Edison Co., Pacific Gas & Elec. Co., San Diego Gas & Elec. Co., FERC Docket Nos. EL10-64-000 & EL10-66-000 (July 15, 2010), 132 FERC P 61047 (F.E.R.C.) 61337-38 (2010).
80. *Id.* at ¶ 72.
81. *Id.* at ¶¶ 17-18.
82. *Id.* 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)." *Id.* at ¶ 31.
83. 16 U.S.C. §§824, 824d & 824e (2006); *see, e.g.*, Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988).
84. Order on Petitions for Declaratory Order, In re California Pub. Utils. Comm'n, Southern Cal. Edison Co., Pacific Gas &Elec. Co., San Diego Gas & Elec. Co., FERC Docket Nos. EL10-64-000 & EL10-66-000 (July 15, 2010), California Pub. Utils. Comm'n, 132 FERC P 61047 (F.E.R.C.), 61337-38 (2010).
85. *Id.* FERC stated:
> 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.

86. Southern Cal. Edison Co., 70 F.E.R.C. P 61215 (F.E.R.C.) (1995). Edison had wholesale electricity supply options available for purchase at $0.04 per kilowatt hour (kWh) or less, while the California Public Utilities Commission required purchase of renewable power at prices as high as $0.066 per kWh.
87. Indepependent Energy Producers Ass'n v. California Pub. Utils. Comm'n, 36 F.3d 848, 853 (9th Cir. 1994).
88. Connecticut Light & Power Co, 70 FERC at 61029-30.
89. *See* Ferrey, New Rules, *supra* note 26, at 260-63.
90. *See* U.S. Dep't of Energy, Electric Energy Market Competition Task Force, Report to Congress on Wholesale and Retail Competition Markets for Electric Energy 149-50 [hereinafter Task Force Report], *available at* http://www.ferc.gov/legal/staff-reports/competition-rpt.pdf.
91. *See* Steven Ferrey, *Sale of Electricity*, *in* The Law of Clean Energy: Efficiency and Renewables 218-19 (Michael B. Gerrard ed., 2011).

power wholesaled before it is sold at retail has shifted from only 8% in the 1960s to a majority of the sales today.[92]

With several states, including Maryland and New Jersey, profiled above,[93] having deregulated retail power sales and required their utilities to divest all of their power generation capacity,[94] 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 with power moving in interstate commerce to a much higher degree,[95] the FPA now substitutes federal authority over these wholesale power transactions, preempting state authority. The Supremacy Clause, coupled with the FPA, creates a bright line that states cannot cross. And that line has shifted, as an increasingly larger majority of U.S. power now proceeds through a wholesale power sale prior to its ultimate retail sale and disposition,[96] thereby fundamentally altering the prohibited area encompassed by that line.[97] As held by the Ninth Circuit and affirmed by the Supreme Court in a 2013 decision:

> 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 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.[98]

2. Resolution

There are other ways that states could accomplish their objectives without violating the Supremacy Clause and the FPA. Most states do not regulate their municipal utilties, and fewer than one-half of the states regulate their cooperative utilities and districts.[99] In fact, there are many more of these unregulated entities than there are private investor-owned utilities that are regulated by the states. There are fewer than 200 investor-owned utilities, while there are more than 2,000 municipal and cooperative utilities.[100] Accordingly, more than 90% of utilities are not subject to the FPA or federal preemption. Excluded from the FERC orders discussed in this section are government power-marketing administrations, all rural electric cooperatives and membership utility cooperatives, municipal utilities,[101] and 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).[102] It is noteworthy that the 200 investor-owned utilities serve approximately 75% of the American population with power.[103]

In a 2014 law review article,[104] this author has suggested a second mechanism by which states might accomplish their objectives without running afoul of the Supremacy Clause or the FPA, although no state has yet adopted the proposal. Briefly stated, instead of enacting impermissible state FiTs, states should set differentiated retail rates that, for independent distributed generators, would provide a discount to account for the system benefits provided by their distributed generation, and thus, also avoid geographically discriminatory violations of the federal dormant Commerce Clause of the Constitution, discussed next.

