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**FELJ Author Talk - Can state CO₂ reduction
policies be implemented through FERC-
regulated tariffs?**



**Foundation of the
Energy Law Journal**



HARVARD LAW SCHOOL

Environmental Law Program

POLICY INITIATIVE

INTEGRATING PUBLIC POLICY IN WHOLESALE ELECTRICITY MARKETS

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Presentation Outline

- I. What do we know about the Federal Power Act?
- II. What Might Integrating Public Policy in Wholesale Markets Mean?
- III. Does FERC Have Authority to Integrate Public Policy in Wholesale Markets?
- IV. Specific Policies: Could FERC approve a CO₂ adder? A REC? A ZEC?
 - a) Would that preempt state policies?



I. The Federal Power Act

Core provisions largely unchanged since enacted



I. The Federal Power Act

FERC facilitated restructuring in the 1980s/90s without new authorization from Congress by approving:

- Market-based rates
- Open-access transmission
- ISO/RTO Guidelines
- ISO/RTO formation
- Energy market rules
- Capacity market rules



II. Integrating Public Policy and Wholesale Markets

- **Accommodate:** allow state-supported resources to participate in RTO capacity markets and obtain capacity supply obligations, subject to adjustments necessary to maintain certain wholesale market prices consistent with the market results that would have been produced had those resources not been state supported.
- **Price (or Achieve):** state policies would value the attributes (e.g., resilience) or externalities (e.g., carbon emissions) that states are targeting in a manner that can be readily integrated into the wholesale markets in a resource-neutral way.

Definitions adapted from FERC's Post-Technical Conference Notice, Docket AD17-11 (5/23/17)



II. Integrating Public Policy and Wholesale Markets

- Early IMAPP Proposals:
 - Capacity market: 1) ZECs and 2) repricing
 - Forward clean energy market
 - CO₂ Adder
- Later IMAPP Proposals:
 - Dynamic REC (CLIPR)
- Feedback from States: We want control



II. Integrating Public Policy and Wholesale Markets

- Section 205: RTO submits tariff proposal to FERC for its approval
- Section 206: FERC must meet a “dual burden”
 - Presents political and practical challenges



III. The Scope of FERC's Authority

FERC's Jurisdiction: what are the limiting principles?

- *EPSA*: Justifications for market reform must be “all about, and only about, improving the wholesale market”
- *EPSA*: Court “will not read the FPA, against its clear terms, to halt a practice that so evidently enables the Commission to fulfill its statutory duties”



III. The Scope of FERC's Authority

Just and Reasonable rates:

- Balance consumer and investor interests (*Hope*)
- Enhance competition (*Morgan Stanley*)
- Are consistent with the Federal Power Act's "principal purpose" (*NAACP*)



III. The Scope of FERC's Authority

In assessing whether a rate is Just and Reasonable

- FERC “is authorized to consider the consequences” of all utility practices that affect rates
- “is not limited to textbook economic analysis of the markets . . . but also may account for the practical realities of how those markets operate”



III. The Scope of FERC's Authority

How does the FPA's ban on unduly discriminatory rates apply?

- FPA has “ambiguous anti-discrimination provisions”
- Undue discrimination only applicable to “similarly situated” entities
 - "Nothing in applicable law requires a rate standard to result in no disparate impact on any power resource whatsoever."



III. The Scope of FERC's Authority

Do IMAPP Proposals Regulate Generation Facilities?

- Key capacity market cases:
 - Municipalities of Groton (DC 1978)
 - Conn. Dept. of Pub. Util. Control (DC 2009)
 - New England Power Generators Ass'n (DC 2014)
 - N.J. Bd. of Pub. Utils. (3rd Cir 2014)



IV. Specific Market Reforms: Credits

- Co-optimized Capacity ZECs
- Dynamic RECs
- Unbundled RECs



IV. Specific Market Reforms: CO₂ Adder

- On what basis should the RTO/FERC set the amount of the adder?
 - Is *cost causation* or *marginal value* relevant?
 - Is a CO₂ adder a form of *scarcity pricing*?



IV. Specific Market Reforms: Will State Programs Be Preempted?

- Post-Hughes FPA preemption is currently confined to programs that condition payment on a resource clearing an RTO auction
- Some resource-specific state programs appear difficult to harmonize with markets
- Will states design future programs for an RTO-administered market?



IV. Specific Market Reforms: What Role May States Play in RTO Programs?

Emera Maine (D.C. 2017)

- “Requiring that ISO-NE, rather than the states, evaluate transmission needs and potential solutions is a reasonable implementation of Order No. 1000’s regional planning process.”



IV. Specific Market Reforms: Summary

How does an RTO-administered credit/CO₂ adder:

- Improve the wholesale market?
- Enhance competition?
- Contribute to orderly industry development?
- Legally discriminate against emitters?
- For a CO₂ adder, how does the amount relate to a pricing principle that FERC has used?



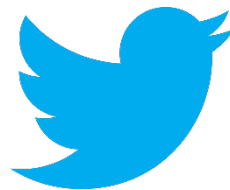
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