III. Commerce Clause Restrictions on State Energy Regulation

A. *Dormant Commerce Clause Jurisprudence*

Electric power can move instantaneously in interstate commerce within the lower 48 states.[105] Therefore, it becomes a legally questionable action when states burden the free flow of electricity by favoring which state or states host the facility that generates the power or altering how identical in-state or out-of-state power is regarded. Geographically based restrictions on interstate commerce, whether discriminating for or against local commerce, raise dormant Commerce Clause concerns.[106]

The dormant Commerce Clause prohibits state regulations that are either facially discriminatory against, or

92. *See* Ferrey, New Rules, *supra* note 26, at 10-11; Steven Ferrey, Environmental Law 587 (6th ed. 2013).
93. *See* Ferrey, Law of Independent Power, *supra* note 26, at §8.3, n.7-8.
94. *See* Ferrey, New Rules, *supra*, note 26, at app B, 280-86, 298-301.
95. *See* Ferrey, Law of Independent Power, *supra* note 26 at §8.3, 8-16 through 8-17.
96. *See* Task Force Report, *supra* note 90, at 10:
> 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. [B]y 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.

97. *See* Ferrey, Law of Independent Power, *supra* note 26, at §§5-26 through 5-28; Ferrey, Environmental Law, *supra* note 92, at 560-61.
98. Public Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC, 471 F.3d 1053, 1066-67 (9th Cir. 2006), *aff'd in part and rev'd in part sub nom.* Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008); *see also* Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 43 ELR 20201 (2d Cir. 2013).
99. Ferrey, Environmental Law, *supra* note 92, at 581.
100. *Id.* at 579.
101. FPA§201(f), 16 U.S.C. §824(f).
102. FPA§201(b), 16 U.S.C. §824(b)(1).
103. Ferrey, Environmental Law, *supra* note 92, at 579.
104. The suggestion is more fully discussed in Steven Ferrey, *Solving the Multimillion Dollar Constitutional Puzzle Surrounding State "Sustainable" Energy Policy*, 49 Wake Forest L. Rev. 121 (2014).
105. *See* New York v. FERC, 535 U.S. 1, 16 (2002) (transmissions on the interconnected national grids constitute transmissions in interstate commerce).
106. U.S. Const., art. I, §8.

unduly burden, interstate commerce.[107] Discriminatory statutes are reviewed subject to the judicial "strict scrutiny" standard. For such a statute or regulation to be held valid, the state must establish that its statute serves a compelling state interest through the least restrictive means affecting commerce to achieve that interest.[108] In *West Lynn Creamery*, the Supreme Court stated that "even if environmental preservation were the central purpose of the pricing order, that would not be sufficient to uphold a discriminatory regulation."[109]

In general, states cannot regulate in ways where the practical effect is to control conduct in other states. States may also not "provid[e] a direct commercial advantage to local business."[110] States are prohibited from attaching restrictions to any goods that they import from other states.[111] "Statutes that discriminate by 'practical effect and design,' rather than explicitly on the face of the regulation, are similarly subjected to heightened scrutiny."[112]

However, if the statute is geographically even-handed, the balancing test of *Pike v. Bruce Church*[113] is applicable, pursuant to which courts undertake a determination of whether the state's interest justifies the incidental discriminatory effect of the regulatory mechanism as applied. For example, in *Proctor & Gamble v. Chicago*,[114] the Seventh Circuit found that a city of Chicago ordinance banning phosphate detergents to protect discharges into the Illinois River and Lake Michigan was a legitimate environmental goal, notwithstanding that it burdened the plaintiff's business in phosphate detergents, and was upheld under the *Pike* balancing test.

The scope of commerce among the states for purposes of a dormant Commerce Clause analysis is broadly defined,[115] and the Supreme Court has held that all objects of interstate trade merit Commerce Clause protection. This protection particularly includes the transmission of electric energy in interstate commerce[116]: "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,"[117] the Court said in *FERC v. Mississippi*. A state cannot regulate to favor, or require use of, its own in-state energy resources,[118] nor can it, by regulation, harbor energy-related resources originating in the state.[119] An Oklahoma energy statute overturned by the Supreme Court involved only a 10% allocation of the market to in-state producers, similar to what occurs in some of the now-challenged in-state preferences in state carbon control and renewable energy statutes. As a result of the Oklahoma statute, the utility market changed its use of almost all out-of-state coal to "[in-state] Oklahoma coal in amounts ranging from 3.4% to 7.4% of their annual needs, with a necessarily corresponding reduction in purchases of Wyoming coal."[120] Thus, even a small or de minimis degree of impact or effect of geographic discrimination is unconstitutional. In-state fuels cannot be required to be used by a state, of note, even for the rationale to satisfy federal CAA requirements.[121] States cannot give income tax credits solely to in-state producers.[122]

Again, as courts consider states' recent attempts to regulate the energy market, a discriminatory law is "virtually per se invalid."[123] If the statute is geographically even-handed, the courts apply the *Pike* balancing test to determine whether the state's interest justifies the incidental discriminatory effect of the regulatory mechanism as applied.[124]

B. Recent Electricity Commerce Clause Tripwires

1. Maryland 2013

In the 2013 Maryland *PPL Energyplus* case,[125] the trial court avoided finding a violation of the dormant Commerce Clause by making several key determinations. First,

107. *See* Department of Revenue v. Davis, 553 U.S. 328, 338 (2008) (*citing* Oregon Waste Sys., Inc. v. Department of Envt'l Quality of State of Or., 511 U.S. 93, 100, 24 ELR 20674 (1994)).
108. *See* Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 43 ELR 20201 (2d Cir. 2013); Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 105, 22 ELR 21073 (1992) ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law."); Norris v. Lumbermen's Mut. Cas. Co., 881 F.2d 1144, 1150 (1st Cir. 1989).
109. West Lynn Creamery v. Healy, 512 U.S. 186 (1994).
110. NW States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959); Rocky Mtn. Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1099, 42 ELR 20013 (E.D. Cal. 2011).
111. Carbone v. Clarkstown, 511 U.S. 383, 393 (1994).
112. Tri-M Group, LLC v. Sharp, 638 F.3d 406, 427 n.28 (3d Cir. 2011).
113. Pike v. Bruce Church, Inc, 397 U.S. 137 (1970).
114. 509 F.2d 69, 5 ELR 20146 (7th Cir. 1975).
115. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 621-22, 8 ELR 20540 (1978) (state cannot discriminate against articles of commerce originating in other states unless there is a "reason, apart from their origin, to treat them differently"); Chemical Waste Mgmt. v. Hunt, 504 U.S. 334, 22 ELR 20909 (1992) (invalidating Alabama's imposition of an additional disposal fee on hazardous waste generated outside the state but disposed of within Alabama); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res., 504 U.S. 353, 22 ELR 20904 (1992) (invalidating the provisions of Michigan's Solid Waste Management Act that restricted a landfill's ability to accept out-of-state waste); Oregon Waste Sys., Inc. v. Oregon Dep't of Envtl. Quality, 511 U.S. 93, 24 ELR 20674 (1994) (invalidating Oregon's increased per-ton surcharge on waste generated in other states).
116. *See* New York v. FERC, 535 U.S. 1, 16 (2002) (transmissions on the interconnected national grids constitute transmissions in interstate commerce).
117. FERC v. Mississippi, 456 U.S. 742, 12 ELR 20896 (1982).
118. Wyoming v. Oklahoma, 502 U.S. 437, 454-56 (1992); Alliance for Clean Coal v. Craig, 840 F. Supp. 554, 560, 24 ELR 20739 (N.D. Ill. 1993).
119. New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982).
120. *Wyoming*, 502 U.S. at 455. *See also* Alliance for Clean Coal v. Miller, 44 F.3d 591, 596, 25 ELR 20510 (7th Cir. 1995) (Even though the Act did not compel use of Illinois coal or forbid use of out-of-state coal, by the statute encouraging use of Illinois coal, it "discriminate[d] against western coal by making it a less viable compliance option for Illinois generating plants.").
121. *Miller*, 44 F.3d at 596-97.
122. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 271, 278-80 (1988). *See also* Oregon Waste Sys., Inc. v. Oregon Dep't of Envtl. Quality, 511 U.S. 93, 99-100, 24 ELR 20674 (1994) (a greater surcharge on disposal of in-state waste than on disposal of out-of-state waste facially discriminated against interstate commerce).
123. Department of Revenue of Ky. v. Davis, 553 U.S. 328, 338-39 (2008).
124. Pike v. Bruce Church, Inc, 397 U.S. 137, 142 (1970) (explaining the balancing test for when a statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental").
125. PPL Energyplus, LLC v. Nazarian, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014).

the district court chose to apply the *Pike* balancing test and determined that because Maryland only provided incentives for location of facilities in the state, but did not restrict whether the electricity output of these facilities was sold in-state or out-of-state, it did not unduly burden interstate commerce. The statute was found to restrict the location of power facilities in-state, but not to restrict either facially or in its practical effect their commercial sales in commerce. Thus, the statute was subject only to judicial review under the balancing test of *Pike*,[126] pursuant to which the plaintiffs could not sustain their burden to demonstrate an excessive burden on commerce.

2. New Jersey 2013

The plaintiffs in the New Jersey 2013 *PPL Energyplus* case[127] alleged a violation of the dormant Commerce Clause because the New Jersey act was predicated on in-state "favoritism," and was a "blatant and explicit effort to promote the construction of new generation facilities in New Jersey."[128] The district court ultimately held that there was no dormant Commerce Clause violation because of the motivation for power reliability issues being within state authority, and based on this, the plaintiffs did not meet their burden.

3. Vermont 2013

In *Entergy Nuclear Vermont Yankee*, a district court in 2012 found that state power to regulate energy matters and state violations was preempted by the dormant Commerce Clause.[129] On appeal, the Second Circuit did not disagree with the substantive decision on the dormant Commerce Clause, but procedurally held that the issue was not ripe for review until the plaintiffs actually entered a forced PPA with the state.[130] However, the court concluded that if Vermont's better-price-guarantee had been put into effect, it most likely would not have passed a dormant Commerce Clause challenge because it would have favored the state.[131]

4. Midwest States 2013

As seen above, there is an immediate in-state bias to ROFRs usurping the ownership of power transmission, which also violates express provisions of FERC Order No. 1000. Incumbent providers of transmission typically are the traditional utilities in a state, which operate only within that state.[132] In terms of scope, Order No. 1000 applies to jurisdictional public utilities, which under the FPA only include the investor-owned utilities and the RTOs managing them.

In *Illinois Commerce Commission*, a unanimous Seventh Circuit panel declared unconstitutional state regulations that limited state renewable portfolio standards to in-state generation. Such state regulation, as employed in Michigan, was found to be a violation of the Commerce Clause. "[Michigan's argument] trips over an insurmountable constitutional objection. Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy,"[133] the court concluded. For authority on the respective jurisdiction of state and federal government to regulate electricity, the opinion relied on an article by this author.[134] While this is technically dicta, it is an important announcement by the first federal circuit court to address the issue. The Supreme Court found no reason to review the Seventh Circuit decision.[135]

Twenty-two of the 29 states providing renewable portfolio standards for promotion of certain power do so in a manner that may be geographically discriminatory in some way.[136] Justice Antonin Scalia, concurring in the majority opinion in *West Lynn Creamery*, stated that "subsidies for in-state industry . . . would clearly be invalid under any formulation of the Court's guiding principle" for dormant Commerce Clause cases.[137]

5. Minnesota 2014

In *North Dakota v. Heydinger*,[138] the Minnesota matter discussed earlier, since the energy affected by the state restrictions was in interstate commerce, North Dakota and others challenged Minnesota's Next Generation Energy Act on dormant Commerce Clause grounds.[139] Such a future ban has been upheld, when not based on geographic loca-

126. Pike v. Bruce Church, Inc, 397 U.S. 137 (1970).
127. PPL Energyplus, LLC v. Hanna, 977 F. Supp. 2d 372 (D.N.J. 2013).
128. Hannah Northey, *Utilities Challenge N.J. Law While Preparing to Reap Its Benefits*, E&E (Mar. 2, 2011), http://www.eenews.net/public/Greenwire/2011/03/02/4. The 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; and all generators selected to participate in the New Jersey LCAPP program were from New Jersey.
129. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 198-200, 42 ELR 20029 (D. Vt. 2012).
130. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 428, 430-31, 43 ELR 20201 (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." [N]o [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.

131. *Id.* at 430-31.
132. Ferrey, New Rules, *supra* note 26, at 38.
133. Illinois Commerce Comm'n v. FERC, 721 F.3d 764, 776 (7th Cir. 2013).
134. *Id.*, *citing* Steven Ferrey, *Threading the Constitutional Needle With Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 Texas J. Oil, Gas & Energy L. 59 (2012) at 69, 106-07 [hereinafter Ferrey, *Constitutional Needle*].
135. *Cert. denied sub nom.* Schuette v. FERC, 134 S. Ct. 1277 (2014), and *cert. denied sub nom.* Hoosier Rural Energy Co-op., Inc. v. FERC, 134 S. Ct. 1278 (2014). The petition for certiorari is available at a law firm website, http://www.bancroftpllc.com/wp-content/uploads/2013/10/2013-10-07-FirstEnergy-cert-petition-FINAL.pdf.
136. *See* Ferrey, *Constitutional Needle*, *supra* note 134.
137. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 208 (1994) (Scalia, J., concurring).
138. North Dakota v. Heydinger, 15 F. Supp. 3d 891 (D. Minn. 2014).
139. Minnesota, Next Generation Energy Act, 2007, codified at Minn. Stat. §216H.03 subd. 7.

tion of the affected commerce.[140] Here, however, the Minnesota district court held that "Such a scenario is 'just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.'"[141] The court announced 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."[142] It held that Minnesota had acted clearly to affect commerce occurring outside the state, and this was a per se violation of the Commerce Clause. Having stricken the statute on constitutional grounds, the court declined to reach the issue of whether there was undue discrimination in the substance of the Minnesota statute.

The Minnesota law is similar to the California LCFS statute. The federal court in Minnesota noted a distinction between electricity unavoidably in interstate commerce, and the more controllable liquid ethanol fuels in commerce at the same time in California.[143] 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.[144]

6. California 2013

The year 2013 saw a Ninth Circuit panel sharply split over the constitutionality of California's LCFS program above. The plaintiffs in *Rocky Mountain Farmers Union*[145] brought a dormant Commerce Clause challenge alleging that CARB discriminated against interstate commerce and fuels produced out of state. The plaintiffs asserted that their Midwest ethanol products are chemically identical to comparable ethanol products manufactured in California, yet CARB assigned the midwestern low-carbon fuel a higher carbon intensity value, making it ultimately cost-disadvantaged and less desirable to California consumers.

The Eastern District of California agreed with the plaintiffs, invalidating certain parts of the LCFS rule and enjoining the rule's enforcement on the finding that it "discriminates against out-of-state corn-derived ethanol while favoring in-state corn ethanol and impermissibly regulates extraterritorial conduct."[146] The court found that the LCFS differentiates based on place of origin of the commerce and discriminates facially against out-of-state ethanol, and stated that the LCFS "may not impose a barrier to interstate commerce based on the distance that the product must travel in interstate commerce."[147]

The California district court reiterated that a state's attempting to regulate commerce outside its borders violates exclusive federal authority to regulate interstate commerce. The court again distinguished motive from constitutional requirements, holding that, "Although [the state's] goal to combat global warming may be legitimate, it cannot be achieved by the illegitimate means of isolating the state from the national economy."[148] Under the Commerce Clause, states cannot place restrictions on imports "in order to control commerce in other states."[149] A state cannot require in-state fuel usage, even if its rationale is to satisfy federal CAA requirements.[150]

The court found that while the LCFS serves a legitimate local purpose, the defendants had not met their burden of showing that no less discriminatory means was available to adequately serve their objective. Pursuant to the requirements of *Dean Milk*[151] and *West Lynn Creamery*,[152] the district court found that CARB had several other means to address the state's purpose without discriminating against out-of-state fuel products: "[L]egislation favoring in-state economic interests is facially invalid under the dormant Commerce Clause, even when such legislation also burdens some in-state interests or includes some out-of-state interests in the favored classification."[153]

On appeal, a sharply divided three-judge panel of the Ninth Circuit reversed the district court's determinations on every issue involving the Commerce Clause, including the standard of review.[154] The majority abandoned the strict scrutiny standard, and instead applied the much more forgiving *Pike* balancing test. The opinion noted that the California "purpose could not be served well by available nondiscriminatory means," but never carefully applied the *Dean Milk* analysis,[155] instead construing it only for an ancillary principle, as the court also did with the *Carbone* decision.[156] It sidestepped the element of the *Carbone* precedent that held that no environmental rationale excuses discrimination based on the geography of commerce. Instead, the majority applied the *Maine v. Taylor*[157] prec-

140. *See* Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 17 ELR 20941 (3d Cir. 1987).
141. *Heydinger*, slip op. at 25 (*quoting* Healy v. Beer Inst., Inc., 491 U.S. 324, 337 (1989)).
142. *Id.*, slip op. at 17 (*citing* Edgar v. MITE Corp., 457 U.S. 624, 642 (1982)).
143. *Id.*, slip op. at 21 (electricity is treated differently "[b]ecause of the boundary-less nature of the electricity grid").
144. *See* Steven Ferrey, *Inverting Choice of Law in the Wired Universe: Thermodynamics, Mass and Energy*, 45 Wm. & Mary L. Rev. 1839 (2004); Ferrey, Law of Independent Power, *supra* note 26, at 2-8 to 2-9; Ferrey, Environmental Law, *supra* note 92, at 568.
145. Rocky Mtn. Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1081, 42 ELR 20013 (E.D. Cal. 2011), *rev'd sub nom.* Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 43 ELR 20216 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014).
146. *Goldstene*, 843 F. Supp. 2d at 1081.
147. *Id.* at 1089.
148. *Id.*
149. *Id.* at 1092.
150. *See* Alliance for Clean Coal v. Miller, 44 F.3d 591, 596-97, 25 ELR 20510 (7th Cir. 1995).
151. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).
152. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), held that a differential burden placed at any point in the stream of commerce on out-of-state producers is constitutionally invalid.
153. Rocky Mtn. Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1089, 42 ELR 20013 (E.D. Cal. 2011), *quoting* Daghlian v. DeVry Univ., 582 F. Supp. 2d 1231, 1243 (C.D. Cal. 2007) (internal quotations omitted).
154. Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 1104, 43 ELR 20216 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014).
155. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 n.4 (1951) ("It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.").
156. Carbone v. Clarkstown, 511 U.S. 383, 391 (1994) ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition").
157. Maine v. Taylor, 477 U.S. 131, 138 (1986).

edent, which is not directly on point with the facts in the California LCFS matter.

The Ninth Circuit majority opinion concluded that it is not unconstitutional for a state to devise and impose a regulatory system that results in discrimination against out-of-state commercial entities that have to purchase additional credits or pay fees. The request for a rehearing en banc to a full panel of the Ninth Circuit was again sharply split, but did not receive majority support. Thus, of four federal judges who have ruled on the constitutional issues in the *Rocky Mountain Farmers Union* case at the federal trial and appellate levels, two found the LCFS program unconstitutional[158] while two found it constitutional.

C. Context and Resolution

States tend to favor their own interests, often at the expense of other states' interests. There are constitutional issues when state law violates the federal integration of commerce embodied in the Commerce Clause. The dormant Commerce Clause only applies to a state acting in a regulatory mode: It does not apply to states acting as market participants[159] by expenditure of state tax dollars. Fifteen states have system benefit charge programs, and 29 states have renewable porfolio standards.[160] California could have subsidized and provided financial incentives for the development of certain kinds of power with more tax subsidies,[161] or enhanced renewable portfolio standards,[162] but did not choose this option in lieu of an FiT.

IV. State Administrative Law Issues in Electricity Regulation

A. Article III Procedural Justiciability and Standing

In a variety of recent claims regarding state energy programs, states have utilized procedural challenges to attempt to avoid a decision on the merits.[163] There are several doctrines within the concept of justiciability, any one of which can be a reason for the federal court to refuse to decide a case regardless of subject matter jurisdiction, personal jurisdiction, or venue: standing, mootness, ripeness (often raised in conjunction with standing), adversity, advisory opinions, finality, and political questions. Standing has been the principal such procedural defense. Justice Scalia articulated the most recognized elements of the doctrine of standing, injury, and redressability, writing in Lujan v. Defenders of Wildlife that "[T]he plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'"[164] Additionally, "it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[165]

B. The Issues in a Microcosm: California

Space limitations allow for only a brief summary of recent administrative law challenges brought in a single state, California, against state regulation of electricity and its carbon byproducts. Procedural violations were alleged against the state's environmental regulatory agency, CARB, which administers the state's global warming statute, for not following state environmental law in implementing the statute. In 2011, California lost a suit against its carbon control cap-and-trade regulation, resulting in an additional year of delay in the start of the entire regulatory program.[166] The trial court found that CARB improperly approved its Scoping Plan prior to completing the legally required environmental review.[167]

There was a challenge by an environmental organization to a California statute[168] limiting the scope of review of environmental approvals for large carbon-neutral development projects. The law, Assembly Bill No. 900, codified as §17885 in the Public Resources Code, allowed legal challenges filed pursuant to alleged failures under the California Environmental Quality Act[169] to bypass the trial court and go directly to a state appellate court on a fast track, thus not providing parties with their full trial court rights.

In a case similar to the earlier discussion of constitutional challenges to the California LCFS, 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. The challenge was successful.[170] California carbon regulation also was challenged for non-environmental violations of California

158. *Goldstene*, 843 F. Supp. 2d at 1081, *rev'd sub nom.* Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 43 ELR 20216 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014). The federal district trial court judge in this *Rocky Mountain* litigation issued a contrary opinion finding multiple California violations of the Commerce Clause.

159. *See* Hughes v. Alexandria Scrap, 426 U.S. 794 (1976).

160. *See* Database of State Incentives for Renewables and Efficiency, www.dsireusa.org.

161. For information on tax subsidies, see Ferrey, Law of Independent Power, *supra* note 26, at tbls. 3.13, 3.15 & 3.19.

162. *See* Ferrey, *Constitutional Needle*, *supra* note 134.

163. *See Corey*, 730 F.3d 1070, *cert. denied*, 134 S. Ct. 2875 (2014); PPL Energyplus, LLC v. Nazarian, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014).

164. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 22 ELR 20913 (1992) (internal citations omitted).

165. *Id.* at 561 (internal citations omitted).

166. Association of Irritated Residents v. CARB, No. 41 ELR 20353, CGC-09-509562, Tentative Statement of Decision (Cal. Super. Ct. May 20, 2011), *available at* http://www.courts.ca.gov/opinions/archive/A132165.PDF; Association of Irritated Residents v. CARB, 206 Cal. App. 4th 1487 (Cal. Ct. App. 2012). *See also* Lisa Weinzimer & Geoffrey Craig, *Delaying California CHG Cap-and-Trade Regime a Year Draws Support From Stakeholders*, Electric Util. Wk., July 4, 2011, at 11-12. The trial court issued a writ of mandate enjoining CARB from any further cap-and-trade rulemaking until 2013.

167. *Association of Irritated Residents*, 206 Cal. App. 4th 1487.

168. Cal. Pub. Res. Code §17785.

169. California Environmental Quality Act, Cal. Pub. Res. Code §§21000-21177.

170. Poet, LLC v. CARB, 218 Cal. App. 4th 681 (Cal. Ct. App. 2013). Poet argued that CARB failed to respond to numerous public comments and that it omitted documents from the rulemaking file.

administrative procedure. In two thus-far unsuccessful suits filed in 2013, different plaintiffs challenged that the California GHG allowance auctions under its emissions cap-and-trade program are an illegal, unconstitutional tax or fee.[171] Allegations were that the auction revenues cannot be characterized as valid regulatory fees because the revenues are not limited to the reasonable costs of any regulatory program.[172]

An unsuccessful 2012 lawsuit in California by advocates for low-income interests attacked the California climate control legislation on the basis that its compliance requirements would be met principally by offsets from out-of-state or even international locations, without any assurance that the offsets would be "additional" to business-as-usual policies in California.[173]

V. Conclusion

The after-shock reverberating through U.S. energy infrastructure is already being felt strongly, with some states scrambling to revise or save their distributed energy promotion programs and siting and operational controls from being entangled in legal tripwires restraining states. The Seventh Circuit's admonition in *Illinois Commerce Commission* that state renewable portfolio standard programs cannot treat out-of-state renewable power differently from in-state renewable power[174] alone should cause review and revision in some of the three-quarters of the 29 states whose programs do discriminate geographically in some fashion.

Recently, federal courts including the Supreme Court,[175] circuit courts,[176] and district courts,[177] plus FERC,[178] have ruled in controversies regarding state energy or utility regulation. In the cases discussed above that articulate the borders of federal and state authority over energy and environmental matters, federal authority preempted state authority in all but one,[179] and that one exception was dismissed without reaching the merits due to a finding of lack of subject matter jurisdiction. The Supreme Court rendered three of the decisions discussed above.[180]

The solitary (and divided) 2013 Ninth Circuit panel decision upholding state energy regulation against constitutional challenge is not typical in its facts nor does it hold to other recent federal court decisions on energy. In the other controversies higlighted in the Comment, preemption of state power to enact energy law under the Supremacy Clause or the dormant Commerce Clause has been found at some level, whether trial, appellate, or both. The Supreme Court in 1986, 1988, 2003, and 2008[181] reaffirmed and enforced the Supremacy Clause as applied to state energy regulation when states attempted to assert jurisdiction in areas subject to FERC's exclusive authority. The FPA creates a "'bright line' between state and federal jurisdiction with wholesale power sales . . . falling on the federal side of the line,"[182] the Court said.

The application of the dormant Commerce Clause is much more nuanced than the Supremacy Clause power's bright line. In the 2013 cases in Maryland and New Jersey, the strict scrutiny standard yielded to the much more state-deferential *Pike* balancing test, dooming the plaintiffs' dormant Commerce Clause claims. In the California LCFS contest implicating the Commerce Clause, the federal district court and the dissenting judge in the Ninth Circuit applied a strict scrutiny standard, while the other two (majority) judges in the Ninth Circuit applied the less-demanding *Pike* balancing test.[183]

These tripwires encircle the core of constitutional federalism and will exert profound effect on U.S. governance of electricity generation. The majority of recent rulings have held that states have acted unconstitutionally by becoming ensnarled in one or more of these tripwires in preempted territory. This Comment outlines a

171. In *Morning Star Packing Co. v. CARB*, No. 34-2013-80001464 (Cal. Super. Ct. filed Apr. 16, 2013), the plaintiffs asked the court to declare that "the auction and revenue generating provisions" of the cap-and-trade regulation are unconstitutional under Proposition 13, the ballot initiative that requires a two-thirds vote on taxes, or under Proposition 26, a ballot initiative requiring a super-majority vote on some fees and levies. The other lawsuit was *California Chamber of Commerce v. CARB*, 69 Cal. 2d 371, 384 (Cal. Super. Ct. 2013).

172. *Morning Star*, Petitioners and Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Issuance of Writ of Mandate, at 2-3 (Cal. Super. Ct. filed June 10, 2013).

173. Citizens Climate Lobby & Our Children's Earth Found. v. CARB, No. CGC-12-5195944 (Cal. Super. Ct. filed Nov. 14, 2012); Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, at 3, *available at* http://webaccess.sftc.org/minds_asp_pdf/Viewer/DownLoadDocument.asp?PGCNT=0.

174. Illinois Commerce Comm'n v. FERC, 721 F.3d 764 (7th Cir. 2013).

175. American Trucking Ass'ns v. City of Los Angeles, 133 S. Ct. 927, 43 ELR 20128 (2013); City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 43 ELR 20112 (2013).

176. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 43 ELR 20201 (2d Cir. 2013); Illinois Commerce Comm'n v. FERC, 721 F.3d 764 (7th Cir. 2013); Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 43 ELR 20216 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014).

177. Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 233, 42 ELR 20029 (D. Vt. 2012); Rocky Mtn. Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1099, 42 ELR 20013 (E.D. Cal. 2011); PPL Energyplus, LLC v. Nazarian, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014); PPL Energyplus, LLC v. Hanna, 977 F. Supp. 2d 372 (D.N.J. 2013), *aff'd*, PPL Energyplus, LLC v. Solomon, 766 F.3d 241, 44 ELR 20207 (3d Cir. 2014).

178. FERC Order on Petitions for Declaratory Order, In re California Pub. Utils. Comm'n, Southern Cal. Edison Co., Pacific Gas & Elec. Co., San Diego Gas & Elec. Co., 132 FERC P 61047 (F.E.R.C.), 61337-38 (2010).

179. Morgan Stanley Capital Grp. v. Public Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008); Independent Energy Producers Ass'n v. California Pub. Utils. Comm'n, 36 F.3d 848, 853 (9th Cir. 1994); Southern Cal. Edison Co., 70 F.E.R.C. P 61215 (F.E.R.C.) (1995); In re PG&E, FERC Order Granting Clarification and Dismissing Rehearing, Re California Pub. Utils. Comm'n, 133 F.E.R.C. P 61059 (F.E.R.C.) (2010); *American Trucking Ass'ns*, 133 S. Ct. 927.

180. *Morgan Stanley*, 554 U.S. 527; *American Trucking Ass'ns*, 133 S. Ct. 927; FPC v. Southern Cal. Edison Co., 376 U.S. 205, 215 (1964).

181. Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 963 (1986); Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988); Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n, 539 U.S. 39 (2003); and Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008).

182. Public Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC, 471 F.3d at 1066 (2006), *aff'd in part and rev'd in part sub nom. Morgan Stanley*, 554 U.S. 527 (*citing Nantahala*, *Southern Cal. Edison*, and *Mississippi Power*).

183. Rocky Mtn. Farmers Union v. Goldstene, 843 F. Supp. 2d 1071, 1081, 42 ELR 20013 (E.D. Cal. 2011), *rev'd sub nom.* Rocky Mtn. Farmers Union v. Corey, 730 F.3d 1070, 43 ELR 20216 (9th Cir. 2013), *cert. denied*, 766 F.3d 241 (3d Cir. 2014).

solution (more fully developed in a law review article elsewhere,[184] and Google has recently endorsed a similar concept[185]) for states continuing to stumble over the various tripwires. This proposed solution involves moving state regulation from the wholesale side of the bright line controlled by federal jurisdiction, to the retail side of the line where states may exercise control without encountering Supremacy Clause issues. Because state regulation only affects in-state-regulated utilities, the Commerce Clause tripwire is also avoided.

184. Steven Ferrey, *Solving the Multimillion Dollar Constitutional Puzzle Surrounding State "Sustainable" Energy Policy*, 49 Wake Forest L. Rev. 121 (2014).

185. *See* Expanding Renewable Energy Options for Companies Through Utility-Offered Renewable Energy Tariffs, Google (Apr. 19, 2013), http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/green/pdf/renewable-energy-options.pdf.